* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Judgment reserved on: 17 May 2024**
Judgment pronounced on: 24 July 2024

\+ **<u>ITA 334/2022</u>**

THE COMMISSIONER OF INCOME TAX - INTERNATIONAL TAXATION -3 ..... Appellant

Through: Mr. Aseem Chawla, SSC with Ms. Monica Benjamin, JSC along with Ms. Pratishtha Chaudhary, Mr. Naveen Rohila, and Ms. Simran Jha, Advs.

versus

TELSTRA SINGAPORE PTE LTD. ..... Respondent

Through: Mr. Manuj Sabharwal and Mr. Sudip Lodh, Advs.

\+ **<u>ITA 335/2022</u>**

THE COMMISSIONER OF INCOME TAX - INTERNATIONAL TAXATION -3 ..... Appellant

Through: Mr. Aseem Chawla, SSC with Ms. Monica Benjamin, JSC along with Ms. Pratishtha Chaudhary, Mr. Naveen Rohila, and Ms. Simran Jha, Advs.

versus

TELSTRA SINGAPORE PTE LTD. ..... Respondent

Through: Mr. Manuj Sabharwal and Mr. Sudip Lodh, Advs.

+ **ITA 206/2023**

THE COMMISSIONER OF INCOME TAX - INTERNATIONAL TAXATION -3 ..... Appellant

Through: Mr. Ruchir Bhatia, SCC with Mr. Anant Mann, JSC.

versus

TELSTRA SINGAPORE PTE LTD. ..... Respondent

Through: Mr. Manuj Sabharwal and Mr. Sudip Lodh, Advs.

+ **ITA 55/2023**

THE COMMISSIONER OF INCOME TAX - INTERNATIONAL TAXATION -3 ..... Appellant

Through: Mr. Aseem Chawla, SSC with Ms. Monica Benjamin, JSC along with Ms. Pratishtha Chaudhary, Mr. Naveen Rohila, and Ms. Simran Jha, Advs.

versus

TELSTRA SINGAPORE PTE LTD. ..... Respondent

Through: Mr. Manuj Sabharwal and Mr. Sudip Lodh, Advs.

+ **ITA 597/2023**

THE COMMISSIONER OF INCOME TAX - INTERNATIONAL TAXATION -3 ..... Appellant

Through: Mr. Ruchir Bhatia, SCC with Mr. Anant Mann, JSC.

versus

TELSTRA SINGAPORE PTE LTD. ..... Respondent

Through: Mr. Manuj Sabharwal and Mr. Sudip Lodh, Advs.

\+ **ITA 61/2023**

THE COMMISSIONER OF INCOME TAX - INTERNATIONAL TAXATION -3 ..... Appellant

Through: Mr. Aseem Chawla, SSC with Ms. Monica Benjamin, JSC along with Ms. Pratishtha Chaudhary, Mr. Naveen Rohila, and Ms. Simran Jha, Advs.

versus

TELSTRA SINGAPORE PTE LTD. ..... Respondent

Through: Mr. Manuj Sabharwal and Mr. Sudip Lodh, Advs.

\+ **ITA 171/2024 & CM APPL 15018/2024**

THE COMMISSIONER OF INCOME TAX - INTERNATIONAL TAXATION -3 ..... Appellant

Through: Mr. Ruchir Bhatia, SCC with Mr. Anant Mann, JSC.

versus

TELSTRA SINGAPORE PTE LTD. ..... Respondent

Through: Mr. Manuj Sabharwal and Mr. Sudip Lodh, Advs.

\+ **ITA 174/2024 & CM APPL 15029/2024**

THE COMMISSIONER OF INCOME TAX - INTERNATIONAL TAXATION -3 ..... Appellant

Through: Mr. Ruchir Bhatia, SCC with Mr. Anant Mann, JSC.

versus

TELSTRA SINGAPORE PTE LTD. ..... Respondent

Through: Mr. Manuj Sabharwal and Mr. Sudip Lodh, Advs.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE PURUSHAINDRA KUMAR KAURAV

J U D G M E N T

YASHWANT VARMA, J.

A. PROLOGUE

1. The Commissioner of Income Tax questions the correctness of the judgments rendered by the **Income Tax Appellate Tribunal**[1] dated 30 September 2020 [ITA 334/2022, ITA 335/2022 and ITA

[1] Tribunal

597/2023], 13 September 2022 [ITA 55/2023 and ITA 61/2023], 27 September 2022 [ITA 206/2023] and 17 July 2023 [ITA 171/2024 and ITA 174/2024] and posits the following questions of law for our consideration:

> "2.1 Whether on the facts and in the circumstances of the case, the ld. ITAT has erred in holding that the receipts from Indian customers for services provided outside' Indian Territory in connection with use or right to use of process or equipment by the assessee company cannot be taxed as royalty as per section 9(l)(vi) of the Act and Article 12 of the DTAA between India and Singapore?
>
> 2.2 Whether on the facts and in the circumstances of the case, the ld. ITAT has erred in interpreting the meaning of Royalty under Article 12 of the India Singapore DTAA without considering Article 3(2) of the said DTAA when the word 'process' is not defined in the said DTAA?
>
> 2.3 Whether on the facts and in the circumstances of the case, the ld. ITAT has erred in not adopting the meaning of royalty as per Explanation 2 and Explanation 6 of section 9(1)(vi) of the Income Tax Act in view of the Article 3(2) of the India Singapore DTAA?
>
> 2.4 Whether on the facts and in the circumstances of the case, the ld. IT AT has erred in holding that provision of DT AA being beneficial to the Assessee is to be followed as per section 90(2) of the Income Tax Act even though there is no difference in scope of taxation of Royalty as per DT AA and that in Income Tax Act in view of the Article 12 read 'with Article 3(2) of the India Singapore DTAA and section 9(1)(vi) of the Income Tax Act, 1961?"

2. By our order of 08 February 2023 passed in ITA 335/2022, we had, however, taken note of the submissions addressed on behalf of the appellant with learned counsel appearing on its behalf seeking to restrict the consideration on these appeals to the question proposed in terms of paragraph 2.1. A perusal of the question formulated would establish that the appellant seeks our opinion on whether the receipts from Indian customers for services provided outside the territory of India would be taxable under Section 9(1)(vi) of the **Income Tax Act,**

1961[2] read along with Article 12 of the **Double Taxation Avoidance Agreement**[3] between India and Singapore. According to the appellants, the receipts become taxable under the Act since the services provided are liable to be viewed as being in connection with the *"use"* or *"right to use"* of process or equipment. They thus seek to invoke the concepts of process and equipment royalty and would bid us to hold that the income in question would be taxable under the Act.

3. These appeals originate from four sets of orders passed by the Tribunal and the details of the individual appeals as instituted before this Court are set out hereinbelow:-

ITA No.	Assessment Year	Date of Impugned Order
ITA No. 597/2023	AY 2011-12	30 September 2020
ITA No. 335/2022	AY 2012-13	30 September 2020
ITA No. 334/2022	AY 2014-15	30 September 2020
ITA No. 55/2023	AY 2015-16	13 July 2022
ITA No. 61/2023	AY 2016-17	13 July 2022
ITA No. 206/2023	AY 2017-18	27 September 2022
ITA No. 171/2024	AY 2018-19	17 July 2023
ITA No. 174/2024	AY 2019-20	17 July 2023

We note that the Tribunal for AYs' 2015-16, 2016-17, 2017-18, 2018-19, and 2019-20 has principally followed its decision dated 30 September 2020 and which pertained to AYs' 2011-12, 2012-13, and 2014-15.

[2] Act
[3] DTAA

B. THE FACTS

4. The undisputed facts on which the appeals proceed are as follows. The respondent-**Telstra Singapore Pte Ltd.**[4] is a company incorporated in Singapore and is engaged in the business of providing connectivity solutions. Amongst the range of services with which we are concerned, are the provision of international private leased circuits, multi-protocol label switching and which are essentially used to facilitate high speed data connectivity. The data connectivity service has been described as bandwidth services. It is also admitted that Telstra Singapore holds and owns the infrastructure and equipment outside India which is utilized in connection with providing of bandwidth services to customers.

5. As per the appellants, in order to facilitate the provision of bandwidth services in India, Telstra Singapore had also entered into a **One Stop Shopping Service Agreement**[5] with **Bharti Airtel Ltd.**[6] and other related telecom operators. In terms of the aforenoted OSS Agreement, the respondent-assessee is obliged to provide bandwidth services to the customers of Bharti outside India with a corresponding obligation being placed on Bharti to provide those services within India. The OSS Agreement essentially envisages reciprocal services being provided by the respondent assessee and Bharti dependent upon the location of their customers. The essential structure of that agreement can be discerned from a perusal of the following chart which formed part of the submissions which were filed before the Tribunal:

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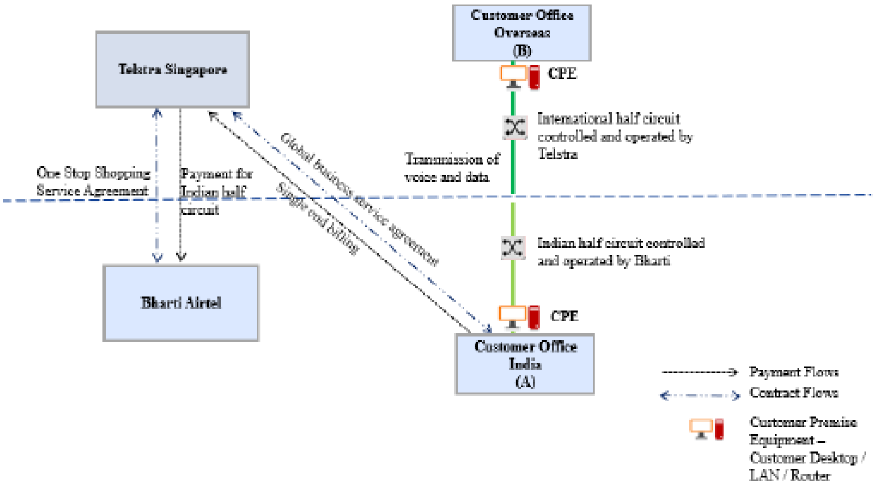
[4] Telstra Singapore
[5] OSS Agreement
[6] Bharti



6. The OSS Agreement which came to be entered into between Bharti and the respondent-assessee contains the following salient provisions. As per the definition and interpretation clause, the words "Administration", "Administration A" and "Administration B" stand defined as follows:

> ""**Administration"** means either Bharti or Telstra as appropriate and "Administrations" means both of them.
>
> **"Administration A"** means the Administration who shall have the authority from its Customer(s) to co-ordinate and co-operate with Administration B inter alia to order, procure , implement and terminate International Service(s) to receive invoices and make payments in respect of the International Service(s), for and on behalf of such Customers in accordance with this Agreement.
>
> **"Administration B"** means the Administration which co-ordinates and co-operates with the Administration A in order for Administration A and Administration B to provide their respective Service(s) to the End User(s)."

7. The OSS Agreement defines the expression "customers" and "end users" in the following terms:

> **"Customer"** means any person or entity who authorises that Administration A to order, procure, implement and terminate the International Service(s) from the Administration B, for and on that person's behalf. For the avoidance of doubt, neither Administration is a Customer of the other for the purposes of this Agreement.

“End Users” means any person or entity who uses the International Services.

8. The words “International Services” and “OSS Service” are ascribed the following meaning:

> **"International Services"** or “Services” means the following international data communications services and each such service is an **“International Service”**:
>
> (a) private leased circuit service between international gateways (**“IPLC”**);
> (b) global frame relay services being frame-switched data carriage services connecting intelligent end-points internationally (**“Frame Relay”**);
> (c) global ATM services being a digital transmission link for the carriage of data via asynchronous transfer mode between access ports on a permanent virtual circuit (**“ATM”**);
> (d) internet access services providing connectivity between a port located at an Administrations point of presence in a country and the global internet (**“GIA”**);
> (e) global IP VPN Service being a service providing a TCP/IP Virtual Private Network connectivity between designated access end points (being ports) (**“IP VPN”**),
>
> operated by each of the Administrations and the.
>
> **"OSS Service"** means the one-stop-shop service for International Services as more particularly described in clause 2.1.”

9. The acronyms SEB and SEO, which are repeatedly used in various clauses of the OSS Agreement are defined as under:

> **"SEB"** means single end billing, whereby the Customer in one country can pay to an Administration in a single currency the amounts invoiced for the International Services provided by Administration A and Administration B.
>
> **“SEO”** means single end billing, whereby Administration A assists its Customer to obtain an International Service from Administration B.”

10. Clause 2 sets out in some detail the scope of service and is structured in the following terms:

> **“2 Service Description**
>
> 2.1 OSS Service is a service by which:

(a) Customers may SEO:

(i) in the case of IPLC, Frame Relay and ATM, both of the half circuits comprising an International Service; and

(ii) GIA and IP VPN,

and Local Loop, through a single point of contact at either of the Administrations, with the option of requesting SEB and SPFR ; and

(b) Administration B may provide SEB and SPFR to Administration A in respect of the International Service subject to the SEO.

2.2 The Administrations shall offer OSS Service to their respective Customers on a non-exclusive basis. Each Administration retains the absolute right to enter into similar or other agreements with other parties for the provision of a similar service.

2.3 One Administration, selected in each case by the Customer, shall be the single point of contact for the Customer in respect of the International Service and shall liaise in relation thereto with the Customer and with the other Administration.

2.4 The provision of OSS Service hereunder is without prejudice to the independent contractual relationship that each Administration has or may have with its respective Customers. Each Administration may separately contract with Customers to provide other International Services not the subject of OSS which it provides whether originating or terminating in its operating territory and each such Customer will be liable to that Administration for all charges, fees and taxes billed under that contract."

11. The principles which would govern One Stop Shopping are set forth in Clause 4 and which is extracted hereinbelow:

"4 Principles Involved in One Stop Shopping

4.1 Each Administration shall use it's form of Customer Contract to enter into agreements with Customers for provision of each Administration's International Service to the Customer. The Administrations will exchange Customer Contracts, information and any promotional literature relating to their respective International Services and keep each other informed of any amendments thereto.

4.2 Where an Administration introduces the International Services of the other Administration to any Customer it shall notify the Customer that such services will be provided by the other Administration under the relevant terms and conditions of the other Administration. The Administrations will exchange instructions on the method of completion of Customer Contracts. Once the Customer has signed the Customer Contract, a copy of the signed Customer Contract must be returned to Administration B for approval. The overall provisioning interval for each International Service will be the longer of the two lead times of each of the Administrations.

4.3 The Customer may, in writing, elect SEB at any time. Administration A shall coordinate the billing when SEB is requested. Any proposed variation of this procedure will be considered by the Administrations on a case by case basis. Administration A shall be responsible for collecting payment from the Customer for the International Service within the billing period as set out in this agreement. Each Administration's billing period will be respected and Administration A will ensure that Administration B is paid according to Administration B's billing cycle and payment due date. The SEB invoice will be payable by the Customer in the currency of the country of Administration A. Administration A shall ensure that the Customer is notified that, notwithstanding subscribing to SEB, the distant end charges will be subject to exchange rate fluctuations. Each Party shall be responsible for the bank charges and other charges in its respective country, arising from the performance of its obligations under this Agreement in the settlement of the respective bills.

4.4 Settlement between the Administrations will be via bank wire transfer. Administration A will pay Administration B in full the amount stated in Administration B's invoice in the currency stated therein by the relevant Payment Due Date, irrespective of whether the Customer has paid Administration A. Credit for service interruptions, if any, shall be given in accordance with each Administration's relevant terms and conditions of service and shall be indicated as a deduction on a subsequent invoice. Each Administration shall notify the other Administration(s) of any tariff changes as soon as possible.

4.5 The provision of SEB does not relieve the Customer of any financial obligation placed on it by Administration B. The Customer shall remain liable to pay for all charges and fees of and taxes on services of both Administrations, notwithstanding election of SEB.

4.6 Unless agreed by both administrations, the scope of OSS agreement shall be limited to the International Services. The principles set out herein may be reviewed from time to time in view of the prevailing market conditions. No amendments to this Agreement shall be effective unless agreed in writing by both Administrations and signed by their authorized representatives."

12. The issues pertaining to billing and settlement arrangements are regulated by Clause 5.6 which reads thus:

"5.6 Billing and Settlement Arrangements

(a) A Customer may request SEB at any time. If the Customer requests SEB, Administration A will communicate this to Administration B as soon as reasonably practicable.
(b) If the Customer requests SEB, either Administration may in its discretion decline to provide SEB. Administration A will advise the Customer whether SEB will be provided.
(c) Each Administration reserves the right to levy a special surcharge on its Customer for providing the SEB service.
(d) Where both Administrations agree to provide SEB:

(i) Administration B will advise Administration A what the total charges (including taxes and other government or regulatory charges recoverable by Administration B from the Customer under Administration B's contract with the Customer) for the International Service Provided by Administration B will be. Administration A will then invoice the Customer on that basis. Administration B may vary charges (other than taxes and other government or regulatory charges) by giving Administration A not less than 30 days notice. Taxes and other government or regulatory charges apply as varied from time to time by the relevant authorities and Administration B will advise Administration A of such changes as soon as is practicable. The parties acknowledge that this clause 5.6(d)(i) is necessary for operational purposes to enable Administration A to invoice the Customer in accordance with Administration A's normal billing cycle without having to first receive the corresponding invoice issued each month by Administration B under clause 5.6(d)(ii);

(ii) Administration B will send its invoice in its local currency (indicating therein the equivalent amount in USD which amount is payable under 5.6(d)(iv) together with a mutually-agreed upon settlement request form to Administration A, first by facsimile or email in pdf format and then by courier;

(iii) International Services will be invoiced by Administration B on a monthly basis;

(iv) Administration B's invoice shall set out all Administration B's charges associated with the provision of the International Service, inclusive of any tax where applicable;

(v) Administration A will convert Administration B's charges into the local currency of Administration A at the appropriate prevailing exchange rate as at the date of Administration A's invoice and present these together with the charges of Administration A to the Customer for payment. The invoice to the Customer shall show clearly that it represents charges on behalf of both Administrations and shall set out each Administration's charges separately;

(vi) Administration A shall arrange for the settlement of Administration B 's invoices by bank wire transfer and shall ensure Administration B is paid in full (amount indicated in USD) in Administration B's invoices. The payment for International Services service should be made separately and not to be clubbed with Administration -B's receivables for any other services. Administration A shall be responsible for any exchange loss due to currency fluctuation; The details of Administration-B's Bank Account for wire transfer is indicated in Schedule 3 and Schedule 4.

(vii) Administration A shall ensure that settlement is made to Administration B on or before the due date of Administration B's invoice, irrespective of whether the Customer has paid Administration A within that period. Any sums not paid by the relevant Payment Due Date, irrespective of whether the Customer had paid Administration A within that period, shall be subject to late payment interest (to be calculated at the Interest Rate) for the period beginning from the Payment Due Date to the date payment of wire transfer to Administration B.

(viii) Administration A shall instruct its bank to quote the appropriate Administration B reference number on any settlement advice note. Once settlement has been made, Administration A shall complete the applicable portion of the settlement request form and send it by facsimile to Administration B's Billing Department;

(ix) Each Administration shall file all returns and remit all such taxes to the applicable taxation authorities with respect to taxes applicable to its own services and will hold the other Administration harmless from and against any liability resulting from any taxes, penalties and interest relating to or arising out of the first-mentioned Administration's failure to do so; and

(x) Tax reclamation will be the responsibility of the Customer. Both Administrations will make best endeavours to make available to the Customer, the requisite documentation by the fiscal authority in the appropriate jurisdiction, to enable the relevant refunds to be claimed whenever appropriate."

13. The relationship between the two Administrations is spelt out in Clause 6 and which acknowledges the understanding of parties that both administrations are independent business entities and the agreement not being liable to be construed as resulting in the creation of a principal and agent relationship. The arrangement between the two parties was on a non-exclusive basis with it being further specified that neither Administration would have the right to represent or hold itself out to be a contracting agent of the other or having the authority to bind the other party in any way or to any extent whatsoever. This becomes evident from a reading of Clause 6 of the OSS Agreement which is extracted hereinbelow:

"6 Relationship of the Administrations

6.1 Notwithstanding anything in this Agreement, the Administrations are independent business entities, and nothing herein shall be construed so as to constitute the parties as principal and agent, partners, joint venture participants, or employer and employee.

6.2 Each Administration hereby appoints the other, on a non-exclusive basis, as its representative in the other Administration's country, to market and co-ordinate the provision of the International Services. The activities of each Administration in the course of such representation shall be by way of introduction only to a prospective Customer. Neither Administration shall be obliged or required to provide the Service to a Customer in its country until it has accepted a Customer's Customer Contract in accordance with the other Administration's International Service Terms and countersigned Customer Contract for the International Service.

6.3 Neither Administration shall have any right to represent or hold itself out as the contracting agent of the other nor as having any authority to bind or commit the other in any way or to any extent whatsoever. Neither Administration shall give or make any warranty, representation or contractual stipulation of any kind which is in any way in addition to or inconsistent with the other Administration's Customer Contract."

14. Apart from the OSS Agreement, Telstra Singapore also entered into a **Global Business Services Agreement**[7] with various telecom operators in India. The question which principally arises is whether the services of Telstra Singapore when utilized outside the territories of India and the consideration received by it from Indian customers in that regard would amount to a process or equipment royalty taxable under Section 9(1)(vi) of the Act read along with article 12 of the DTAA.

15. For purposes of brevity, we propose to notice the salient facts as they obtain in ITA 335/2022. For **Assessment Year**[8] 2012-13, the respondent-assessee had furnished Returns of Income declaring 'nil' income. Those Returns are stated to have been selected for scrutiny assessment as a consequence of which notices under Section 143(2) came to be issued. Following the route of assessment as prescribed by Section 144C of the Act, a Draft Assessment Order is stated to have been framed with the **Assessing Officer**[9] proposing that the amount received by the respondent from Indian customers for the provision of bandwidth services outside India being liable to be construed as constituting equipment/process royalty taxable under Section 9(1)(vi) of the Act read along with Article 12(3) of the DTAA. Assailing the proposed assessment, the respondent filed its objections before the **Dispute Resolution Panel**[10] on 16 October 2015. Consequent to the DRP upholding the proposed assessment, a final assessment order came to be framed on 16 November 2015 with the AO determining

[7] GBSA
[8] AY
[9] AO
[10] DRP

the total taxable income of the assessee at INR 26,75,15,533/-. It is this final order of assessment which was assailed before the Tribunal.

16. In terms of the judgment impugned before us the Tribunal has held in favour of the respondent-assessee and has come to conclude that the consideration received by Telstra Singapore from Indian customers would not be taxable as royalty bearing in mind the beneficial provisions of the DTAA and which had remained unamended notwithstanding the changes which had come to be introduced in Section 9 of the Act.

C. CHALLENGE IN THE APPEAL

17. Appearing in support of the appeals, Mr. Chawla, learned counsel, submitted that the receipts from Indian customers for services provided outside Indian territories is liable to be viewed as those being in connection with the *"use"* or *"right to use"* of process or equipment. According to learned counsel, the Tribunal clearly erred in failing to construe royalty in light of Explanations 2 and 6 which form part of Section 9(1)(vi) of the Act. In order to appreciate the submissions which were canvassed by Mr. Chawla, we deem it apposite to extract Section 9(1)(vi) as well as the Explanations which are relied upon hereinbelow:

> "**9. Income deemed to accrue or arise in India.**— (1) The following incomes shall be deemed to accrue or arise in India—
>
> **xxxx** **xxxx** **xxxx**
>
> *(vi)* income by way of royalty payable by—
>
> *(a)* the Government; or
>
> *(b)* a person who is a resident, except where the royalty is payable in respect of any right, property or information used or services utilised for the purposes of a business or profession carried on by such person outside India or for the

purposes of making or earning any income from any source outside India; or

(c) a person who is non-resident, where the royalty is payable in respect of any right, property or information used or services utilised for the purposes of a business or profession carried on by such person in India, or for the purposes of making or earning any income from any source in India:

Provided that nothing contained in this clause shall apply in relation to so much of the income by way of royalty as consists of lump sum consideration for the transfer outside India of, or the imparting of information outside India in respect of, any data, documentation, drawing or specification relating to any patent, invention, model, design, secret formula or process or trade mark or similar property, if such income is payable in pursuance of an agreement made before the 1st day of April, 1976, and the agreement is approved by the Central Government:

Provided further that nothing contained in this clause shall apply in relation to so much of the income by way of royalty as consists of lump sum payment made by a person, who is a resident, for the transfer of all or any rights (including the granting of a licence) in respect of computer software supplied by a non-resident manufacturer along with a computer or computer-based equipment under any scheme approved under the Policy on Computer Software Export, Software Development and Training, 1986 of the Government of India.

Explanation 1.—For the purposes of the first proviso, an agreement made on or after the 1st day of April, 1976, shall be deemed to have been made before that date if the agreement is made in accordance with proposals approved by the Central Government before that date; so, however, that, where the recipient of the income by way of royalty is a foreign company, the agreement shall not be deemed to have been made before that date unless, before the expiry of the time allowed under sub-section (1) or sub-section (2) of Section 139 (whether fixed originally or on extension) for furnishing the return of income for the assessment year commencing on the 1st day of April, 1977, or the assessment year in respect of which such income first becomes chargeable to tax under this Act, whichever assessment year is later, the company exercises an option by furnishing a declaration in writing to the Assessing Officer (such option being final for that assessment year and for every subsequent assessment year) that the agreement may be regarded as an agreement made before the 1st day of April, 1976.

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;

(iv) the imparting of any information concerning technical, industrial, commercial or scientific knowledge, experience or skill;

(iv-a) the use or right to use any industrial, commercial or scientific equipment but not including the amounts referred to in Section 44-BB;

(v) the transfer of all or any rights (including the granting of a licence) in respect of any copyright, literary, artistic or scientific work including films or video tapes for use in connection with television or tapes for use in connection with radio broadcasting; or
(vi) the rendering of any services in connection with the activities referred to in sub-clauses (i) to (iv), (iv-a) and (v);

Explanation 3.—For the purposes of this clause, 'computer software' means any computer programme recorded on any disc, tape, perforated media or other information storage device and includes any such programme or any customized electronic data;].

Explanation 4.—For the removal of doubts, it is hereby clarified that the transfer of all or any rights in respect of any right, property or information includes and has always included transfer of all or any right for use or right to use a computer software (including granting of a licence) irrespective of the medium through which such right is transferred.

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;]"

18. Mr. Chawla highlighted the fact that Explanation 6 had come to be introduced with retrospective effect from 01 June 1976 by virtue of Finance Act, 2012. It was contended by Mr. Chawla that Explanation 6 to Section 9(1)(vi) is clearly clarificatory in character and stipulates that the expression "process" would be deemed to have always included transmission by satellite, cable, optical fibre or any other similar technology, including the provision of services, such as, up-linking, amplification, conversion for down-linking irrespective of whether or not such process were a secret. In order to discern the intent of the Legislature while introducing Explanation 6, Mr. Chawla also placed reliance upon the relevant parts of the Memorandum which had explained the various clauses of the Finance Bill, 2012 and the relevant parts whereof are extracted hereinbelow:

"**II.** Section 9(1)(vi) provides that any income payable by way of royalty in respect of any right, property or information is deemed to be accruing or arising in India. The term "royalty" has been defined in Explanation 2 which means consideration received or receivable for transfer of all or any right in respect of certain rights, property or information. Some judicial decisions have interpreted this definition in a manner which has raised doubts as to whether consideration for use of computer software is royalty or not; whether the right, property or information has to be used directly by the payer or is to be located in India or control or possession of it has to be with the payer. Similarly, doubts have been raised regarding the meaning of the term processed. Considering the conflicting decisions of various courts in respect of income in nature of royalty and to restate the legislative intent, it is further proposed to amend the Income Tax Act in following manner:—

(i) To amend section 9(1)(vi) to clarify that the consideration for use or right to use of computer software is royalty by clarifying that transfer of all or any rights in respect of any right, property or information as mentioned in Explanation 2, includes and has always included transfer of all or any right for use or right to use a computer software (including granting of a licence) irrespective of the medium through which such right is transferred.

(ii) To amend section 9(1)(vi) to clarify that 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.

(iii) To amend section 9(1)(vi) to clarify that the term "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.

These amendments will take effect retrospectively from 1st June, 1976 and will accordingly apply in relation to the assessment year 1977-78 and subsequent assessment years."

19. Mr. Chawla then submitted that the concept of royalty in light of the DTAA would have to be understood bearing in mind the provisions made in Article 12. Article 12 of the DTAA reads as follows:-

"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 and fees for technical services may also be taxed in the Contracting State in which they arise and according to the laws of that Contracting State, but if the recipient is the

beneficial owner of the royalties or fees for technical services, the tax so charged shall not exceed 10 per cent.

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 :

(a) any copyright of a literary, artistic or scientific work, including cinematograph film or films or tapes used for 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, including gains derived from the alienation of any such right, property or information ;
(b) any industrial, commercial or scientific equipment, other than payments derived by an enterprise from activities described in paragraph 4(b) or 4(c) of Article 8.

4. The term "fees for technical services" as used in this Article means payments of any kind to any person in consideration for services of a managerial, technical or consultancy nature (including the provision of such services through technical or other personnel) if such services:

(a) are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 3 is received ; or
(b) make available technical knowledge, experience, skill, know-how or processes, which enables the person acquiring the services to apply the technology contained therein ; or
(c) consist of the development and transfer of a technical plan or technical design, but excludes any service that does not enable the person acquiring the service to apply the technology contained therein.

For the purposes of *(b)* and *(c)* above, the person acquiring the service shall be deemed to include an agent, nominee, or transferee of such person.

5. Notwithstanding paragraph 4, "fees for technical services" does not include payments:

(a) for services that are ancillary and subsidiary, as well as inextricably and essentially linked, to the sale of property other than a sale described in paragraph 3(a) ;
(b) for services that are ancillary and subsidiary to the rental of ships, aircraft, containers or other equipment used in connection with the operation of ships or aircraft in international traffic ;
(c) for teaching in or by educational institutions ;
(d) for services for the personal use of the individual or individuals making the payment;

(e) to an employee of the person making the payments or to any individual or firm of individuals (other than a company) for professional services as defined in Article 14 ;
(f) for services rendered in connection with an installation or structure used for the exploration or exploitation of natural resources referred to in paragraph 2(j) of Article 5 ;
(g) for services referred to in paragraphs 4 and 5 of Article 5.

6. 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, property or contract 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.

7. Royalties and fees for technical services shall be deemed to arise in a Contracting State when the payer is that State itself, a political sub-division, a local authority, a statutory body or 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.

8. 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 royalties or fees for technical services paid exceeds the amount which would have been paid 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."

20. According to learned counsel, the Tribunal clearly erred in failing to interpret the expression royalty in accordance with Article 12 and which would have had to necessarily be construed alongside

the amendments which were introduced in the Act by virtue of Finance Act, 2012. According to learned counsel, this course of interpretation was liable to be followed bearing in mind Article 3(2) of the DTAA and which mandates that for the purposes of ascertaining the meaning of any term which remains undefined in the Treaty, recourse may be had to domestic tax laws. According to Mr. Chawla, the Convention does not define the term "process" and consequently recourse would necessarily have to be had to Explanation 6 comprised in Section 9(1)(vi) and which would be deemed to have existed in the statute right from 01 June 1976. In support of the aforesaid submission, Mr. Chawla placed reliance upon the following passages from the decision in **Commissioner of Income Tax vs. P.V.A.L Kulandagan Chethiar**[11]**:**

> "**19.** The contention put forth by the learned Attorney General that capital gains is not income and, therefore, is not covered by the Treaty cannot be accepted at all because for purposes of the Act capital gains is always treated as income arising out of immovable property though subject to a different kind of treatment. <u>Therefore, the contention advanced by the learned Attorney General that it is not a part of the Treaty cannot be accepted because in the terms of the Treaty wherever any expression is not defined the expression defined in the Income Tax Act would be attracted.</u> The definition of "income" would, therefore, include capital gains. Thus, capital gains derived from immovable property is income and therefore Article VI would be attracted."

21. Mr. Chawla contended that when faced with a situation where the meaning of a term is not defined under a tax treaty, Courts would have to necessarily follow the ambulatory approach, as enunciated, as opposed to a static approach. Mr. Chawla submitted that the private line services which are provide by the respondent are supported by an "*exclusive range*" of bandwidth options dedicated for "*exclusive use*"

[11] (2004) 6 SCC 235

and which is suggestive of *"use"* as well as a *"right to use"* of industrial, commercial or scientific equipment and consequently clearly falling within the ambit of royalty as defined not only under the DTAA but the Act itself.

22. The sheet anchor of the challenge raised by the appellants however rested on the judgment rendered by the Madras High Court in **Verizon Communications Singapore Lte Ltd. vs. Income Tax officer, International Taxation-I**[12] and to the following observations as appearing therein:

> "**25.** Keeping these principles in the background as far as the present case is concerned, we are concerned about the treatment of income under the head "royalty". As per clause (b) of sub-clause (vi) to section 9(1) of the Income-tax Act, where, income by way of royalty is payable by a person, who is a resident, to a non-resident, the same shall be taxable as income under the provisions of the Act. Explanation 2 to sub-clause (vi) gives the definition of "royalty". As is evident from the reading of the provision, "royalty" means the consideration for transfer of intellectual property rights ; for imparting of any information regarding the working of, or the use of the intellectual property rights, use of any intellectual property, imparting of any information concerning technical, industrial, commercial, scientific knowledge, experience or skill ; use or right to use any industrial, commercial or scientific equipment but not including the amounts referred to in section 44BB ; transfer of all or any rights including the granting of a licence in respect of any copyright, literary, artistic or scientific work including films or video tapes for use in connection with television or tapes for use in connection with radio broadcasting but not including consideration for the sale, distribution or exhibition of cinematographic films or rendering of any services in connection with the activities referred to in sub- clauses (i) to (iv), (iva) and (v).
>
> **26.** The said amendment relating to "royalty", particularly with reference to use or right to use any industrial, commercial or scientific equipment, etc., was inserted with effect from April 1, 2002, under the Finance Act, 2001. The said expression came up for consideration before the Authority for Advance Rulings in the

[12] 2013 SCC OnLine Mad 3316

decision reported in Dell International Services India (P.) Ltd., In re (2008) 305 ITR 37 (AAR), a decision strongly relied on by the appellant in support of its contention that the payment to the assessee herein is not "royalty". The applicant-company before the Authority for Advance Rulings was Dell International Services (India) P. Ltd. engaged in the business of providing call centre, data processing and information technology support services to its group companies. It entered into an agreement with BT America - a non-resident company formed and registered in the USA under which BTA provides the applicant with two-way transmission of voice and data through telecom bandwidth. While BTA would provide the international half-circuit from the US/Ireland, the Indian half circuit is provided by Indian telecom company, namely, VSNL with whom BTA has a tie-up. The bandwidth so provided by BTA would give full country coverage in both the countries of delivery, i.e., USA and India. The fixed monthly recurring charge for the circuit between America and Ireland and for the circuit between Ireland and India is payable to BTA.

xxxx **xxxx** **xxxx**

77. In the background of the service agreement with the customer, service agreement with VSNL and the one between customer and VSNL, it is clear that these are part and parcel of one composite agreement split into four for the purposes of convenience and the nature of services to be offered through the different agencies having a bearing on each other. The ultimate aim, however, being to give the customer a point-to-point private line to communicate between offices that are geographically dispersed throughout the world for the purposes of accessing business data exchange, video conferencing or any other form of telecommunication. As is evident from the reading of the terms of all these agreements, parties have agreed to go for one stop shopping, which allows an organisation, namely, customer to place a single order with a single carrier for two private leased circuits for two offices in two different countries, here the Indian half by VSNL and the other half by MCI. Nevertheless, this consolidation in a single invoice at the agreed currency enables the customer to report its problem from either circuit to one carrier. It fixes the responsibility on the parties herein for ensuring undisturbed enjoyment of the private leased line. There is a symmetric telecommunication facility permanently connecting one end to the other. Thus, the contract ensures that the customer has an active internet dedicated to that particular customer at a particular speed agreed upon, namely, 2 Mbps. VSNL is a provisioning entity whose services the assessee has to direct the customer to avail of, since as per the Indian law, the assessee is not the licensed operator in the Indian half circuit. Thus, when the customer requires a seamless dedicated point-to-point

IPLC service for transmission of voice and data, it requests the assessee' affiliate in India who arranges for the assessee MCI Singapore to enter into an agreement with the customer on the terms and conditions of the service provided by it.

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87. We do not agree with the assessee principally for the reason that the decision of the Delhi High Court reported in Asia Satellite Telecommunications Co. Ltd. v. DIT (2011) 332 ITR 340 (Delhi) and the rulings of the Authority for Advance Rulings reported in (2008) 305 ITR 37 (AAR) (Dell International Services (India) Pvt. Ltd., In re and Cable and Wireless Network India P. Ltd., In re (2009) 315 ITR 72 (AAR) on which heavy reliance was made were all rendered prior to the insertion of Explanation 5 and that the decision of the Delhi High Court rested on the facts therein. The amendments by insertion of Explanation 5 gives a very expansive meaning to the term "royalty" and this has a bearing on the issue so too the various clauses in the agreements which are to be looked at in a holistic manner. The agreement entered into between the assessee and the customer herein is for providing of seamless point-to-point private line so as to enable the customer to communicate between its office that are geographically dispersed. The service order reveals that the parties had agreed for a particular bandwidth and in entering this the assessee had provided the necessary equipment at customer premises, configured and customised to ensure that the customer gets the uninterrupted connectivity from one end to the other end in different geographical point.

88. A reading of the agreement with VSNL also shows that the configuration at the customer's end and at the VSNL end and in the other half managed by the assessee match with each other and compatible for ensuring the integrated service to the customer. The arrangement between the assessee and the VSNL has to be necessarily integrated and technically and financially viable having regard to the close functional relationship between the two. For this, the Indian customer pays through the single billing system called OSS for the integrated services. Thus, the service agreement assuring the service is possible and workable only when the assessee and VSNL are considered as rendering the service jointly in their respective leg. Thus, the two half being the mirror image of each other and going by the terms of the agreements, the assessee renders service in India and the consideration received attracts the incidence of taxation in India.

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97. Thus, even going by the above decision, we hold that providing of service is not possible without the use of the equipment ensuring the assured bandwidth for transmission of data/voice which provides the internet access to the customer to and fro. After the insertion of Explanation 5, possession, control of such right, property or information usage directly by the payer, location of the right are not matters of concern in deciding the character of payment as "royalty" and but for the use of the connectivity by the payer, the service agreement itself has no meaning. Thus, the amendment introduced as a result of the decision of the Authority for Advance Rulings reported in Dell International Services India (P.) Ltd., In re (2008) 305 ITR 37 (AAR) ; (2008) 172 Taxmann 418 (AAR) and Cable and Wireless Network India P. Ltd., In re (2009) 315 ITR 72 (AAR) clearly answer the question raised in this regard against the assessee.

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100. The definition of "royalty" under the DTAA and the Indian Income-tax Act are in pari materia. As rightly pointed out by the Revenue, Explanation 6 defines "process" to mean and include transmission by satellite (including uplinking, amplification, conversion for down-linking of any signal) cable, optic fibre, or by any other similar technology, whether or not such process is secret. Thus, apart from the relevance and applicability of clause (iva) that the payment is for the use or right to use of the equipment, the Tribunal held that payment for the bandwidth amounts to royalty for the use of the process. The Tribunal also pointed out that by reason of the long distance, to maintain the required speed, boosters are kept at periodical intervals. Going by this too, in any event, the payment received by the assessee was rightly assessed as "royalty" and would constitute so for the purposes of the DTAA.

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102. In the circumstances, we reject the case of the assessee holding that the receipts are liable to be treated as "royalty" for the use of IPLC under section 9(1)(vi) read with Explanation 2(iva) and correspondingly article 12(3) of the DTAA between India and Singapore. We also agree with the Tribunal that even if the payment is not treated as one for the use of the equipment, the use of the process was provided by the assessee, whereby through the assured bandwidth the customer is guaranteed the transmission of the data and voice. The fact that the bandwidth is shared with others, however, has to be seen in the light of the technology governing the operation of the process and this by itself does not take the assessee out of the scope of royalty. Thus, the consideration being for the use and the right to use of the process, it is "royalty" within the meaning of clause (iii) of Explanation 2 to section 9(1)(vi) of the Income-tax Act.

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> **106.** In the circumstances, we affirm the order of the Tribunal holding that the consideration paid by the customer to the assessee is "royalty" within the meaning of Explanation 2(iva) or in the alternative under Explanation 2(iii) of section 9(1)(vi) of the Income-tax Act and article 12(3) of the DTAA between India and Singapore. With regard to the levy of interest under sections 234A, 234B and 234D of the Income-tax Act, as the case may be, we remand this issue alone to the Income-tax Appellate Tribunal for its consideration on the merits and in accordance with law. Accordingly, the above tax case (appeals) are disposed of. No costs. Consequently, the connected miscellaneous petitions are closed."

23. Mr. Chawla submitted that if the provisions of the OSS Agreement were contrasted with the agreement which formed the subject matter of consideration of the Madras High Court in *Verizon*, it would be apparent that both the contracts are similar and consequently the decision of that High Court would apply on all fours. This submission was sought to be amplified by way of the following chart:

Clauses	**Relevant Clause of One Stop Shopping ("OSS") Service Agreement & Global Business Services Agreement ("GBSA")**	**Verizon Communications Singapore Pte Ltd. V. Income Tax Officer, International Taxation-1 [2013] 39 taxmann.com 70 (Madras)**
Clause 4: *"Principles Involved in One Stop Shopping"* of OSS Agreement @ Pg. 10 of document filed by the respondent dated 3 February 2024	**Refer Para 4.4 @ Pg.11 (Pdf Pg 505)** *"4.4 Settlement between the Administrations will be via bank wire transfer. Administration A will pay Administration B in full the amount stated in Administration B's invoice in the currency stated therein by the relevant Payment Due*	**Refer Para 70 @ Pg.81 (Pdf pg 839) of the compilation filed by appellant dated 14 January 2024** *"70. Clause 4.4 states that settlement between the Administrations will be via bank wire transfer. Administration A will pay Administration B in full the amount received from*

	Date, irrespective of whether the Customer has paid Administration A. Credit for service interruptions, if any, shall be given in accordance with each Administration's relevant terms and conditions of service and shall be indicated as a deduction on a subsequent invoice. Each Administration shall notify the other Administration(s) of any tariff changes as soon as possible.	*the customer in the currency stated therein by the relevant Payment Due Date. Credit for service interruptions, if any, shall be given in accordance with each Administration's relevant terms and conditions of service and shall be indicated as a deduction on a subsequent invoice. Each Administration shall notify the other Administration of any rate changes through the normal billing cycle as outlined in Schedule 3 and Schedule 6.*
Clause 5.3: *"Provisioning Phase"* of OSS Agreement @ Pg. 13 of document filed by the respondent dated 3 February 2024	**Refer Para 5.3 (e) @ Pg.14 (Pdf pg 508)** *"5.3 (e) A shall notify the Customer when the International Service has been satisfactorily established and shall notify both the Customer and Administration B via fax or email of the date when the International Service and billing should commence.*	**Refer Para 72 @ Pg.81 (Pdf pg 839) of the compilation filed by appellant dated 14 January 2024** *"72. Upon satisfactory completion of the end-to-end testing, Administration A will advise the customer that the service has been satisfactorily established. Billing will commence after the satisfactory completion of the end-to-end testing.*
Clause 6: *"Relationships of the Administrators"* of OSS Agreement @ Pg.18 of document filed by the respondent dated 3 February 2024	**Refer Para 6.1 @ Pg.18 (Pdf pg 512)** *"6.1. Notwithstanding anything in this Agreement, the Administrations are independent business entities, and nothing herein shall be construed so as to constitute the*	**Refer Para 72 @ Pg.81 (Pdf pg 839) of the compilation filed by appellant dated 14 January 2024** *"72. As regards the relationship of the Administrations, it is stated that the Administrations are*

	parties as principal and agent, partners, joint venture participants, or employer and employee. **Refer Para 6.2 @ Pg.18 (Pdf pg 512)** *"6.2. Each Administration hereby appoints the other, on a non-exclusive basis, as its representative in the other Administration's country, to market and co-ordinate the provision of the International Services. The activities of each Administration in the course of such representation shall be by way of introduction only to a prospective Customer. Neither Administration shall be obliged or required to provide the Service*	*independent business entities and it shall not be construed so as to constitute the parties as principal and agent, partners, joint venture participants, or employer and employee.* **Refer Para 73 @ Pg.81-82 (Pdf pg 839-840) of the compilation filed by appellant dated 14 January 2024** *"73. Clause 6.2 states that each Administration appoints the other, on a non-exclusive basis, as its representative in the other Administration's country, to market and co-ordinate the provision of the IPLC Service. The activities of each Administration in the course of such representation shall be by way of introduction only to a prospective customer. Neither Administration shall be obliged or required to provide the Service to a customer in its country until it has accepted a customer's Order Form in accordance with the other Administration's IPLC Terms and countersigned its Order Form for the service.*
Schedule 1: "When Bharti is Administration-A" of OSS Agreement @ Pg. 28 of document filed by the respondent dated 3	**Refer Para 1.2 @ Pg.28 (Pdf pg 522)** *"1.2 Bharti, shall get the relevant documents filled by the Customer at their*	**Refer Para 74 @ Pg.82 (Pdf pg 840) of the compilation filed by appellant dated 14 January 2024**

February 2024	*end as per the Customer Contract and terms & conditions made available to them by Telstra. This document shall be handed over to Telstra at the earliest, by courier and also intimated by facsimile/email to contacts of Telstra as provided, for expediting the order.* **Refer Para 1.5 @ Pg.28 (Pdf pg 522)** *"1.5 The charges or fees raised by Telstra through its invoices will be the total charges to be paid by Bharti under this Agreement.*	*"74. When VSNL is Administration A, VSNL shall get the relevant documents, including the MCI Warranty of Agency, filled by the customer at Indian end as per the customer order form made available to VSNL by MCI. This document has to be handed over to MCI at the earliest time possible, by courier and also communicated by facsimile/email to contacts of MCI as provided, for expediting the order. The charges or fees raised by MCI through its invoices will be the total charges to be paid by VSNL under the Agreement.*
Schedule 2: "When Bharti is Administration-B" of OSS Agreement @ Pg. 29 of document filed by the respondent dated 3 February 2022	**Refer Para 1.2 @ Pg.29 (Pdf pg 523)** *"1.2 Telstra, shall get the relevant documents filled by the Customer at their end as per the Customer Contract and terms & conditions made available to them by Bharti. This document shall be handed over to Bharti at the earliest, by courier and also intimated by facsimile/email to contacts of Bharti as provided , for expediting the order.* **Refer Para 1.5 @ Pg.29 (Pdf pg 523)** *"1.5. The charges or fees raised by Bharti through its invoices will be the*	**Refer Para 74 @ Pg.82 (Pdf pg 840) of the compilation filed by appellant dated 14 January 2024** *"74. When VSNL is Administration B, under SEO, MCI shall get the relevant documents filled by the customer at their end as per the customer order form made available to them by VSNL. This document shall be handed over to VSNL at the earliest time possible, by courier and also communicated by facsimile/email to contacts of VSNL as provided, for expediting the order. The charges or fees raised by VSNL through its invoices will*

	total charges to be paid by Telstra under this Agreement.	*be the total charges to be paid by MCI under this Agreement.*

24. Mr. Chawla then contended that the Tribunal clearly erred in resting its decision on the judgment rendered by this Court in **Director of Income Tax vs. New Skies Satellite BV**[13] and sought to highlight the fact that the aforesaid decision had not examined the scope of Explanation 6 of Section 9(1)(vi). It was further submitted that in the present case the AO had on due consideration of the judgments rendered and relevant to the questions which arose, specifically adverted to the decision of the Madras High Court in *Verizon*. In view of the above, it was Mr. Chawla's contention that we should reiterate the position in law as propounded in *Verizon*.

25. While continuing submissions based on the view taken by the AO it was additionally contended that the AO had also taken into consideration the pertinent observations which appear in the order of the Tribunal pronounced in the case of **New Skies Satellite N.V. vs. Assistant Director of Income Tax**[14] and which ultimately formed subject matter of an appeal before this Court. In view of the above, it was his contention that the AO had for cogent and valid reasons ultimately come to the correct conclusion that the receipts from Indian customers were liable to be taxed as royalty.

26. Mr. Chawla also sought to draw sustenance from the following extracted passages which appear in the decision of the Tribunal in *New Skies Satellite N.V.*:-

[13] 2016 SCC OnLine Del 796

[14] 2009 SCC OnLine ITAT 1509

"255. To briefly state, our findings in respect of issues raised and argued before us are as under:

> On facts, it is held that a process is involved in the transponder through which the telecasting companies are able to uplink the desired images/data and downlink the same in the desired area which, inter alia, covers Indian territory. For the purpose of falling within the scope of royalty, it is not necessary that the process which has been used and in respect of which the consideration is paid should be a secret process. Even consideration paid in respect of simple process shall be covered by the scope of royalty. The scope of "royalty" has not been restricted either by the domestic provisions or by the provisions contained in respective Double Taxation <u>The process, even if it is construed to be intellectual property, for falling within the ambit of royalty, it is not necessary that the process should be protected one. The simple process, even if it is intellectual property, will fall within the ambit of royalty. For holding that consideration is in respect of royalty, it is not necessary that the instruments through which the process is carried on should be in the control or possession of the person who is receiving the payment. The context and factual situation has to be kept in mind while finding out that whether a process was actually used by the payer. In the case of satellites, physical control and possession of the process can neither be with the satellite companies nor with the telecasting companies. The control of the process, by either of them will be through sophisticated instruments either installed at the ground stations owned by the satellite companies or through the instruments installed at the earth stations owned and operated by telecasting companies. The use of process, according to agreement, was provided by the satellite companies to the telecasting companies whereby the telecasting companies are enabled to telecast their programmes by uplinking and downlinking the same with the help of that process.</u> Avoidance Agreement's. Insertion of "comma" after the words "secret formula or process" in the respective Double Taxation Avoidance Agreement's does not give different interpretation to the provisions of the Double Taxation Avoidance Agreement as compared to the provisions of domestic law. Time of telecast and the nature of programme, all depends upon the telecasting companies and, thus, they are using that process. The consideration paid by telecasting companies to satellite companies is for the purpose of providing use and right to use of the process and, thus, it is royalty within the meaning of clause (iii) of Explanation 2 to section 9(1)(vi). It is also a royalty within the meaning of clause (vi) of Explanation 2 to section 9(1)(vi)."

It was submitted by Mr. Chawla that although the order of the Tribunal was ultimately set aside by this Court, the same has not attained finality in light of appeals presently pending before the Supreme Court.

27. It was then contended that as would be evident from a reading of the orders impugned in these appeals, the Tribunal has essentially relied upon various orders passed by it following *New Skies Satellite*, in order to articulate its view with respect to equipment royalty and has failed to independently evaluate or accord consideration to the issues which arose. While we do notice this submission, it may be only noted that the Tribunal was clearly bound by an authoritative pronouncement of the jurisdictional High Court and it cannot possibly be faulted in adopting that course. This more so when the decision in *New Skies Satellite* appears to have been consistently followed. We thus find no justification to hold that its decisions impugned in these appeals is liable to be interfered with on the ground as suggested.

28. Proceeding further, Mr. Chawla also placed reliance on yet another decision of the Madras High Court in **Poompuhar Shipping Corporation Ltd. vs Income Tax Officer**, **International Taxation-II, Chennai**[15] in order to explain the meaning to be ascribed to the expressions "use" or "right to use" and "royalty". The relevant extracts of that judgment are reproduced hereinbelow:

> "**83.** Both sides placed heavy reliance on the commentary on article 12 on the meaning of the expression "for the use of or right to use". Leaving aside the arguments on "equipment" for a moment, when we look at the commentary on article 12, one would note in paragraph 8.2, taking the view that where a payment is for consideration for transfer of full ownership of an element of

[15] [(2013) SCC OnLine Mad 3089]

property referred to in the definition, the payment is not in consideration "for the use of, or the right to use" that property and cannot, therefore, represent a royalty. It further pointed out to the changes brought to the model convention that the expression "for the use of, or right to use" industrial, commercial or scientific equipment was subsequently deleted by using the expression "for the use of, or right to use" industrial, commercial and scientific experience. It was observed that given the nature of income from leasing of industrial, commercial, scientific equipment including the leasing of containers, the Committee on Fiscal Affairs decided to exclude the income from such leasing from the definition of "royalty" and to consequently remove it from the application of article 12, in order to make sure that it would fall under the Rules for the taxation of business profits, as defined in articles 5 and 7. The decision and the background of the decision leading to the removal of the equipment to be replaced by experience in the OECD model, cannot be pressed into service, to contend that the payment under time charter cannot come under the definition of "royalty". As already pointed out, the payment herein is for "use or right to use". As the expression stands in the section, we do not find any assistance on this aspect from the OECD model post 1992. <u>Thus, even in a case where physical possession is not with the transferee or the lessee or the hirer, the payment made for the use of or right to use of an equipment, would fall under the head of "Royalty".</u> <u>In the commentary on article 12, in paragraph 9.1, it was observed "as regards treaties that include the leasing of industrial, commercial or scientific (ICS) equipment in the definition of royalties, the characterisation of the payment will depend to a large extent on the relevant contractual arrangements".</u>

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88. This takes us to the consideration on article 12 under DTAA. Article 12 of the Australian DTAA deals with the jurisdiction of the State on the taxability of royalty. It states that article 8—Ships and aircraft—1. Profits from the operation of ships or aircraft, including interest on funds connected with that operation, derived by a resident of one of the Contracting States shall be taxable only in that State.<u> The definition of "royalty" as given under article 12(3) of the DTAA with Australia is the same as in the definition in the DTAA with France in article 13, with Germany in article 12 ; with Norway in article 13 ; with Singapore in article 12 ; with Switzerland in article 12 and with U. S. A in article 12</u>.

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90. <u>Thus, while some of the DTAAs include payment for use of or right to use of industrial, commercial and scientific experience as a</u>

heading under royalty, invariably, in all the DTAAs, payment for use of or right to use of industrial, commercial and scientific equipment, is included in the meaning of "royalty". The provision contained in section 9(1)(vi), Explanation 2 (iva) is modelled after U. N. Model and is different from what one has in the OECD model at present.

91. Thus, while the OECD Model got amended to bring payment for use of or right to use of the industrial, commercial scientific experience as "royalty", all the DTAAs under consideration contain the clauses on consideration for use of or right to use of industrial, commercial and scientific equipment as well as experience as "royalty".

92. Thus, when the use or right to use the ship for an economic benefit is given to the assessee, the consideration for the use of the industrial, commercial and scientific equipment is "royalty", assessable under Explanation 2(iva) to section 9(1)(vi) of the Income-tax Act. Thus, for the purposes of Income-tax Act, under the time charter, the payment made being for the use of the ship, the same comes within the meaning of the word "royalty"."

D. SUBMISSIONS OF TELSTRA

29. Appearing for the respondents, Mr. Sabharwal submitted that undisputedly, the assessee is a foreign telecom operator engaged in the business of providing data transmission/ bandwidth services from outside India facilitating high speed data connectivity. It was submitted that in pursuance of the above, it enters into contracts for transmission of voice and data to customers. Mr. Sabharwal pointed out that for rendering telecom services in India, it is incumbent upon an operator to obtain a telecom license and which the assessee, admittedly, does not hold since it does not render any service in India. It was asserted that the entire infrastructure and equipment with the aid of which the assessee provides transmission/bandwidth services is situate outside India and that at no point of time does it rent out that equipment.

30. It was his submission that the controversy pertaining to taxation of bandwidth/ data transmission services is no longer res integra having been settled by this Court in **Principal Commissioner of Income Tax vs. Verizone Communications India Pvt. Ltd**[16]. *Verizone Communications* was a decision rendered on an appeal preferred by the Principal Commissioner of Income Tax assailing the judgment rendered by the Tribunal and in which the Revenue appears to have conceded to the legal question having been laid to rest by the decisions rendered by the Supreme Court in **Engineering Analysis Centre of Excellence Private Ltd. v. Commissioner of Income Tax**[17] and by the Division Bench of this Court in *New Skies Satellite*.

31. Mr. Sabharwal drew our attention specifically to paragraph 16 of that decision and which is reproduced hereinbelow: -

> "**16.** Insofar as this court is concerned, either way, no substantial question of law would arise, as, according to Mr. Bhatia, the issue stands covered by the judgment rendered by the coordinate bench of this court in New Skies Satellite BV case."

32. It was submitted that the issue of bandwidth services and its taxability has also been ruled upon by the Karnataka High Court in its decision in **Vodafone Idea Ltd. vs. Deputy Director of Income Tax**[18] and where while dealing with an identical question, the issue came to be answered in favor of the Revenue. In *Vodafone Idea***,** the Karnataka High Court was called upon to examine the following questions of law: -

> "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

[16] 2023 SCC OnLine Del 7752
[17] (2022) 3 SCC 321
[18] 2023 SCC OnLine Kar 107

section 201 of the Act and that it is not open to the payer to take benefit of the Double Taxation Avoidance Agreement when he is making payment to a non-resident?

2. Whether the Income-tax Appellate Tribunal was correct in holding that amendment to provisions of royalty under section 9(1)(vi) by inserting Explanations 5 and 6 under the Income-tax Act (hereinafter referred to as the 'Act') will also result in amendment of the Double Taxation Avoidance Agreements?

3. Whether the Income-tax Appellate Tribunal 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' and 'process' in the clarificatory Explanations 2, 5 and 6 of section 9(1)(vi) of the Act, and consequently, the 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 per cent. 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-deduction of tax at source for payments made for the assessment year 2008-09 to the assessment year 2012-13 on the basis of a subsequent amendment to section 9(1)(vi) whereby Explanations 5 and 6 were introduced?"

33. On due consideration of the statutory position, the Karnataka High Court observed as follows: -

"**19.** <u>The second question for consideration is whether the Income-tax Appellate Tribunal was correct in holding that the amendment to provisions of section 9(1)(vi) inserting the Explanations will result in amendment of Double Taxation Avoidance Agreement. 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</u>

<u>June 1, 1976 and in fact expands that position to include what is stated therein vide Finance Act, 2012</u>.

20. Explanations 5 and 6 to section 9(1)(vi) of the Act has been inserted with effect from June 1, 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 (page 558 of 432 ITR):

> "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.. ..
>
> 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 Double Taxation Avoidance Agreement, as per section 90(2) of the Income-tax Act read with Explanation 4 thereof, and article 3(2) of the Double Taxation Avoidance Agreement."

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 the assessee's own case, the Income-tax Appellate Tribunal 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, etc., W. P. No. 36 of 2018, rendered by the Income-tax Appellate Tribunal. 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. The 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."

34. Mr. Sabharwal then submitted that the assessment orders which formed the subject matter of challenge before the Tribunal were founded solely on the decision of its Special Bench in *New Skies Satellite N.V.*, and which had in any case come to be reversed by this Court. In view of the above, it was his submission that since the assessee is engaged in an identical business, no substantial question of law can be said to arise for consideration. Mr. Sabharwal contended that the Tribunal while holding in favour of the respondent assessee insofar as AY 2015-16 was concerned, had allowed the appeal following the judgment of the Supreme Court in *Engineering Analysis* as well as of this Court in *New Skies Satellite*. In view of the aforesaid, it was his submission that the appeals deserve to be dismissed.

35. Seeking to explain the nature of the contract that exists between the assessee and Bharti, as well as the GBSA which it enters into with other telecom operators, Mr. Sabharwal sought to highlight the fact that the respondents themselves had understood the operations of the assessee as essentially being that of providing of a service. This, according to learned counsel, is evident from a reading of what the AO itself chose to record in the assessment order for AY 2012-13 in Para. 2.5.1 and which is extracted hereinbelow: -

> "**2.5.1** M/s Telstra Singapore is a company incorporated in Singapore, outside of India, and is in the business of providing connectivity solutions (International Private Leased Circuits, Multiprotocol Label Switching ('MPLS'), IP /VPN etc) to facilitate high speed data connectivity (hereinafter referred to as 'bandwidth services'). Telstra Singapore holds the infrastructure and equipment, either owned or leased, outside India required to provide bandwidth services to customers."

36. This position, according to Mr. Sabharwal, is also evident from a reading of the directions of the DRP dated 16 October 2015 and where the business of the respondent assessee was examined and understood as having the following characteristics: -

> "**1.0** The assessee, M/s. Telstra Singapore Pvt. Ltd., is a non-resident company incorporated in Singapore. It is engaged in the business of providing connectivity solutions (International Private Leased Circuits, Multi-Protocol Label Switching ('MPLS'), IP/VPN etc.) to facilitate high speed data connectivity (hereinafter referred to as 'bandwidth services'). Telstra Singapore holds the infrastructure and equipment, either owned or leased, outside India required to provide bandwidth services to customers. Under the Indian telecom regulations, only a licensed service provider can provide Bandwidth Services in India. To facilitate provision of bandwidth services in India, it entered into an agreement with Bharti Airtel Limited ('Bharti'), an unrelated telecom company (referred as One Stop Shop ('OSS') Agreement).
>
> **xxxx xxxx xxxx**
>
> **5.1** The assessee submitted that after considering the following relevant clauses of the various agreements, contracts and service schedules, it is indisputably clear that the transaction is a mere rendition of bandwidth services wherein the customer enjoys an uninterrupted 24x7 service to receive and send voice and data at a standard rate of reliability. The fact that a failure
>
> to render service at such a level results in non-payment or loss of consideration for the payee (except on agreed excusable service outages), proves that the transaction under question is a pure service transaction, and is not a transaction involving a grant of use or right to use any equipment in the entire global network to the customer."

37. According to Mr. Sabharwal, once it was admitted to the respondents that the provision of service was on a non-exclusive basis, it would be wholly incorrect for the Department to either assume or contend that any particular customer had obtained control over the infrastructure or the equipment of the respondent assessee. The fact that the assessee was engaged in rendering standardized services, Mr. Sabharwal pointed out, was also accepted by the Tribunal. This, according to learned counsel, would be evident from a reading of

Paras 5,13,19 and 26 of the Tribunal's order which are extracted hereinbelow:-

> "**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. 1n 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.
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> **xxxx** **xxxx** **xxxx**
>
> **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. <u>Delivery of Bandwidth service at a particular speed (say 2 mbps) is nothing but a contract to deliver</u>

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.

xxxx xxxx xxxx

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 tum, 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 (Bam), 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 the 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 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. Siemens Akteingesellschaft (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 judgement, 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 1(2). Considering the express language of article 1(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 err Vs. Seimens Aktiongesellschaft (supra) and held that the amendments could not be read into the treaty. Unilateral amendments by the Indian Government to the term 'royalty' by way amendment to section (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. AC1T (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. Delhi (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

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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."

xxxx **xxxx** **xxxx**

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."

38. Proceeding to the merits of the issues which were canvassed, Mr. Sabharwal contended that this Court in **Asia Satellite Telecommunications Co. Ltd. vs. Director of Income-Tax**[19] had in unequivocal terms enunciated the test for the purposes of royalty being an effective and general control of goods being conferred upon a customer and that only in such a situation could it be said that a use or a right to use had been transferred or created. Mr. Sabharwal drew our attention specifically to Paras 68 and 69 of that decision and which read thus: -

"**68.** We are inclined to agree with the argument of the learned senior counsel for the appellant that in the present case, control of the satellite or the transponder always remains with the appellant. We may also observe at this stage that the terms "lease of transponder capacity", "lessor", "lessee" and "rental" used in the agreement would not be the determinative factors. It is the substance of the agreement which is to be seen. When we go through the various clauses of the said agreement, it becomes clear that the control always remained with the appellant and the appellant had merely given access to a broadband available with the transponder, to particular customers. We may also point out that against the decision of the Authority for Advance Rulings in ISRO case (2008) 307 ITR

[19] 2011 SCC OnLine Del 507

59, special leave petition was dismissed by the Supreme Court (see Puran Singh Sahni v. Sundari Bhagwandas Kripalani (1991) 2 SCC 180).

69. We may also refer to the following distinction brought out by the Karnataka High Court between leasing out of equipment and the use of equipment by its customer. This was done in the case of Lakshmi Audio Visual Inc. v. Asst. CCT 124 STC 426 (Karn) in the following terms (page 433):

> "9. Thus if the transaction is one of leasing/hiring/letting Simpliciter under which the possession of the goods, i.e., effective and general control of the goods is to be given to the customer and the customer has the freedom and choice of selecting the manner, time and nature of use and enjoyment, though within the frame work of the agreement, then it would be a transfer of the right to use the goods and fall under the extended definition of 'sale'. On the other hand, if the customer entrusts to the assessee the work of achieving a certain desired result and that involves the use of goods belonging to the assessee and rendering of several other services and the goods used by the assessee to achieve the desired result continue to be in the effective and general control of the assessee, then, the transaction will not be a transfer of the right to use goods falling within the extended definition of 'sale'. Let me now clarify the position further, with an illustration which is a variation of the illustration used by the Andhra Pradesh High Court in the case of Rashtriya Ispat Nigam Ltd. v. CTO 77 STC 182 (AP).
>
> Illustration:
>
> (i) A customer engages a carrier (transport operator) to transport one consignment (a full lorry load) from place A to B, for an agreed consideration which is called freight charges or lorry hire. The carrier sends its lorry to the customer's depot, picks up the consignment and proceeds to the destination for delivery of the consignment. The lorry is used exclusively for the customer's consignment from the time of loading, to the time of unloading at destination. Can it be said that right to use of the lorry has been transferred by the carrier to the customer ? The answer is obviously in the negative, as there is no transfer of the 'use of the lorry' for the following reasons : (i) the lorry is never in the control, let alone effective control of the customer ; (ii)the carrier decides how, when and where the lorry moves to the destination, and continues to be in effective control of the lorry ; (iii)the carrier can at any point (of time or place) transfer the consignment in the lorry to another lorry ; or the carrier may unload the consignment en-route in any of his godowns, to be picked up later by some other lorry assigned by the carrier for further transportation and delivery at destination.

(ii) On the other hand, let us consider the case of a customer (say a factory) entering into a contract with the transport operator, under which the transport operator has to provide a lorry to the customer, between the hours 8.00 a.m. to 8.00 p.m. at the customer's factory for its use, at a fixed hire per day or hire per km subject to an assured minimum, for a period of one month or one week or even one day ; and under the contract, the transport operator is responsible for making repairs apart from providing a driver to drive the lorry and filling the vehicle with diesel for running the lorry. The transaction involves an identified vehicle belonging to the transport operator being delivered to the customer and the customer is given the exclusive and effective control of the vehicle to be used in any manner as it deems fit ; and during the period when the lorry is with the customer, the transport operator has no control over it. The transport operator renders no other service to the customer. Therefore, the transaction involves transfer of right to use the lorry and thus be a deemed sale."

39. According to learned counsel, a more detailed enunciation on the meaning liable to be ascribed to the expression "right to use" is found in the decision of the **Authority for Advance Rulings**[20] in **Dell International Services India (P.) Ltd.**[21] and where the following pertinent observations were rendered: -

"**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 praesenti 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

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[20] AAR
[21] [2009] 305 ITR 37 (AAR)

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.

xxxx **xxxx** **xxxx**

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 equip-ment 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.

xxxx **xxxx** **xxxx**

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 (iv.a) 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 infrastruc-ture 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."

40. It becomes pertinent to note that the aforesaid view as taken was reiterated by the AAR in **Cable & Wireless Networks India (P.) Ltd.**[22] and where the legal position was explained in the following words: -

"According to the applicant, in the proposed business model, no intellectual property rights are involved; C&W UK has not granted to it any right to use any intellectual property or any equipment. The Commissioner, on the other hand, states that the payment made by the applicant is clearly for using secret process. According to him the technology involved in the process of transmission of voice/data contains proprietary resources. It is not a case of mere rendition of service, but the quality of service and secrecy are also material. It is further stated that the services to be availed by the applicant would amount to the use of a secret process and thus is covered by royalty as stipulated in article 13(3) of the treaty. But, no material has been placed before us to show that C&W UK uses any secret process in the transmission of the international leg of the

[22] [2009] 182 Taxman 76 (AAR)

service, or that the applicant pays towards the use or right to use that secret process. It is well-settled that telecom services are standard services. The arrangement between the applicant and C&W UK is for rendition of service and the applicant pays for the same. It is for C&W UK to see how it will provide that service. The applicant is not concerned with the same. This Authority has dealt with this issue in the case of Dell International Services India (P.) Ltd. (supra). In that case BT America provided two way transmission of voice and data to Dell India between India and USA. For providing this service, BT America had tied up with VSNL in India and other telecom service providers outside India. Dell India had an agreement with BT America for the entire service for which it made payment directly to BT America. One of the issues that arose for consideration was whether the payment made by the applicant to BT America was in the nature of royalty falling either under clause (iii) of Explanation 2 of section 9(1) or article 12(3) of the tax avoidance treaty between India and USA, which is materially similar to the provisions of article 13(3) of the treaty between India and UK. The Authority held—

> "14. Whether the payment made by the applicant to BTA is in the nature of royalty falling under clause (iii) of Explanation 2 and/or article 12(3) of the Treaty?
>
> 14.1 It is one of the contentions of the Revenue that the applicant makes use of or is conferred with the right to use a 'process' within the meaning of clause (iii) to Explanation (2) to section 9(1) of the Act. That clause speaks of 'the use of any patent, invention, model, design, secret formula or process or trade mark or similar property'. It is contended, relying on the decision of ITAT in the case of Asia Satellite Telecommunications Co. Ltd. v. Dy. CIT [2003] 85 ITD 478 (Delhi) that the word 'secret' only qualifies the expression 'formula' and cannot be read before the word 'process'. On such interpretation, it is submitted by the revenue in its comments that the services provided to the applicant are clearly in the nature of a process and not in the nature of standard facility and the applicant has used and has been conferred with the right to use such process. However, this contention has not been urged before us by the learned Counsel for the Department for the obvious reason that the language used in the relevant clause of the Treaty does not support any such interpretation. <u>The expression in article 12(3) (referred to at para 7.1 (supra) is 'for the use of or the ight to use any copyright, patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience'. It is, thus, clear that formula/process are part of the same group and the adjective 'secret' governs both. The reasoning of ITAT in the</u>

aforementioned case, based on the absence of comma after process and the impact of the immediately following word, 'trade mark', does not hold good in view of the clear language in article 12(3) of the Treaty. It has been so pointed out very rightly by another Bench of ITAT in Panamsat International Systems Inc. v. Dy. CIT (IT Appeal No. 1796/Delhi/2001, dated 11-8-2006) at paragraph 6.18. Going by such Interpretation, it cannot be held that there is, in the instant case, the use of or the right to use a secret process. In fact it is nobody's case that any secret process is involved here and the applicant makes use of it. The use of secret process is alien to the minds of contracting parties. Incidentally, we may mention that it was brought to our notice that similar bandwidth services; through private circuits are being provided by many other telecom operators. Hence, the royalty definition under the treaty relating to secret process is not attracted here. We may mention that the applicant contended that the decision of ITAT in Asia Satellite Telecommunication Co. Ltd.'s case (supra) is distinguishable on facts. It is unnecessary to deal with this aspect." (p. 494)"

41. In view of the above, it was Mr. Sabharwal's submission that dominion and control over infrastructure and equipment constitute the primary test in order to ascertain whether a right to use had been transferred. Juxtaposing those submissions with the facts of the present batch, Mr. Sabharwal highlighted the fact that none of the authorities had even remotely come to conclude that the service extended by the respondent assessee entailed a grant of control or a right to use any process or equipment. This, according to learned counsel, must be viewed in addition to its consistent position that no equipment of the assessee was even housed in India. In view of the aforesaid, Mr. Sabharwal submitted that the Court would come to the inevitable and indisputable position that the assessee is merely using its own infrastructure to provide services and is thus not transferring the "use" or "right to use" in any equipment or process.

42. Proceeding then to Explanation 2 to Section 9 and Article 12(3)

of the DTAA, Mr. Sabharwal submitted that the word "process" appears in the company of various species of intellectual properties such as patents, invention, model, design, formula and trademark. In view of the aforesaid, according to learned counsel, the principles of *noscitur a sociis* would apply and consequently the word "process" being liable to be understood as relating to an item of intellectual property. It was his contention that no intellectual property right stands associated with the provision of bandwidth services provided to customers. Mr. Sabharwal contended that the argument based on equipment royalty is also liable to be negatived since the assessee neither transfers a right to use the equipment nor is the customer conferred a right to utilize that equipment on an exclusive basis.

43. Learned counsel then sought to draw support for the aforenoted submissions from the OECD Model Commentary pertaining to Article 12 and where, in the context of transponder leasing, pipelines, transmission of electrical power or communications, the following observations appear: -

> "**9.1** Satellite operators and their customers (including broadcasting and telecommunication enterprises) frequently enter into "transponder leasing" agreements under which the satellite operator allows the customer to utilise the capacity of a satellite transponder to transmit over large geographical areas. Payments made by customers under typical "transponder leasing" agreements are made for the use of the transponder transmitting capacity and will not constitute royalties under the definition of paragraph 2: these payments are not made in consideration for the use of, or right to use, property, or for information, that is referred to in the definition (they cannot be viewed, for instance, as payments for information or for the use of, or right to use, a secret process since the satellite technology is not transferred to the customer). As regards treaties that include the leasing of industrial, commercial or scientific (ICS) equipment in the definition of royalties, the characterisation of the payment will depend to a large extent on the relevant contractual arrangements. Whilst the relevant contracts often refer to the "lease"

of a transponder, in most cases the customer does not acquire the physical possession of the transponder but simply its transmission capacity: the satellite is operated by the lessor and the lessee has no access to the transponder that has been assigned to it. In such cases, the payments made by the customers would therefore be in the nature of payments for services, to which Article 7 applies, rather than payments for the use, or right to use, ICS equipment.A different, but much less frequent, transaction would be where the owner of the satellite leases it to another party so that the latter may operate it and either use it for its own purposes or offer its data transmission capacity to third parties. In such a case, the payment made by the satellite operator to the satellite owner could well be considered as a payment for the leasing of industrial, commercial or scientific equipment. Similar considerations apply to payments made to lease or purchase the capacity of cables for the transmission of electrical power or communications (*e.g.* through a contract granting an indefeasible right of use of such capacity) or pipelines (*e.g.* for the transportation of gas or oil).

9.2 Also, payments made by a telecommunications network operator to another network operator under a typical "roaming" agreement (see paragraph 9.1 of the Commentary on Article 5) will not constitute royalties under the definition of paragraph 2 since these payments are not made in consideration for the use of, or right to use, property, or for information, referred to in the definition (they cannot be viewed, for instance, as payments for the use of, or right to use, a secret process since no secret technology is used or transferred to the operator). This conclusion holds true even in the case of treaties that include the leasing of industrial, commercial or scientific (ICS) equipment in the definition of royalties since the operator that pays a charge under a roaming agreement is not paying for the use, or the right to use, the visited network, to which it does not have physical access, but rather for the telecommunications services provided by the foreign network operator."

44. Mr. Sabharwal also placed reliance on the following passage as appearing in the seminal work of **Professor Klaus Vogel on Double Taxation Conventions** (3rd Edition) vide para 44 at page 788: -

"Within the range from services, viz "letting" to "alienation", outright alienation is the one clear-cut extreme, viz outright transfer of the asset involved (right, etc.) to the payer of the royalty. The other, just as clear-cut extreme is the exercise by the payee of activities in the service of the payer, activities for which the payee uses his own proprietary rights, know-how etc. while not letting or transferring them to the payer (for more details regarding the distinction between licensing and the provision of services,

> ……in connection with the various subjects of licenses). Neither extreme comes under Art. 12, all that does is the central category, viz., 'letting'."

45. Questioning the correctness of the view expressed by the Madras High Court in *Verizon*, Mr. Sabharwal argued that the judgment clearly does not lay down the correct law since the same is founded on the basis that Explanations 5 and 6 of Section 9 as inserted by Finance Act, 2012, are liable to be read into the DTAA. Mr. Sabharwal submitted that this contention stands specifically negated by not only this Court in *New Skies Satellite* but also by the Supreme Court in *Engineering Analysis*.

46. Learned counsel submitted that the various Explanations which came to be introduced in Section 9 of the Act and are claimed by the appellants to be declaratory, clearly attempt to expand the meaning to be assigned to the expression "royalty" with retrospective effect. This, according to learned counsel, are *"transformative and substantive amendments"* and would thus clearly be hit by the principles laid down by the Supreme Court in **Commissioner of Income Tax(Central)-1,New Delhi vs. Vatika Township Private Limited**[23].

47. Learned counsel submitted that an amendment would be deemed to be clarificatory only if it attempts to explain and expand the text of a provision which may be either obscure, ambiguous or where a statutory provision either suffers from an obvious omission or is capable of being understood to have more than one meaning. According to learned counsel, the Explanations inserted in Section 9 clearly fail to meet the aforesaid tests.

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[23] (2015) 1 SCC 1

48. Learned counsel drew our attention to the following passages from the judgment of the Supreme Court in *Vatika Township*:-

> "**28.** Of the various rules guiding how a legislation has to be interpreted, one established rule is that unless a contrary intention appears, a legislation is presumed not to be intended to have a retrospective operation. The idea behind the rule is that a current law should govern current activities. Law passed today cannot apply to the events of the past. If we do something today, we do it keeping in view the law of today and in force and not tomorrow's backward adjustment of it. Our belief in the nature of the law is founded on the bedrock that every human being is entitled to arrange his affairs by relying on the existing law and should not find that his plans have been retrospectively upset. This principle of law is known as *lex prospicit non respicit*: law looks forward not backward. As was observed in *Phillips* v. *Eyre* [(1870) LR 6 QB 1] , a retrospective legislation is contrary to the general principle that legislation by which the conduct of mankind is to be regulated when introduced for the first time to deal with future acts ought not to change the character of past transactions carried on upon the faith of the then existing law.
>
> **29.** The obvious basis of the principle against retrospectivity is the principle of "*fairness*", which must be the basis of every legal rule as was observed in *L'Office Cherifien des Phosphates* v. *Yamashita-Shinnihon Steamship Co. Ltd.* [(1994) 1 AC 486 : (1994) 2 WLR 39 : (1994) 1 All ER 20 (HL)] Thus, legislations which modified accrued rights or which impose obligations or impose new duties or attach a new disability have to be treated as prospective unless the legislative intent is clearly to give the enactment a retrospective effect; unless the legislation is for purpose of supplying an obvious omission in a former legislation or to explain a former legislation. We need not note the cornucopia of case law available on the subject because aforesaid legal position clearly emerges from the various decisions and this legal position was conceded by the counsel for the parties. In any case, we shall refer to few judgments containing this dicta, a little later.
>
> **30.** We would also like to point out, for the sake of completeness, that where a benefit is conferred by a legislation, the rule against a retrospective construction is different. If a legislation confers a benefit on some persons but without inflicting a corresponding detriment on some other person or on the public generally, and where to confer such benefit appears to have been the legislators' object, then the presumption would be that such a legislation, giving it a purposive construction, would warrant it to be given a retrospective effect. This exactly is the justification to treat procedural provisions as retrospective. In *Govt. of India* v. *Indian*

Tobacco Assn. [(2005) 7 SCC 396] , the doctrine of fairness was held to be relevant factor to construe a statute conferring a benefit, in the context of it to be given a retrospective operation. The same doctrine of fairness, to hold that a statute was retrospective in nature, was applied in *Vijay* v. *State of Maharashtra* [(2006) 6 SCC 289] . It was held that where a law is enacted for the benefit of community as a whole, even in the absence of a provision the statute may be held to be retrospective in nature. However, we are (*sic* not) confronted with any such situation here.

31. In such cases, retrospectivity is attached to benefit the persons in contradistinction to the provision imposing some burden or liability where the presumption attaches towards prospectivity. In the instant case, the proviso added to Section 113 of the Act is not beneficial to the assessee. On the contrary, it is a provision which is onerous to the assessee. Therefore, in a case like this, we have to proceed with the normal rule of presumption against retrospective operation. Thus, the rule against retrospective operation is a fundamental rule of law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication. Dogmatically framed, the rule is no more than a presumption, and thus could be displaced by outweighing factors.

32. Let us sharpen the discussion a little more. We may note that under certain circumstances, a particular amendment can be treated as clarificatory or declaratory in nature. Such statutory provisions are labelled as "declaratory statutes". The circumstances under which provisions can be termed as "declaratory statutes" are explained by Justice G.P. Singh [*Principles of Statutory Interpretation*, (13th Edn., LexisNexis Butterworths Wadhwa, Nagpur, 2012)] in the following manner:

> "*Declaratory statutes*
>
> The presumption against retrospective operation is not applicable to declaratory statutes. As stated in Craies [W.F. Craies, *Craies on Statute Law* (7th Edn., Sweet and Maxwell Ltd., 1971)] and approved by the Supreme Court [**Ed.**: The reference is to *Central Bank of India* v. *Workmen*, AIR 1960 SC 12, para 29] : 'For modern purposes a declaratory Act may be defined as an Act to remove doubts existing as to the common law, or the meaning or effect of any statute. Such Acts are usually held to be retrospective. The usual reason for passing a declaratory Act is to set aside what Parliament deems to have been a judicial error, whether in the statement of the common law or in the interpretation of statutes. Usually, if not invariably, such an Act contains a Preamble, and also the word "declared" as well as the word "enacted".' But the use of the words 'it is declared' is not conclusive that the Act is

> declaratory for these words may, at times, be used to introduced new rules of law and the Act in the latter case will only be amending the law and will not necessarily be retrospective. In determining, therefore, the nature of the Act, regard must be had to the substance rather than to the form. If a new Act is 'to explain' an earlier Act, it would be without object unless construed retrospective. An explanatory Act is generally passed to supply an obvious omission or to clear up doubts as to the meaning of the previous Act. It is well settled that if a statute is curative or merely declaratory of the previous law retrospective operation is generally intended. The language 'shall be deemed always to have meant' is declaratory, and is in plain terms retrospective. In the absence of clear words indicating that the amending Act is declaratory, it would not be so construed when the pre-amended provision was clear and unambiguous. An amending Act may be purely clarificatory to clear a meaning of a provision of the principal Act which was already implicit. A clarificatory amendment of this nature will have retrospective effect and, therefore, if the principal Act was existing law which the Constitution came into force, the amending Act also will be part of the existing law."

The above summing up is factually based on the judgments of this Court as well as English decisions."

49. Refuting some of the contentions which were advanced by Mr. Chawla, learned counsel then submitted that the attempt of the appellants seeking to distinguish *"satellite cases"* and asserting that the same would have no application to telecom services is clearly misconceived when one bears in consideration that Explanation 6 to Section 9, groups transmission by satellite, cable optic fiber or *"any other similar technology"* together. Even here, according to learned counsel, if the precept of *ejusdem generis* were to be applied, it would become apparent that telecom services would fall within the broad group spoken of in Explanation 6 and fall in the category of *"any other similar technology"*. It was pointed out by Mr. Sabharwal that similar broad classifications appear in various other DTAAs' and which would be evident from the extracts which appear at pages 393

and 398 of our record.

50. In any case, according to Mr. Sabharwal, a payment would be liable to be categorized as royalty under the DTAA only if it entailed a "use" or a "right to use". Those two expressions, according to learned counsel, have been clearly explained by this Court in *Asia Satellite* and *New Skies Satellite*. According to learned counsel, the enunciation of the legal position as appearing in Paras 68 and 69 of *Asia Satellite* follows the position which was expounded by the Andhra Pradesh High Court in **Rashtriya Ispat Nigam Limited vs. Commercial Tax Officer, Company Circle, Visakhapatnam**[24] and which ultimately came to be affirmed by the Supreme Court in **State of A.P vs. Rashtriya Ispat Nigam Limited**[25].

51. The fact that the assessee is essentially engaged in providing bandwidth and telecom services, according to Mr. Sabharwal, was a position which remained unquestioned not just at the stage of assessment but has continued even before this Court as would be evident from the following averments which form part of the appeal: -

> " **3.1** That Telstra Singapore Pte Ltd. (hereinafter referred to as 'the Assessee') 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').
>
> **xxxx xxxx xxxx**
>
> **3.3** That during the Assessment proceeding, it was noticed by the Assessing officer that 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

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[24] 1989 SCC OnLine AP 414
[25] (2002) 3 SCC 314

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.

xxxx xxxx xxxx

3.7 That being aggrieved, Assessee filed an appeal before the Ld. ITAT. The Ld. ITAT allowed the appeal of Assessee by holding that the Assessee company is a tax resident of Singapore and is engaged in providing band width services to various Indian Telecom Operators like Bharati Airtel In India and such services are being provided outside India. Hence, in view of the ld. ITAT, the consideration received by the Assessee is not taxable as Royalty in view of the beneficial provision of DTAA between India and Singapore under which the definition of Royalty has not been amended to align with the definition given in the Act."

52. Mr. Sabharwal also drew our attention specifically to the following grounds on which the appeals proceed: -

"b) Because ld. ITAT has erred in holding that the receipts from Indian customers for services provided outside Indian Territory in connection with use or right to use of process or equipment by the assessee company cannot be taxed as royalty as per section 9(1)(vi) of the Act and Article 12 of the DTAA between India and Singapore.

xxxx xxxx xxxx

f) Because ld. ITAT failed to note that the receipts pertain to a transaction aimed at providing high speed data connectivity between two different countries at the request of the customer . concerned. <u>An Indian customer, in order to complete this connection, relies on the Indian telecom service provider for the Indian leg of the transmission and further on the assessee company for the foreign leg of the same connection. Since the Indian and foreign (i.e. the assessee company) service providers are in an agreement to provide these services together, the receipts pertain to provision of the same service. The service is being rendered by the assessee company In connection with the use of a process and an equipment. Therefore, the receipts of the assessee qualify both as process royalty and equipment royalty under Explanation 6 to Section 9(1)(iv) of the IT.Act and under clause (iva) of Explanation 2 to S.9(1)(vi) of the I.T. Act respectively</u>. Hence the income of the assessee is assessable to tax as royalty both under the DTAA and as per Section 115 A of the I. T .Act, at the rate of

10%. The ITAT's contention is basically two fold. First, the nature of receipt in the hands of the assessee company is not Royalty in view of Hon'ble Delhi High Court's New Satellite NY case (319 ITR 269). It is pertinent to mention here that the Department has not accepted the order of Hon'ble Delhi High Court and preferred further appeal before the Hon'ble Supreme Court which is pending for adjudication. Further, the Hon'ble Madras High Court in the case of M/s Verizon Singapore Pte Ltd.(2013) has taken a contrary view on the identical issue. Thus the order of the Id. ITAT is not correct on merit."

53. Seeking to expand upon the meaning of the expression "right to use", Mr. Sabharwal also placed reliance upon the following paragraphs of the judgment rendered by the Constitution Bench in **Bharat Sanchar Nigam Ltd and Another vs. Union of India and Ors**[26].:-

"**58.** The State respondents in their submissions had initially differed as to what constituted "goods" in telecommunication. Ultimately, the consensus among the respondents appeared to be that the "goods" element in telecommunication were the electromagnetic waves by which data generated by the subscriber was transmitted to the desired destination. The inspiration for the argument has been derived from the provisions of the Telegraph Act, 1885 which defines telegraph [Amended in 2004 by Act 8 of 2004 with effect from 1-4-2002.] as meaning:

"3. (1-AA) 'telegraph' means any appliance, instrument, material or apparatus used or capable of use for transmission or reception of signs, signals, writing, images and sounds or intelligence of any nature by wire, visual or other electromagnetic emissions, radio waves or hertzian waves, galvanic, electric or magnetic means;

Explanation.—'Radio waves' or 'Hertzian waves' means electro-magnetic waves of frequencies lower than 3000 gigacycles per second propagated in space without artificial guide."

59. What is also important are the definitions of the words "message" and "telegraph line" in the 1885 Act which read:

"3. (3) 'message' means any communication sent by telegraph, or given to a telegraph officer to be sent by telegraph or to be delivered;

[26] (2006) 3 SCC 1

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Signing Date:24.07.2024
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(4) 'telegraph line' means a wire or wires used for the purpose of a telegraph, with any casing, coating, tube or pipe enclosing the same, and any appliances and apparatus connected therewith for the purpose of fixing or insulating the same;"

60. Section 4 of the 1885 Act gives exclusive privilege in respect of telecommunication and the power to grant licences to the Central Government. Pursuant to such power, licences have been granted to service providers. According to the service providers, in terms of their licence no further transfer of the rights to use the telegraph could be affected by them. Therefore, what was provided was a service by the utilisation of the telegraph licensed to the service providers for the benefit of the subscribers.

61. We will proceed on the basis that incorporeal rights may be goods for the purposes of levying sales tax. Assuming it to be so, the question is whether these electromagnetic waves can fulfil the criteria laid down in *Tata Consultancy* [(2005) 1 SCC 308] for goods. In our opinion the question must be answered in the negative. Electromagnetic waves have been described in David Gilles & Roger Marshal: *Telecommunications Law*: Butterworths:

"*1.14*. Electromagnetic waves travel through free space from one point to another but can be channelled through waveguides which may be metallic cables, optical fibres or even simple tubes. All electromagnetic waves are susceptible to interference from one another and unrelated electrical energy can distort or destroy the information they carry. To reduce these problems they have been organised within the spectrum into bands of frequencies or wavelengths for the transmission of particular types of services and information."

62. The process of sending a signal is as follows:

"Data is superimposed on a carrier current or wave by means of a process called *modulation*. Signal modulation can be done in either of two main ways: *analog* and *digital*. In recent years, digital modulation has been getting more common, while analog modulation methods have been used less and less. There are still plenty of analog signals around, however, and they will probably never become totally extinct. Except for DC signals such as telegraph and baseband, all signal carriers have a definable frequency or frequencies. Signals also have a property called *wavelength,* which is inversely proportional to the frequency". (*Encyclopedia of Technology Terms of Techmedia*)

63. It is clear, electromagnetic waves are neither abstracted nor are they consumed in the sense that they are not extinguished by their user. They are not delivered, stored or possessed. Nor are they marketable. They are merely the medium of communication. What is transmitted is not an electromagnetic wave but the signal through such means. The signals are generated by the subscribers themselves. In telecommunication what is transmitted is the message by means of the telegraph. No part of the telegraph itself is transferable or deliverable to the subscribers.

64. The second reason is more basic. A subscriber to a telephone service could not reasonably be taken to have intended to purchase or obtain any right to use electromagnetic waves or radio frequencies when a telephone connection is given. Nor does the subscriber intend to use any portion of the wiring, the cable, the satellite, the telephone exchange, etc. At the most the concept of the sale in a subscriber's mind would be limited to the handset that may have been purchased for the purposes of getting a telephone connection. As far as the subscriber is concerned, no right to the use of any other goods, incorporeal or corporeal, is given to him or her with the telephone connection.

xxxx **xxxx** **xxxx**

95. The petitioner Bharat Sanchar Nigam Ltd. (for short "BSNL") is a licensee under the Telegraph Act, 1885. The licence of the petitioner is obtained from the Government of India which is the same as the licence given also to various private telecom operators which entitles BSNL to carry the activity of operating telegraph limited to the scope of telecommunication facilities.

96. The entire infrastructure/instruments/appliances and exchange are in the physical control and possession of the petitioner at all times and there is neither any physical transfer of such goods nor any transfer of right to use such equipment or apparatuses.

97. To constitute a transaction for the transfer of the right to use the goods, the transaction must have the following attributes:

(*a*) there must be goods available for delivery;

(*b*) there must be a consensus ad idem as to the identity of the goods;

(*c*) the transferee should have a legal right to use the goods—consequently all legal consequences of such use including any permissions or licences required therefor should be available to the transferee;

(*d*) for the period during which the transferee has such legal right, it has to be the exclusion to the transferor—this is the necessary concomitant of the plain language of the statute viz. a "transfer of the right to use" and not merely a licence to use the goods;

(*e*) having transferred the right to use the goods during the period for which it is to be transferred, the owner cannot again transfer the same rights to others.

98. In my opinion, none of these attributes are present in the relationship between a telecom service provider and a consumer of such services. On the contrary, the transaction is a transaction of rendition of service.

xxxx **xxxx** **xxxx**

Nature of transaction in the present case

108. The contract between the telecom service provider and the subscriber is merely to receive, transmit and deliver messages of the subscriber through a complex system of fibre optics, satellite and cables.

109. Briefly, the subscriber originates/generates his voice message through the handset. The transmitter in the handset converts the voice into radio waves within the frequency band allotted to the petitioners. The radio waves are transmitted to the switching apparatus in the local exchange and thereafter after verifying the authenticity of the subscriber, the message is transmitted to the telephone exchange of the called party and then to the nearest Base Transceiver Station (BTS). BTS transmits the signal to the receiver apparatus of the called subscriber, which converts the signals into voice, which the subscriber can hear.

110. The modern legislature makes laws to govern a society, which is fast moving. It is aware of the changing concepts of the emerging times. The law adapts itself to social, economic, political, scientific and other revolutionary changes.

111. Traditionally, a contract for carriage of goods or passengers is by roadways, railways, airways and waterways. This is associated with carriage of tangible goods. Such a carrier has no right over the goods of the customer and does not effect transfer of right to use any goods used by the carrier for goods. On this analogy, the petitioners carry messages. They are only carriers and have neither property in the message nor effect any transfer to the subscriber. The advancement of technology should be so absorbed in the interpretation that this method of carriage of message should also be understood as carriage of goods and not a transfer of a right to use goods, if any.

112. The licence clearly manifests that it is one for providing telecommunication service and not for supply of any goods or transfer of right to use any goods. It expressly prohibits transfer or assignment. The integrity of the licence cannot be broken into pieces nor can the telecommunication service rendered by them be so mutilated. Not only does this position flow from the terms of contract, this also flows from Section 4 of the Telegraph Act which provides for grant of licence on such conditions and in consideration of such payments as it thinks fit, to any person "to establish, maintain or work a telegraph". The integrity of establishing, maintaining and working is not to be mutilated.

113. Clause 9 clearly interdicts the licensee provided that the licensee will not assign or transfer his rights in any manner whatsoever under the licence to third party. It is impossible to contend that the right to use goods, assuming without conceding that they are goods, which are essential for the rendition of service can never be a transaction or transfer of right to use goods. Nor can the contract between subscribers and licensee viz. service provider be interpreted as involving transfer of right to use goods.

114._Gannon Dunkerley_ [_State of Madras_ v. _Gannon Dunkerley & Co. (Madras) Ltd._, (1958) 9 STC 353 : AIR 1958 SC 560 : 1959 SCR 379] declared that a transaction of sale of goods has to be under a contract i.e. it is consensual.

115. Section 4 of the Telegraph Act maintains the integrity of the subject-matter of the licence viz. "establish, maintain or work a telegraph". Therefore, the transaction of service is a composite one not capable of being disintegrated. Except in sub-clause (_a_) [of Article 366(29-A)] in all other sub-clauses the transactions are contractual. There is no scope for importing any doctrine of statutory agency of the service provider. Except in the case of sub-clause (_a_) where the transfer otherwise than in pursuance of contract of property in any goods is deemed to be sale in each one of the other sub-clauses the transaction is consensual. The contrast between sub-clause (_a_) and all other sub-clauses clearly manifests that the transactions involved in the present dispute are contractual. The fiction operates to deem what is not otherwise a sale of goods as a sale of goods i.e. even the transfer of a right to use goods is deemed to be a sale of the goods.

116. It is not possible to interpret the contract between the service provider and the subscriber that the consensus was to mutilate the integrity of contract as a transfer of right to use goods and rendering service. Such a mutilation is not possible except in the case of deemed sale falling under sub-clause (_b_). Nor can the service element be disregarded and the entirety of the transaction be treated as a sale of goods (even when it is assumed that there are any goods at all involved) except when it falls under sub-clause (_f_). This will also result in an anomaly of the entire payment by the subscriber to the service provider being for alleged transfer of a right to use goods and no payment at all for service. The licence granted by the Central Government fixes the tariff rates and all are for services."

54. Mr. Sabharwal also cited for our consideration the position taken by the Tribunal in the case of **Bhart Airtel Ltd. vs. Income**

Tax Officer (TDS)[27] and where while evaluating a similar contract, the Tribunal had come to the following conclusions: -

> "**52.** 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) and (ii) of the said Explanation also use the same coinage of terms. 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. Thus, the word "process" must also refer to a specie of intellectual property applying the rule of ejusdem generis or noscitur a sociis as held in the case of CIT v. Bharti Cellular Ltd. [2011] 330 ITR 239 (SC). 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.
> >
> > "'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. It is one of the most readily tradable properties in the digital market place." (as per the definition provided in Business Dictionary.com)
>
> **53.** <u>The term "process" is, therefore, to be understood as an item of intellectual property resulting from the discovery, specialised knowledge, creative ideas, or expressions of human mind having a commercial value and not widely available in public domain. It is, therefore, an intangible asset, the exclusive right over which normally rests with its developer/ creator or with the person to whom such asset has been exclusively transferred.</u>

[27] 2016 SCC OnLine ITAT 5578

In order to receive a "royalty" in respect of allowing the usage or right to use any property including an intellectual property, the owner thereof must have an exclusive right over such property. As far as intellectual properties (IPs) are concerned, these have significance for the purpose of "royalty" only till the time the ownership (as differentiated from the right to use) of such property vests exclusively with a single person and such person by virtue of its exclusive ownership allows the usage or right to use such IP to another person/persons for a consideration in the form of "royalty". Payment made for anything which is widely available in the open market to all those willing to pay, cannot constitute "royalty" and is essentially in the nature of business income.

The hon'ble High Court of Madras in the case of CIT v. Neyveli Lignite Corporation Ltd. [2000] 243 ITR 459 (Mad) held that (headnote) "the term 'royalty' normally connotes the payment made by 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 a 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".

The hon'ble High Court of Calcutta in the case of N. V. Philips Gloeilampenfabrieken Eindhoven v. CIT (No. 1) [1988] 172 ITR 521 (Cal) held as under (page 538):

> "From the dictionary meaning of the term 'royalty', it appears that the said term connotes payments periodic or at a time for user by one person of certain exclusive rights belonging to another person. The examples of such exclusive rights are rights in the nature of a patent, mineral rights or rights in respect of publications.. .. It is possible that a person who invents may not take out a patent for his invention but unless some there inventor independently and by his own efforts comes to duplicate the invention the original invention remains exclusive to the inventor and it is conceivable that such an inventor might exploit his invention permitting some other person to have the user thereof against payment. Similarly, it is possible for a person carrying out operations of manufacture and production of a particular produce to acquire specialised knowledge in respect of such manufacture and production which is not generally available. A person having such specialised knowledge can claim exclusive right to the same as long as he chooses not to make such specialised knowledge public. It is also conceivable that such

> a person can exploit and utilise such specialised knowledge in the same way as a person holding a patent or owning a mineral right or having the copyright of a publication to allow a limited user of such specialised knowledge to others in confidence against payment. There is no reason why payment for the user of such specialised knowledge, though not protected by a patent, should not be treated as royalty or in the nature of royalty. Handley Page v. Butterworth (H. M. Inspector of Taxes) (1935) 19 TC 328 (HL) relied on."

Thus, the term "royalty" connotes exclusivity and the exclusive right in relation to the thing (be it physical or intellectual property) for which royalty is paid should be with the grantor of that right. In case an intellectual property, it is generally associated with some discovery, invention, creation, specialised knowledge, etc., emanating from human mind and is payable to the inventor/creator for allowing the usage of his invention or creation and having an exclusive right over it. The hon'ble Calcutta High Court in the case of N. V. Philips Gloeilampenfabrieken Eindhoven v. CIT (supra) held that a person having some specialised knowledge can claim exclusive right to the same as long as he chooses not to make such specialised knowledge public. Such a person can exploit and utilise such specialised knowledge in the same way as a person holding a patent or owning a mineral right or having the copyright of a publication to allow a limited use of such specialised knowledge to others in confidence against payment in which case it is termed as royalty. However, once such specialised knowledge becomes public ; such person loses the exclusivity in respect of such special knowledge and, hence, loses the right to receive any royalty in respect of the same. Thus, for a payment to be classified as royalty, "exclusivity" of the subject matter is of crucial relevance.

54. The dictionary meaning of the term "process" (as defined in the Business Dictionary.com) is as under:

> "Sequence of interdependent and linked procedures which, at every stage, consume one or more resources (employee time, energy, machines, money) to convert inputs (data, material, parts, etc.) into outputs. These outputs then serve as inputs for the next stage until a known goal or end result is reached."

As Cambridge Dictionaries Online, defines "process" to mean a series of actions that you take in order to achieve a result.

54.1 Hence, the term "process" implies a sequence of interdependent and linked procedures or actions consuming resources to convert inputs into outputs. Therefore, "process" when viewed as an asset is an intangible asset and does not have physical existence. Various tangible equipment and resources may be employed in executing a process but "process" per se, just like a formula or design, is intangible. The term "process" as contemplated by the definition is thus referable to "know-how" and intellectual property. There is a clear distinction between a "process" and the physical equipment and resources deployed in the execution of a "process". While the former is an intangible asset, the latter is tangible and has a physical existence. The right to receive a royalty in respect of a process would only be with the person having exclusive right over such "process" and "process" being in the nature of intellectual property, the grantor of such right would normally be the inventor or creator of such process or person enjoying exclusive ownership of such process. The owner of the "process" might grant the "use" or "right to sue" to different persons at the same time but the exclusivity of the ownership should be with the grantor. The royalty is paid for the "use of" the "process" as an item of intellectual property by the manufacturing company in contradistinction to the equipment or resources deployed in the execution of such "process". The payer must, therefore, use the intellectual property on its own and bear the risk of its exploitation. If the intellectual property is used by the owner himself and he bears the risk of exploitation or liabilities for the use, then as the owner makes own entrepreneurial use of the intellectual property the income would fall under the scope of "business income" and not "royalty". A "process" which is widely known and deployed by everyone in the field and for which the owner does not have exclusive rights cannot be a "process" contemplated in this section 9(1)(vi)(iii).

54.2 In the case of telecom industry, all the telecom operators have similar infrastructure and telecom networks in place, for rendition of telecommunication services. The process embedded in the networks of all telecom operators is the same. The equipment, resources, etc., employed in the execution of the process may be different in physical terms, i.e., in terms of ownership and physical presence but the process embedded in the execution of a telecom infrastructure is the same and commonly available with all the telecom operators. The "royalty" in respect of use of a "process" would imply that the grantor of the right has an exclusive right over such "process" and allows the "use" thereof to the grantee in return for a "royalty". It is necessary that guarantee must "use" the "process" on its own and bear the risk of exploitation. The "process" of running the networks in the case of all the telecom operators is essentially the same and they do not have any exclusive right over such "process" so as to be in a position to charge a "royalty". For allowing the use of such process, the term "use" in the context of royalty connotes use by the grantee and not by the grantor. A "process" which has been in public domain for some time and is widely used by everyone in the field cannot constitute an item of intellectual property for the purpose of charge of "royalty". Any compensation or consideration, if at all received for allowing the use of any such "process" which is publically available and not exclusively owned by the grantor constitutes

55. We now consider the interpretation of the term "process" after insertion of Explanation 6 to section 9(1)(vi) by the Finance Act, 2012, with retrospective effect from June 1, 1976. As per this Explanation, 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. However, the Explanation does not do away with the requirement of successful exclusivity of the right in respect of such process being with the person claiming "royalty" for granting its usage to a third party. None of the FTOs have any exclusive ownership or rights in respect of such process, and, hence, in our view, the payment in question cannot be considered as royalty. The telecom operator merely render telecommunications services to the subscribers, as well as interconnecting telecom operators with the aid of their network and the process embedded therein. This is a standard facility which is used by the FTO itself. Thus, the insertion of Explanation 6 to section 9(1)(vi) does not alter the decision taken by us on this issue.

56. As far as the insertion of Explanation 5 to section 9(1)(vi) is concerned, we hold that this Explanation comes into play only in case of royalty falling within the ambit of Explanation 2 to section 9(1)(vi). When a process is widely available in the public domain and is not exclusively owned by anyone it cannot constitute an item of intellectual property for the purpose of charge of "royalty" under clauses (i), (ii) and (iii) of Explanation 2 to section 9(1)(vi). Hence, the criteria of possession, control, location, indirect use, etc., as explained by Explanation 5 has no effect in the case in hand.

57. The arguments of the learned Departmental representative that Explanation 5 is attracted since the assessee-company is indirectly using such equipment and process through the services provided by the FTO, in our view, is devoid of merits. There is difference between the services rendering agreements and royalty agreements. If the arguments of the Departmental representative is accepted it would result in absurdity. For example :

(i) A person hiring a taxi will be paying a royalty for indirectly using the process of running of the engines of the taxi.

(ii) A person using a cable connection will be termed to be paying royalty in the form of cable charges for indirectly using the process of running of the systems of the cable operators.

(iii) A telephone subscriber using or making a call would be held as indirectly using the process of the service of telecom.

58. The hon'ble Delhi High Court in the case of CIT v. Bharti Cellular Ltd. reported in [2009] 319 ITR 139 (Delhi) has given a finding that the facility in question provided to the assessee is a "service" and in a broader sense a "communication service". The facility of interconnection is held as providing service which is "technical" in the sense that involved sophisticated technology. Thus, the factual finding of the jurisdictional High Court in this very facts and circumstances is that "technical services" is being provided by the FTOs to the assessee but that such "technical service" is not FTS as defined under section 9(1)(vii) of the Act as there is no human intervention. This finding that it is a "service" has not been upheld by the hon'ble Supreme Court of India only the factual issue as to whether there was human intervention was set aside to the Assessing Officer. Under such circumstances, the question of taking a contrary view that it is not a "technical services" but a case where the FTO had granted the assessee a right to use a process and the payment is for "royalty" cannot be countenanced. Applying the binding decision of the hon'ble jurisdictional High Court we have to hold that the payment cannot be termed as covered by Explanation 2 read with section 9(1)(vi) of the Act. On this ground alone the order of the first appellate authority has to be upheld. The charge that the payment in question is FTS under section 9(1)(vii) excludes the possibility of the payment being royalty under section 9(1)(vi) of the Act. Both these sections deal with different set of facts situation which cannot co-exist."

55. It was lastly contended by Mr. Sabharwal that the submission based on Article 3(2) of the DTAA and which was pressed into aid for the purposes of invoking Section 9 is clearly unsustainable since an identical argument already stands negated by the Court in *New Skies Satellite*. Mr. Sabharwal referred to Paras 45 to 49 of the report which are extracted hereunder: -

"**45.** At the very outset, it should be understood that it is not as if the double taxation avoidance agreements completely prohibit reliance on domestic law. Under these, a reference is made to the domestic law of the Contracting States. Article 3(2) of both double taxation avoidance agreements state that in the course of application of the treaty, any term not defined in the treaty, shall, have the meaning which is imputed to it in the laws in force in that State relating to the taxes which are the subject of the Convention.

"Indo-Thailand Double Taxation Avoidance Agreements ((1986) 161 ITR (St.) 82, 83):

'Article 3 : General definitions

2. In the application on the provisions of this Convention by one of the Contracting States, any term not defined herein shall, unless the context otherwise requires, have the meaning which it has for the purposes of the laws in force in that State relating to the taxes which are the subject of this Convention.'

Indo-Netherlands Double Taxation Avoidance Agreement (see (1989) 177 ITR (St.) 72, 74):

'Article 3: General definitions

2. As regards the application of the Convention by one of the States any term not defined herein shall, unless the context otherwise requires, have the meaning which it has under the law of that State concerning the taxes to which the Convention applies.'"

The treaties therefore, create a bifurcation between those terms, which have been defined by them (i.e the concerned treaty), and those, which remain undefined. It is in the latter instance that domestic law shall mandatorily supply the import to be given to the word in question. In the former case however, the words in the treaty will be controlled by the definitions of those words in the treaty if they are so provided.

46. Though this has been the general rule, much discussion has also taken place on whether an interpretation given to a treaty alters with a transformation in, or amendments in, domestic law of one of the State parties. At any given point, does a reference to the treaty point to the law of the Contracting States at the time the treaty was concluded, or relate to the law of the States as existing at the time of the reference to the treaty? The former is the "static" approach while the latter is called the "ambulatory" approach. One opportunity for a State to ease its obligations under a tax convention comes from the ambulatory reference to domestic law. States seeking to furtively dodge the limitations that such treaties impose, sometimes, resort to amending their domestic laws, all the while under the protection of the theory of ambulatory reference. It thereby allows itself an adjustment to broaden the scope of circumstances under which it is allowed to tax under a treaty. A convenient opportunity sometimes presents itself in the form of ambiguous technical formulations in the concerned treaty. States attempting to clarify or concretise any one of these meanings, (unsurprisingly the one that benefits it) enact domestic legislation which subserves such purpose.

47. In this context, recently in Sanofi Pasteur Holding SA v. Department of Revenue (2013) 354 ITR 316 (AP), the Andhra Pradesh High Court discussed and subscribed to the ratio of the Supreme Court of Canada in R. v. Melford Developments Inc. 82 DTC 6281 (1982) with respect to the applicability of domestic amendments to international instruments. In R. v. Melford Developments Inc. 82 DTC 6281 (1982), the Canadian Supreme Court held that the ambulatory approach is antithetical to treaty obligations:

> "There are 26 concluded and 10 proposed tax conventions, treaties or agreements between Canada and other nations of the world. If the submission of the appellant is correct, these agreements are all put in peril by any legislative action taken by Parliament with reference to the revision of the Income-tax Act. For this practical reason one finds it difficult to conclude that Parliament has left its own handiwork of 1956 in such inadvertent jeopardy. That is not to say that before the 1956 Act can be amended in substance it must be done by Parliament in an Act entitled 'An act to Amend the Act of 1956'. But neither is the converse true, that is that every tax enactment adopted for whatever purpose, might have the effect of amending one or more bilateral or multilateral tax conventions without any avowed purpose or intention so to do."

48. In CIT v. Siemens Aktiongesellschaft (2009) 310 ITR 320 (Bom), the Bombay High Court citing R. v. Melford Developments Inc. held that (page 333 of 310 ITR):

> "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."

49. It is essential to note the context in which this judgment was delivered. There, the court was confronted with a situation where the word royalty was not defined in the German Double Taxation Avoidance Agreements. Following our previous discussion on the bifurcation of terms within the treaty, in situations where words remain undefined, assistance is to be drawn from the definition and import of the words as they exist in the domestic "laws in force". It was in this context that the Bombay High Court held that they were unable to accept the assessee's contention that the law applicable would be the law as it existed at the time the double taxation avoidance agreement was entered into. This is the context in which the ambulatory approach to tax treaty interpretation was not rejected. The situation before this court however is materially different as there is in fact a definition of the word royalty under article 12 of both double taxation avoidance agreements, thus dispensing with the need for recourse to article 3."

56. Learned counsel submitted that similar was the position which was enunciated by the Court in **Director of Income Tax vs. Nokia Networks OY**[28] when it observed: -

"**23.** It will be of relevance to point out that section 9 of the Act has been amended, vide Finance Act, 2012. The following provisions have been added to section 9 of the Act, vide sub-section (b) of section 4 of the Finance Act, 2012, seeking to clarify the scope of clause (vi) of sub-section (1) of section 9 of the Act:

> "Explanation 4.—For the removal of doubts, it is hereby clarified that the transfer of all or any rights in respect of any right, property or information includes and has always included transfer of all or any right for use or right to use a computer software (including granting of a licence) irrespective of the medium through which such right is transferred.
>
> 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 ;"

[28] 2012 SCC OnLine 4694

24. The above Explanations have been inserted with retrospective effect from June 1, 1976. The Memorandum Explaining the Provisions in the Finance Bill, 2012, in the context of the above provisions states ([2012] 343ITR (St.) 234, 267):

> "Section 9(1)(vi) provides that any income payable by way of royalty in respect of any right, property or information is deemed to be accruing or arising in India. The term 'royalty' has been defined in Explanation 2 which means consideration received or receivable for transfer of all or any right in respect of certain rights, property or information. Some judicial decisions have interpreted this definition in a manner which has raised doubts as to whether consideration for use of computer software is royalty or not ; whether the right, property or information has to be used directly by the payer or is to be located in India or control or possession of it has to be with the payer. Similarly, doubts have been raised regarding the meaning of the term processed.

Considering the conflicting decisions of various courts in respect of income in nature of royalty and to restate the legislative intent, it is further proposed to amend the Income-tax Act in the following manner:

(i) To amend section 9(1)(vi) to clarify that the consideration for use or right to use of computer software is royalty by clarifying that transfer of all or any rights in respect of any right, property or information as mentioned in Explanation 2, includes and has always included transfer of all or any right for use or right to use a computer software (including granting of a licence) irrespective of the medium through which such right is transferred.

(ii) To amend section 9(1)(vi) to clarify that 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

(iii) To amend section 9(1)(vi) to clarify that the term "process" includes and shall be deemed to have always included transmission by satellite (including up-linking, amplification, conversion for downlinking of any signal), cable, optic fibre or by any other similar technology, whether or not such process is secret.

These amendments will take effect retrospectively from 1st June, 1976, and will accordingly apply in relation to the assessment year 1977-78 and subsequent assessment years."

25. On the basis of this amendment made effective from June 1, 1976, Mr. Parasaran argued that the above amendments are only clarificatory in nature depicting Parliament intention, viz. ;

(i) the medium through which the software is transferred itself will not affect the taxability of the royalty payments made for the transfer of right to use or actual use of the software in India by a non-resident.

(ii) It is not necessary that the actual software be transferred to an Indian user or in fact used in India so long as the right to use has been transferred to a resident taxpayer for valuable consideration.

26. He, thus submitted that the question of "copyrighted article" or actual copyright does not arise in the context of software both in the Double Taxation Avoidance Agreement and in the Income-tax Act since the right to use simpliciter of a software program itself is a part of the copyright in the software irrespective of whether or not a further right to make copies is granted. The decision of the Delhi Bench of the Income-tax Appellate Tribunal has dealt with this aspect in its judgment in Gracemac Corporation v. ADIT (2010) 134 TTJ (Delhi) 257 ; (2011) 8 ITR (Trib) 522 (Delhi) pointing out that even software bought off the shelf, does not constitute a "copyrighted article" as sought to be made out by the Special Bench of the Income-tax Appellate Tribunal in the present case. <u>However, the above argument misses the vital point namely 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 v. Siemens Aktiongesellschaft (2009) 310 ITR 320 (Bom) that the amendments cannot be read into the treaty</u>. On the wording of the treaty, we have already held in Ericsson A. B. (2012) 343 ITR 470 (Delhi) that a copyrighted article does not fall within the purview of royalty. Therefore, we decide question of law Nos. 1 and 2 in favour of the assessee and against the Revenue. "

57. Mr. Sabharwal submitted that the fallacy of the position as canvassed by the appellants would become further evident when one views Article 12 of the DTAA and the distinctive provisions which appear in the India Hungary DTAA as well as the Convention between India and Other Mexican States. Mr. Sabharwal drew our attention to the following Articles from those Conventions: -

"**AGREEMENT FOR AVOIDANCE OF DOUBLE TAXATION AND PREVENTION OF FISCAL EVASION WITH HUNGARY**

ARTICLE 12

ROYALTIES AND FEES FOR TECHNICAL SERVICES

1. Royalties or 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 to a 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 recipient is the beneficial owner of the royalties or fees for technical services, the tax so charged shall not exceed 10 per cent of the gross amount of the royalties or fees for technical services.

3. (a) 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 and films or tapes for radio or television broadcasting, any patent, trade mark, design or model, plan, secret formula or process, or transmission by satellite, cable, optic fibre or similar technology, or for the use of, or the right to use, industrial, commercial, or scientific equipment, or for information concerning industrial, commercial or scientific experience.

(b) The term "fees for technical services" means payment of any kind in consideration for the rendering of any managerial, technical or consultancy services including the provision of services by technical or other personnel but does not include payments for services mentioned in Articles 14 and 15 of this Convention.

4. 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.

5. Royalties or fees for technical services shall be deemed to arise in a Contracting State when the payer is that State itself, a political sub-division, a local authority or 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.

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 or fees for technical services, 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 Convention.

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AGREEMENT FOR AVOIDANCE OF DOUBLE TAXATION AND PREVENTION OF FISCAL EVASION WITH UNITED MEXICAN STATES

ARTICLE 12

ROYALTIES AND FEES FOR TECHNICAL SERVICES

1. Royalties or 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 or 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 or fees for technical services.

3. (a) <u>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 television or radio 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</u>.

(b) The term "fees for technical services" as used in this Article means payments of any kind, other than those mentioned in Articles 14 and 15 of this Agreement as consideration for managerial or technical or consultancy services, including the provision of services of technical or other personnel.

4. 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.

5. (a) Royalties and fees for technical services shall be deemed to arise in a Contracting State when the payer is that State itself, a political sub-division, a local authority, or 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 Contracting State in which the permanent establishment or fixed base is situated.

(b) Where under sub-paragraph (a) royalties or fees for technical services do not arise in one of the Contracting States, and the royalties relate to the use of, or the right to use; the right or property, or the fees for technical services relate to services performed, in one of the Contracting States, the royalties or fees for technical services shall be deemed to arise in that Contracting State.

6. Where, owing to 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 for whatever reason the amount which would have been paid or 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 that 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."

58. Learned counsel essentially sought to highlight the fact that transmission by satellite, cable, optic fiber or any other similar technology is separated from the category pertaining to secret process or equipment. According to learned counsel, this would clearly establish that process and equipment royalty are treated as a distinct

and distinguishable category. It is the aforenoted submissions which fall for our consideration.

E. TREATIES – BASIC POSTULATES

59. As would be evident from a recordal of the rival submissions which were addressed, the appellants principally seek to base the challenge upon Section 9 of the Act and question the view that was expressed in *New Skies Satellite* and *Asia Satellite*. This submission was addressed with Mr. Chawla essentially arguing that *"satellite cases"* rest on a distinct pedestal and were rendered in the context of distinguishable facts. It was Mr. Chawla's submission that the amendments introduced in Section 9 constitute a paradigm shift of the Legislature requiring us to revisit the meaning to be ascribed to the expression royalty wherever it occurs. According to Mr. Chawla, Section 9 as it stands in its present avatar would have to inevitably looked at in order to discern the various attributes of the expressions "royalty", "process" and "equipment" as they appear in different parts of the DTAA.

60. However, and before we proceed to analyze the various contentions, which were advanced by Mr. Chawla, it would be apposite to bear in mind the indubitable position that both *New Skies Satellite* as well as *Engineering Analysis* had taken due notice of Section 9 as it came to exist in the statute book post Finance Act, 2012. The arguments on that score can thus neither be acknowledged to be novel or for that matter untested. However, before we proceed further it would be pertinent to recognize some of the *grundnorms* which precedents bid us to bear in mind while examining the interplay

between domestic taxing statutes and taxing conventions.

61. Undoubtedly, tax treaties are the outcome of negotiations undertaken at a political level and are primarily concerned with according a degree of certainty in respect of business transactions which citizens of the contracting States may undertake and in aid of commercial relations between two nations. Tax treaties being the outcome of detailed negotiations and bargains that may be struck by sovereign nations may well contain provisions which may be at variance with domestic taxing statutes. The significance of the deliberation between nation States which precede the inking of a tax convention and the sanctity which imbues upon its terms was lucidly explained by Bhat J. while speaking for the Court in *New Skies Satellites*. *New Skies Satellite* essentially follows the legal position which came to be enunciated in **Union of India vs. Azadi Bachao Andolan**[29]. While dealing with the framework which underlies the formation of treaties amongst nations, *Azadi Bachao Andolan* carries the following pertinent observations: -

> "**17.** Every country seeks to tax the income generated within its territory on the basis of one or more connecting factors such as location of the source, residence of the taxable entity, maintenance of a permanent establishment, and so on. A country might choose to emphasise one or the other of the aforesaid factors for exercising fiscal jurisdiction to tax the entity. Depending on which of the factors is considered to be the connecting factor in different countries, the same income of the same entity might become liable to taxation in different countries. This would give rise to harsh consequences and impair economic development. In order to avoid such an anomalous and incongruous situation, the Governments of different countries enter into bilateral treaties, conventions or agreements for granting relief against double taxation. Such treaties, conventions or agreements are called Double Taxation Avoidance Treaties, Conventions or Agreements.

[29] (2004) 10 SCC 1

18. The power of entering into a treaty is an inherent part of the sovereign power of the State. By Article 73, subject to the provisions of the Constitution, the executive power of the Union extends to the matters with respect to which Parliament has power to make laws. Our Constitution makes no provision making legislation a condition for the entry into an international treaty in times either of war or peace. The executive power of the Union is vested in the President and is exercisable in accordance with the Constitution. The executive is, qua the State, competent to represent the State in all matters international and may by agreement, convention or treaty incur obligations which in international law are binding upon the State. But the obligations arising under the agreement or treaties are not by their own force binding upon Indian nationals. The power to legislate in respect of treaties lies with Parliament under Entries 10 and 14 of List I of the Seventh Schedule. But making of law under that authority is necessary when the treaty or agreement operates to restrict the rights of citizens or others or modifies the law of the State. If the rights of the citizens or others which are justiciable are not affected, no legislative measure is needed to give effect to the agreement or treaty. [*See in this connection Maganbhai Ishwarbhai Patel* v. *Union of India*, (1970) 3 SCC 400]

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20. The purpose of Section 90 becomes clear by reference to its legislative history. Section 49-A of the Income Tax Act, 1922 enabled the Central Government to enter into an agreement with the Government of any country outside India for the granting of relief in respect of income on which, both income tax (including supertax) under the Act and income tax in that country, under the Income Tax Act and the corresponding law in force in that country, had been paid. The Central Government could make such provisions as necessary for implementing the agreement by notification in the Official Gazette. When the Income Tax Act, 1961 was introduced, Section 90 contained therein initially was a reproduction of Section 49-A of the 1922 Act. The Finance Act, 1972 (Act 16 of 1972) modified Section 90 and brought it into force with effect from 1-4-1972. The object and scope of the substitution was explained by a circular of the Central Board of Direct Taxes (No. 108 dated 20-3-1973) as to empower the Central Government to enter into agreements with foreign countries, not only for the purpose of avoidance of double taxation of income, but also for enabling the Tax Authorities to exchange information for the prevention of evasion or avoidance of taxes on income or for investigation of cases involving tax evasion or avoidance or for recovery of taxes in foreign countries on a reciprocal basis. In 1991, the existing Section 90 was renumbered as sub-section (1) and sub-section (2) was inserted by the Finance Act, 1991 with retrospective effect from 1-4-

1972. CBDT Circular No. 621 dated 19-12-1991 explains its purpose as follows:

> "43. *Taxation of foreign companies and other non-resident taxpayers*.—Tax treaties generally contain a provision to the effect that the laws of the two contracting States will govern the taxation of income in the respective State except when express provision to the contrary is made in the treaty. It may so happen that the tax treaty with a foreign country may contain a provision giving concessional treatment to any income as compared to the position under the Indian law existing at that point of time. However, the Indian law may subsequently be amended, reducing the incidence of tax to a level lower than what has been provided in the tax treaty.
>
> 43.1. Since the tax treaties are intended to grant tax relief and not put residents of a contracting country at a disadvantage vis-à-vis other taxpayers, Section 90 of the Income Tax Act has been amended to clarify that any beneficial provision in the law will not be denied to a resident of a contracting country merely because the corresponding provision in the tax treaty is less beneficial."

21. The provisions of Sections 4 and 5 of the Act are expressly made "subject to the provisions of this Act", which would include Section 90 of the Act. As to what would happen in the event of a conflict between the provision of the Income Tax Act and a notification issued under Section 90, is no longer res integra.

22. The Andhra Pradesh High Court in *CIT* v. *Visakhapatnam Port Trust* [(1983) 144 ITR 146 (AP)] held that provisions of Sections 4 and 5 of the Income Tax Act are expressly made "subject to the provisions of the Act" which means that they are subject to the provisions of Section 90. By necessary implication, they are subject to the terms of the Double Taxation Avoidance Agreement, if any, entered into by the Government of India. Therefore, the total income specified in Sections 4 and 5 chargeable to income tax is also subject to the provisions of the agreement to the contrary, if any.

23. In *CIT* v. *Davy Ashmore India Ltd.* [(1991) 190 ITR 626 (Cal)] while dealing with the correctness of Circular No. 333 dated 2-4-1982, it was held that the conclusion is inescapable that in case of inconsistency between the terms of the Agreement and the taxation statute, the Agreement alone would prevail. The Calcutta High Court expressly approved the correctness of CBDT Circular No. 333 dated 2-4-1982 on the question as to what the assessing officers would have to do when they found that the provision of the double taxation was not in conformity with the Income Tax Act, 1961. The said circular provided as follows (quoted at ITR p. 632):

"The correct legal position is that where a specific provision is made in the Double Taxation Avoidance Agreement, that provision will prevail over the general provisions contained in the Income Tax Act, 1961. In fact the Double Taxation Avoidance Agreements which have been entered into by the Central Government under Section 90 of the Income Tax Act, 1961, also provide that the laws in force in either country will continue to govern the assessment and taxation of income in the respective country except where provisions to the contrary have been made in the Agreement.

Thus, where a Double Taxation Avoidance Agreement provided for a particular mode of computation of income, the same should be followed, irrespective of the provisions in the Income Tax Act. Where there is no specific provision in the Agreement, it is the basic law i.e. the Income Tax Act, that will govern the taxation of income."

24. The Calcutta High Court held that the circular reflected the correct legal position inasmuch as the convention or agreement is arrived at by the two contracting States "in deviation from the general principles of taxation applicable to the contracting States". Otherwise, the Double Taxation Avoidance Agreement will have no meaning at all. [*See also in this connection Leonhardt Andra Und Partner, GmbH* v. *CIT*, (2001) 249 ITR 418 (Cal)]

25. In *CIT* v. *R.M. Muthaiah* [(1993) 202 ITR 508 (Kant)] the Karnataka High Court was concerned with DTAT between the Government of India and the Government of Malaysia. The High Court held that under the terms of the Agreement, if there was a recognition of the power of taxation with the Malaysian Government, by implication it takes away the corresponding power of the Indian Government. The Agreement was thus held to operate as a bar on the power of the Indian Government to tax and that the bar would operate on Sections 4 and 5 of the Income Tax Act, 1961, and take away the power of the Indian Government to levy tax on the income in respect of certain categories as referred to in certain articles of the Agreement. The High Court summed up the situation by observing (ITR at pp. 512-13):

"The effect of an 'agreement' entered into by virtue of Section 90 of the Act would be: (*i*) if no tax liability is imposed under this Act, the question of resorting to the agreement would not arise. No provision of the agreement can possibly fasten a tax liability where the liability is not imposed by this Act; (*ii*) if a tax liability is imposed by this Act, the agreement may be resorted to for negativing or reducing it; (*iii*) in case of difference between the provisions of the Act and of the agreement, the provisions of the agreement prevail over the provisions of this Act and can be enforced by the Appellate Authorities and the court."

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27. In *Arabian Express Line Ltd. of United Kingdom* v. *Union of India* [(1995) 212 ITR 31 (Guj)] the Gujarat High Court, interpreting Section 90, in the light of Circular No. 333 dated 2-4-1982 issued by CBDT, held that the procedure of assessing the income of an NRI because of his occasional activities in establishing a business in India would not be applicable in a case where there is a convention between the Government of India and the foreign country as provided under Section 90 of the Income Tax Act, 1961. In case of such an agreement, Section 90 would have an overriding effect. Interestingly, in this case a certificate issued by HM Inspector of Taxes certifying that the company was a resident of the United Kingdom for purposes of tax and that it had paid advance corporate tax in the office of the English Revenue Accounts Office, was held to be sufficient to take away the jurisdiction of the income tax officer.

28. A survey of the aforesaid cases makes it clear that the judicial consensus in India has been that Section 90 is specifically intended to enable and empower the Central Government to issue a notification for implementation of the terms of a Double Taxation Avoidance Agreement. When that happens, the provisions of such an agreement, with respect to cases to which they apply, would operate even if inconsistent with the provisions of the Income Tax Act. We approve of the reasoning in the decisions which we have noticed. If it was not the intention of the legislature to make a departure from the general principle of chargeability to tax under Section 4 and the general principle of ascertainment of total income under Section 5 of the Act, then there was no purpose in making those sections "subject to the provisions of the Act". The very object of grafting the said two sections with the said clause is to enable the Central Government to issue a notification under Section 90 towards implementation of the terms of DTACs which would automatically override the provisions of the Income Tax Act in the matter of ascertainment of chargeability to income tax and ascertainment of total income, to the extent of inconsistency with the terms of DTAC."

62. More recently, the Supreme Court in **Assessing Officer vs. Nestle SA**[30] while speaking on the treaty making power observed: -

"**48.** The clearest enunciation of law, on Section 90 can be found in Union of India (UOI) v. Azadi Bachao Andolan. Apart from

[30] 2023 SCC OnLine SC 1372

noticing the decisions of various High Courts (i.e. Commissioner of Income Tax v. Visakhapatnam Port Trust, Commissioner of Income Tax v. Davy Ashmore India Ltd., Leonhardt Andra Und Partner, Gmbh v. Commissioner of Income Tax, Commissioner of Income Tax v. R.M. Muthaiah and Arabian Express Line Ltd. of United Kingdom v. Union of India) this court held as follows:

> "The provisions of Sections 4 and 5 of the Act are expressly made "subject to the provisions of this Act", which would include Section 90 of the Act. As to what would happen in the event of a conflict between the provision of the Income Tax Act and a notification issued Under Section 90, is no longer res integra.
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> 26. A survey of the aforesaid cases makes it clear that the judicial consensus in India has been that section 90 is specifically intended to enable and empower the Central Government to issue a notification for implementation of the terms of a double taxation avoidance agreement. When that happens, the provisions of such an agreement, with respect to cases to which where they apply, would operate even if inconsistent with the provisions of the Income Tax Act. We approve of the reasoning in the decisions which we have noticed. If it was not the intention of the legislature to make a departure from the general principle of chargeability to tax under section 4 and the general principle of ascertainment of total income under section 5 of the Act, then there was no purpose in making those sections "subject to the provisions" of the Act". The very object of grafting the said two sections with the said clause is to enable the Central Government to issue a notification under section 90 towards implementation of the terms of the DTAs which would automatically override the provisions of the Income Tax Act in the matter of ascertainment of chargeability to income tax and ascertainment of total income, to the extent of inconsistency with the terms of the DTAC.
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> 27. The contention of the respondents, which weighed with the High Court viz. that the impugned circular No. 789 is inconsistent with the provisions of the Act, is a total non-sequitur. As we have pointed out, Circular No. 789 is a circular within the meaning of section 90; therefore, it must have the legal consequences contemplated by sub-section (2) of section 90. In other words, the circular shall prevail even if inconsistent with the provisions of Income Tax Act, 1961 insofar as assessees covered by the provisions of the DTAC are concerned.

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> 29. In our view, the contention is wholly misconceived. Section 90, as we have already noticed (including its precursor under the 1922 Act), was brought on the statute book precisely to enable the executive to negotiate a DTAC and quickly implement it. Even accepting the contention of the respondents that the powers exercised by the Central Government under section 90 are delegated powers of legislation, we are unable to see as to why a delegate of legislative power in all cases has no power to grant exemption. There are provisions galore in statutes made by Parliament and State legislatures wherein the power of conditional or unconditional exemption from the provisions of the statutes are expressly delegated to the executive. For example, even in fiscal legislation like the Central Excise Act and Sales Tax Act, there are provisions for exemption from the levy of tax. (See Section 5A of Central Excise Act, 1944 and Section 8(5) of the Central Sales Tax Act, 1956). therefore we are unable to accept the contention that the delegate of a legislative power cannot exercise the power of exemption in a fiscal statute."

84. Klaus Vogel (an acknowledged authority on double taxation), in the Treatise Double Taxation Conventions, comments - pertinently states, on the aspect of assimilation of international treaties into municipal (national) laws, that:

> **"**45. **For purposes of international law**, a tax treaty comes into existence upon the declaration **of consent** by both Contracting States (Article 9(1) VCLT). Ordinarily, the Head of State is authorized to make the declaration. In Germany, the declaration under Article 59 Abs. 1 GG is made by the Federal President. In the US, under Article II, section 2, clause 2 of the Constitution, the President, as Head of State, declares the consent of the United States to be bound by the treaty under international law. This power is ordinarily delegated to the Secretary of State or a US Ambassador.
>
> 46. The method by which the Contracting States declare their consent is left to the Contracting Parties (Article 11 et seq. VCLT). For important treaties, however, it is generally agreed that the conclusion of the treaty shall be given effect only through an exchange of instruments, or **'ratification'** (Article 14(1) VCLT); for multilateral treaties, it is by deposit of instruments at a location agreed upon in the treaty through corresponding notification (Articles 14(1), 16 VCLT). Ratification is to be distinguished from parliamentary consent (see above), which frequently, primarily in the language of the media, is incorrectly termed

as 'ratification'. Article 31 of the OECD MC, Article 30 of the UN MC and Article 29 of the US MC each provide for ratification of tax treaties and treaties normally follow the MC in this respect. In the document of ratification, the authorized agent - the President in the US, the Federal President in Germany, Austria and Switzerland - delivers the formal declaration that the constitutional requirements necessary for internal application of the treaty have been fulfilled (see infra Article 31 at m. no. 11 et seq.).

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47. Upon declaration of intent to contract, whether through ratification or other means, the treaty becomes binding under international law (unless the treaty provides for a different date for entry into force). The binding force of the treaty under international law is to be distinguished from its **internal applicability.** Internal applicability is a consequence only of treaties which - like tax treaties - are designed to be applied by domestic authorities in addition to obligating the States themselves (i.e., **self-executing** treaties).

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49. In the **UK,** where parliamentary consent is not necessary for conclusion of a treaty, the treaty becomes applicable internally only when a special law to this effect is passed by Parliament after the treaty enters into force under international law. In special, legally authorized cases, such as for DTCs under § 788 ICTA 1988, the Queen may enact an Order in Council in place of parliamentary legislation. A special law is also required in Canada and other members of the Commonwealth. Under **Netherlands** constitutional law, the treaty becomes applicable domestically at the time it enters into force, reflecting the 'monist' theory of international law. In general, the conflict between 'monistic' and 'dualist' theories has been overcome by a compromise view.

50. The process pursuant to which a treaty acquires the force and effect of domestic law was for long referred to by German theorists as a **'transformation'** (i.e., as the promulgation of a domestic statute parallel to the treaty and incorporating the treaty text). A similar view can also be found, though often not very explicit, in other countries. This theory, however cannot explain why, among other things, the treaty, even after parliamentary consent, becomes applicable domestically only when it enters into force under international law or why it loses its binding force internally when it is rescinded or terminated at the international level.

> For these reasons, the German doctrine of international law abandoned the transformation theory. Parliamentary consent is now understood as a mandate through which the treaty itself - rather than a corresponding internal legislative provision-becomes applicable within the scope of domestic law.
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> 51. The point in time at which a treaty enters into force internationally and the point at which it becomes applicable under domestic law must be distinguished from the point in time at which the **material consequences** of the treaty begin to take effect, or, in other words, the taxable period or the date from which taxation shall be limited by the treaty (the effective date). Usually this 'initiation of treaty effects' is established by explicit treaty rules. Various aspects may be of importance here. Treaty rules in particular often distinguish between treaty effects on assessed taxes and those on withholding taxes. In general, the material effects of tax treaties apply retrospectively, viewed from the date of entry into force under international law; detrimental retrospectivity, however, may be prohibited.
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> 52. Through the mandate of the legislature, treaties in most States obtain the **same authority as internal law**. In some States they are even considered to have priority over domestic law."

63. As would be manifest from the aforesaid discussion and the review of the precedents rendered on the subject, the power of nations to enter into an arrangement pertaining to taxation though principally being sourced to the political power of a State now stands accorded statutory recognition by virtue of Section 90(2) of the Act. It is pertinent to observe that the said statutory provision as inserted in the Act recognizes the power of the nation to enter into taxing conventions and which could hypothetically encompass provisions which may not only be more beneficial to an assessee, but may in certain circumstances override provisions contained in our domestic legislation. This could extend to a restricted scope of taxable income, lower withholding tax rates, or exemptions from taxability in a source country. Regard must also be had to the fact that treaty provisions

come into effect by virtue of a notification that is promulgated under Section 90. The provision is thus in a sense distinct from Article 253 of the Constitution and which confers a power upon Parliament to make a law to give effect to any treaty or convention. Section 90 is in that sense a self-contained code which enables the Union to bring a tax treaty into force and is not predicated upon Parliamentary legislation.

F. THE CONVENTION AND DOMESTIC LEGISLATION

64. The position of treaties having elements of preferentiality is one which stands duly recognized right from the decision of the Supreme Court in *Azadi Bachao Andolan***.** This becomes apparent from the Supreme Court having pertinently observed of a judicial consensus having been forged and in terms of which Section 90 is not only recognized as being the repository of the power of the Union Government to enter into and enforce the terms of a DTAA, but more importantly, upon such a convention coming into force, its provisions with respect to cases to which they may apply becoming operable even if they be inconsistent with the provisions of the Act. This proposition also stood reaffirmed in paragraphs 130 and 131 of the report which are extracted hereinbelow: -

> "**130.** The principles adopted in interpretation of treaties are not the same as those in interpretation of a statutory legislation. While commenting on the interpretation of a treaty imported into a municipal law, Francis Bennion observes:
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> > "With indirect enactment, instead of the substantive legislation taking the well-known form of an Act of Parliament, it has the form of a treaty. In other words, the form and language found suitable for embodying an international agreement become, at the stroke of a pen, also the form and language of a municipal legislative instrument. It is rather like saying that, by Act of Parliament, a woman

> shall be a man. Inconveniences may ensue. One inconvenience is that the interpreter is likely to be required to cope with disorganised composition instead of precision drafting. The drafting of treaties is notoriously sloppy usually for a very good reason. To get agreement, politic uncertainty is called for.
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> … The interpretation of a treaty imported into municipal law by indirect enactment was described by Lord Wilberforce as being 'unconstrained by technical rules of English law, or by English legal precedent, but conducted on broad principles of general acceptation. This echoes the optimistic dictum of Lord Widgery, C.J. that the words 'are to be given their general meaning, general to lawyer and layman alike … the meaning of the diplomat rather than the lawyer'." [Francis Bennion: Statutory Interpretation, p. 461 [Butterworths, 1992 (2nd Edn.)].]

131. An important principle which needs to be kept in mind in the interpretation of the provisions of an international treaty, including one for double taxation relief, is that treaties are negotiated and entered into at a political level and have several considerations as their bases. Commenting on this aspect of the matter, David R. Davis in *Principles of International Double Taxation Relief* [David R. Davis: Principles of International Double Taxation Relief, p. 4 (London, Sweet & Maxwell, 1985).] , points out that the main function of a Double Taxation Avoidance Treaty should be seen in the context of aiding commercial relations between treaty partners and as being essentially a bargain between two treaty countries as to the division of tax revenues between them in respect of income falling to be taxed in both jurisdictions. It is observed (vide paragraph 1.06):

> "The benefits and detriments of a double tax treaty will probably only be truly reciprocal where the flow of trade and investment between treaty partners is generally in balance. Where this is not the case, the benefits of the treaty may be weighed more in favour of one treaty partner than the other, even though the provisions of the treaty are expressed in reciprocal terms. This has been identified as occurring in relation to tax treaties between developed and developing countries, where the flow of trade and investment is largely one-way."

65. A short while thereafter in *P.V.A.L Kulandagan*, the import of Section 90 was explained by the Supreme Court in the following terms:-

"**7.** But, we have travelled very far from this stage as the Indian law has developed in this regard. Section 90 of the Income Tax Act, 1961 (hereinafter referred to as "the Act") provides for "agreement with foreign countries": (*a*) for granting of relief in respect of income on which have been paid both income tax under the Act and income tax in that country, or (*b*) for the avoidance of double taxation of income under the Act and under the corresponding law in force in that country, or (*c*) for exchange of information for the prevention of evasion or avoidance of income tax chargeable under the Act or under the corresponding law in force in that country, or investigation of cases of such evasion or avoidance, or (*d*) for recovery of income tax under the Act and under the corresponding law in force in that country. By virtue of provisions of sub-section (2) thereof it is provided that where such agreement has been entered into for granting relief of tax, or as the case may be, avoidance of double taxation, then in relation to the assessee to whom such agreement applies, the provisions of this Act shall apply to the extent they are more beneficial to that assessee.

8. Where liability to tax arises under the local enactment provisions of Sections 4 and 5 of the Act provide that taxation of global income of an assessee chargeable to tax thereunder is subject to the provisions of an agreement entered into between the Central Government and the Government of a foreign country for avoidance of double taxation as envisaged under Section 90 to the contrary, if any, and such an agreement will act as an exception to or modification of Sections 4 and 5 of the Income Tax Act. The provisions of such agreement cannot fasten a tax liability where the liability is not imposed by a local Act. Where tax liability is imposed by the Act, the agreement may be resorted to either for reducing the tax liability or altogether avoiding the tax liability. In case of any conflict between the provisions of the agreement and the Act, the provisions of the agreement would prevail over the provisions of the Act, as is clear from the provisions of Section 90(2) of the Act. Section 90(2) makes it clear that "where the Central Government has entered into an agreement with the Government of any country outside India for granting relief of tax, or for avoidance of double taxation, then, in relation to the assessee to whom such agreement applies, the provisions of this Act shall apply to the extent they are more beneficial to that assessee" meaning thereby that the Act gets modified in regard to the assessee insofar as the agreement is concerned, if it falls within the category stated therein."

66. The Bombay High Court in **CIT vs. Siemens Aktiongesellschaft**[31], while dealing with the aspect of treaty override

[31] 2008 SCC OnLine Bom 1492

and the right of a Contracting State to legislate measures which would have the effect of amending treaty provisions pertinently observed: -

> "**32.** We now proceed to consider and answer as to what was taxable under the Indo-German Double Taxation Avoidance Agreement. On a reading of article II(2) it would be clear that if a term is not defined in the agreement and in the instant case royalty was not defined it will have the meaning which it has under the laws in force in that territory relating to the taxes which are the subject-matter of this agreement. Learned counsel for the assessee has placed reliance on the judgment of the Supreme Court of Canada in Her Majesty the Queen v. Melford Developments Inc. (82 DTC 6281). Considering a similar clause in article II(2) of the treaty between Canada and Germany the Supreme Court of Canada was considering the expression "law in force in Canada" relating to the taxes which are the subject of the Convention whether it means the laws as they existed in 1956 or the laws of Canada from time to time in force. The court observed that:
>
> > "Laws enacted by Canada to redefine taxation procedures and mechanisms with reference to income not subjected to taxation by the agreement are not, in my view, incorporated in the expression 'laws in force' in Canada as employed by the agreement. To read this section otherwise would be to feed the argument of the appellant, which in my view is without foundation in law, that sub-section (2) authorizes Canada or Germany to unilaterally amend the tax treaty from time to time as their domestic needs may dictate."
>
> **33.** <u>The ratio of that judgment, in our opinion, would mean that by an 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.</u> Such income would not be subject to tax under the expression "laws in force". Income covered by the provisions of the Income-tax Act is subject to tax. The question which calls for consideration is article III and articles V to XII of the Double Taxation Avoidance Agreement. We have already reproduced article III(1) and article III(3). Article III(1) provides that tax shall not be levied in one of the territories on the industrial or commercial profits of an enterprise of the other territory unless profits are derived in the first mentioned territory through a permanent establishment of the said enterprise situated in the first-mentioned territory. Sub-clause (3) of article III includes only rents or royalties in respect of cinematographic films within the expression "industrial or commercial profits" but does not include income in the form of rents, royalties which are set out therein."

67. This position was succinctly explained by the Andhra Pradesh

High Court in **Sanofi Pasteur Holding SA vs. Department of Revenue and others,**[32] as would be evident from the following passages of that decision: -

> "**149.** The Act (section 90) authorizes, effectuation of a tax treaty (to which India is a signatory) and for the prevalence of the duly notified treaty provisions over the provisions of the Act, as well.
>
> **150.** Strained construction of the treaty provisions, where not authorized by the settled principles of statutory construction, either by the tax administrator or by the judicial branch at the invitation of the Revenue of one of the Contracting States to a treaty would also transgress the inherent and vital constitutional scheme, of separation of powers. Treaty-making power is integral to the exercise of sovereign legislative or executive will according to the relevant constitutional scheme, in all jurisdictions. Once the power is exercised by the authorized agency (the Legislature or the executive, as the case may be) and a treaty entered into, the provisions of such treaty must receive a good faith interpretation by every authorized interpreter, whether an executive agency, a quasi-judicial authority or the judicial branch. The supremacy of the tax treaty provisions duly operationalised within a contracting State (which may (theoretically) be disempowered only by explicit and appropriately authorized legislative exertions), cannot be eclipsed by employment of an interpretive stratagem, on misconceived and ambiguous assumption of revenue interests of one of the Contracting States. Where the operative treaty's provisions are unambiguous and their legal meaning clearly discernible and lend to an uncontestable comprehension on good faith interpretation, no further interpretive exertion is authorized ; for that would tantamount to usurpation (by an unauthorized body—the interpreting agency/tribunal), intrusion and unlawful encroachment into the domain of treaty-making under article 253 (in the Indian context), an arena off-limits to the judicial branch ; and when the organic charter accommodates no participatory role, for either the judicial branch or the executors of the Act."

68. In *Engineering Analysis*, the Supreme Court reiterated the legal position in respect of Section 90 and the provisions of the Act being applicable only to the extent that they may be more beneficial to the assessee in the following terms: -

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[32] 2013 SCC OnLine AP 422

"**31.** That such transaction may be governed by a DTAA is then recognised by Section 5(2) read with Section 90 of the Income Tax Act, making it clear that the Central Government may enter into any such agreement with the Government of another country so as to grant relief in respect of income tax chargeable under the Income Tax Act or under any corresponding law in force in that foreign country, or for the avoidance of double taxation of income under the Income Tax Act and under the corresponding law in force in that country. <u>What is of importance is that once a DTAA applies, the provisions of the Income Tax Act can only apply to the extent that they are more beneficial to the assessee and not otherwise.</u> <u>Further, by Explanation 4 to Section 90 of the Income Tax Act, it has been clarified by Parliament that where any term is defined in a DTAA, the definition contained in the DTAA is to be looked at. It is only where there is no such definition that the definition in the Income Tax Act can then be applied</u>. This position has been recognised by this Court in *Azadi Bachao Andolan* [*Union of India* v. *Azadi Bachao Andolan*, (2004) 10 SCC 1] , which held : (SCC pp. 25 & 27, paras 21 & 28)

> "*21*. The provisions of Sections 4 and 5 of the Act are expressly made "*subject to the provisions of this Act*", which would include Section 90 of the Act. As to what would happen in the event of a conflict between the provision of the Income Tax Act and a notification issued under Section 90, is no longer res integra.
>
> ***
>
> *28*. A survey of the aforesaid cases makes it clear that the judicial consensus in India has been that Section 90 is specifically intended to enable and empower the Central Government to issue a notification for implementation of the terms of a Double Taxation Avoidance Agreement. When that happens, the provisions of such an agreement, with respect to cases to which they apply, would operate even if inconsistent with the provisions of the Income Tax Act. We approve of the reasoning in the decisions which we have noticed. *If it was not the intention of the legislature to make a departure from the general principle of chargeability to tax under Section 4 and the general principle of ascertainment of total income under Section 5 of the Act, then there was no purpose in making those sections "subject to the provisions of the Act"*. The very object of grafting the said two sections with the said clause is to enable the Central Government to issue a notification under Section 90 towards implementation of the terms of DTACs which would automatically override the provisions of the Income Tax Act in the matter of ascertainment of *chargeability to income tax and*

ascertainment of total income, to the extent of inconsistency with the terms of DTAC."

69. Once we recognise the Convention as the constant, it becomes apparent that changes in domestic legislation cannot, principally speaking, override the treaty provisions. If a contrarian position were to be accepted, it would lead us to hold that treaty provisions could be amended or overcome based upon the will of Legislatures of independent nations to amend domestic legislation unilaterally and without being bound by the Convention. That is clearly not the position which merits acceptance from either a constitutional or statutory point of view. It is this fundamental position which appears to have weighed upon the Court in *New Skies Satellite* to observe that a treaty cannot be overridden by independent legislative amendments that a contracting nation may choose to introduce. The fact that treaty provisions supervene and the option available to the assessee to opt for the more beneficial scheme stands statutorily recognised and reiterated in Section 90(2) of the Act.

G. <u>THE SECTION 9 ARGUMENT</u>

70. We thus come to the firm conclusion that the Section 9 amendments cannot be read as having subsumed, eclipsed or overridden the provisions of the DTAA. If one were to accept the proposition propounded by the appellants, it would lead us to hold that a contracting State stands enabled and empowered to overcome treaty conditions by resorting to its plenary power to amend and modulate domestic legislation. The deliberative exercise which underscores the formulation of a treaty between Nations cannot be permitted to be overcome solely upon one of those parties having the legislative

competence to amend a taxing provision. This since the power to legislate cannot be legally countenanced to extend to depriving a party of the benefits which the two contracting States chose to confer by virtue of a higher covenant drawn in exercise of their political and sovereign authority.

71. It was the aforesaid precepts which appear to have guided the Court in *New Skies Satellite* and where the amendments introduced in Section 9 were sought to be pressed into aid by the Department. In *New Skies Satellite*, the Court firstly doubted the characterization of those amendments as being clarificatory or for that matter being liable to be viewed as an explanation of existing terms of the statute. This becomes apparent from the following discussion which appears in that decision: -

> "**36.** A clarificatory amendment presumes the existence of a provision the language of which is obscure, ambiguous, may have made an obvious omission, or is capable of more than one meaning. In such case, a subsequent provision dealing with the same subject may throw light upon it. Yet, it is not every time that the Legislature characterises an amendment as retrospective that the court will give such effect to it. This is not in derogation of the express words of the law in question, (which as a matter of course must be the first to be given effect to), but because the law which was intended to be given retrospective effect to as a clarificatory amendment, is in its true nature one that expands the scope of the section it seeks to clarify, and resultantly introduces new principles, upon which liabilities might arise. Such amendments though framed as clarificatory, are in fact transformative substantive amendments, and incapable of being given retrospective effect. In R. Rajagopal Reddy v. Padmini Chandrasekharan (1995) 213 ITR 340 (SC) ; (1995) 2 SCC 630, it was held that the use of the words "it is declared" is not conclusive that the Act is declaratory because it may be used to introduce new rules of law. If the amendment changes the law it is not presumed to be retrospective irrespective of the fact that the phrase used is "it is declared" or "for the removal of doubts". In determining, therefore, the nature of the Act, regard must be had to the substance rather than to form. While adjudging whether an amendment was clarificatory or substantive in nature, and whether it will have retrospective effect

or not, it was held in CIT v. Gold Coin Health Food (P.) Ltd. (2008) 304 ITR 308 (SC) ; (2008) 9 SCC 622 and CIT v. Podar Cement (P.) Ltd. [1997] 226 ITR625 (SC) ; (1997) 5 SCC 482 that, (i) the circumstances under which the amendment was brought in existence, (ii) the consequences of the amendment, and (iii) the scheme of the statute prior and subsequent to the amendment will have to be taken note of.

37. An important question, which arises in this context, is whether a "clarificatory" amendment remains true to its nature when it purports to annul, or has the undeniable effect of annulling, an interpretation given by the courts to the term sought to be clarified. In other words, does the rule against clarificatory amendments laying down new principles of law extend to situations where law had been judicially interpreted and the Legislature seeks to overcome it by declaring that the law in question was never meant to have the import given to it by the court ? The general position of the courts in this regard is where the purpose of a special interpretive statute is to correct a judicial interpretation of a prior law, which the Legislature considers inaccurate, the effect is prospective. Any other result would make the Legislature a court of last resort. United States v. Gilmore 8 Wall (75 US) 330, 19 L Ed 396 (1869), Peony Park v. O'Malley 223 F.2d 668 (8th Cir. 1955). It does not mean that the Legislature does not have the power to override the judicial decisions which in its opinion it deems as incorrect, however to respect the separation of legal powers and to avoid making a Legislature a court of last resort, the amendments can be made prospective only (Ref. County of Sacramento v. State of California 134 Cal. App. 3d 428, In re, Marriage of Davies, In re 105 Ill App 3d 661 [1982]).

38. The circumstances in this case could very well go to show that the amendment was no more than an exercise in undoing an interpretation of the court which removed income from data transmission services from taxability under section 9(1)(vi). It would also be difficult, if not impossible to argue, that inclusion of a certain specific category of services or payments within the ambit of a definition alludes not to an attempt to illuminate or clarify a perceived ambiguity or obscurity as to interpretation of the definition itself, but towards enlarging its scope. Predicated upon this, the retrospectivity of the amendment could well be a contentious issue. Be that as it may, this court is disinclined to conclusively determine or record a finding as to whether the amendment to section 9(1)(vi) is indeed merely clarificatory as the Revenue suggests it is, or prospective, given what its nature may truly be. The issue of taxability of the income of the assessees in this case may be resolved without redressal of the above question purely because the assessee has not pressed this line of arguments before the court and has instead stated that even if it were to be assumed that the contention of the Revenue is correct, the ultimate taxability of this income shall rest on the interpretation of the terms of the double taxation avoidance agreements. Learned Counsel for the assessee has therefore contended that even if the first question is answered in favour of the Revenue, the income shall nevertheless escape the Act by reason of the double taxation avoidance agreement. The court therefore proceeds with the assumption that the amendment is retrospective and the income is taxable under the Act."

72. The Court thereafter and while speaking of the extent of parliamentary power to overcome or override treaty provisions significantly observed: -

"**41.** This court is of the view that no amendment to the Act, whether retrospective or prospective can be read in a manner so as to extend in operation to the terms of an international treaty. In other words, a clarificatory or declaratory amendment, much less one which may seek to overcome an unwelcome judicial interpretation of law, cannot be allowed to have the same retroactive effect on an international instrument effected between two sovereign states prior to such amendment. In the context of international law, while not every attempt to subvert the obligations under the treaty is a breach, it is nevertheless a failure to give effect to the intended trajectory of the treaty. Employing interpretive amendments in domestic law as a means to imply contoured effects in the enforcement of treaties is one such attempt, which falls just short of a breach, but is nevertheless, in the opinion of this court, indefensible.

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54. Neither can an act of Parliament supply or alter the boundaries of the definition under article 12 of the Double Taxation Avoidance Agreement by supplying redundancy to any part of it. This becomes especially important in the context of Explanation 6, which states that whether the 'process' is secret or not is immaterial, the income from the use of such process is taxable, none the less. Explanation 6 precipitated from confusion on the question of whether it was vital that the "process" used must be secret or not. This confusion was brought about by a difference in the punctuation of the definitions in the double taxation avoidance agreements and the domestic definition. For greater clarity and to illustrate this difference, we reproduce the definitions of royalty across both double taxation avoidance agreements and clause (iii) to Explanation 2 to 9(1)(vi)………."

73. It, however, desisted from rendering a definitive opinion on the scope of those provisions firstly since submissions in that respect had

not been advanced and it upon an ultimate analysis coming to the conclusion that the treaty provisions would prevail over the provisions introduced in Section 9(1)(vi) of the Act. This is evident from a reading of Para 38 which has been extracted hereinabove. In our considered opinion, the test of whether domestic legislation asserts to *"supply or alter the boundaries"* is the correct enunciation of the legal position. A provision enshrined in the legislation of an individual contracting State would thus be entitled to operate and subsist provided it remains within the perimeters judicially recognised above.

74. The applicability of Section 9(1)(vi) and its provisions being liable to be read as overriding provisions contained in a Treaty appears to have been urged again in **Commissioner of Income Tax (International Taxation) vs. Micro Focus Ltd**[33]. The Court, however, negated that submission by referring to the aforenoted observations appearing in *New Skies Satellite*. This becomes evident from a reading of Paras 9 and 10 of that decision and which are reproduced hereinbelow: -

> "**9.** Further, the learned Income-tax Appellate Tribunal also dealt with the contention of the appellant-Revenue regarding Explanation 4 to section 9(1)(vi) of the Act for interpreting the terms used in article 13 of the Double Taxation Avoidance Agreement and observed in para 6 of the impugned order that, "In view of section 90(2) of the Income-tax Act, the assessee opts for Double Taxation Avoidance Agreement between India and UK to override the provisions of the Act as there is no corresponding amendment to the definition of the term "royalty" in article 13(3) of the aforesaid Double Taxation Avoidance Agreement as carried out in the definition of royalty under section 9(1)(vi) of the Act". The learned Income-tax Appellate Tribunal then rejected the contention of the appellant-Revenue by relying upon the judgment of this court in DIT v. New Skies Satellite BV [2016] 382 ITR 114 (Delhi) ; [2016] 285 CTR (Delhi) 1 which deals with the question of retrospective effect

[33] 2020 SCC OnLine Del 2680

of the amendment. The relevant portion as quoted in para 8 of the impugned order is reproduced herein below—

> "8. .. The learned Departmental representative's contention was that as per the judgment in the case of Shine Satellite, the amendment has to be given retrospective effect. But when we read the judgment of the hon'ble High Court in case of New Skies Satellite BV the hon'ble Delhi High Court held in para 60 as follows (page 152 of 382 ITR) :
>
> 'Consequently, since we have held that the Finance Act, 2012 will not affect article 12 of the Double Taxation Avoidance Agreement, it would follow that the first determinative interpretation given to the word "royalty" in Asia Satellite Telecommunications Co. Ltd. v. DIT [2011] 332 ITR 340 (Delhi), 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 Taxation Avoidance Agreement, unless the said Double Taxation Avoidance Agreement are amended jointly by both parties to incorporate income from data transmission services as partaking of the nature of royalty, or amend the definition in a manner so that such income automatically becomes royalty. It is reiterated that the court has not returned a finding on whether the amendment is in fact retrospective and applicable to cases preceding the Finance Act of 2012 where there exists no Double Taxation Avoidance Agreement.
>
> For the above reasons, it is held that the interpretation advanced by the Revenue cannot be accepted. The question of law framed is accordingly answered against the Revenue. The appeals fail and are dismissed, without any order as to costs.'
>
> Therefore, in fact, the reliance of New Skies Satellite BV (supra) by the learned Departmental representative is favouring the assessee's case and the issue involved before us is squarely covered by the judgment of Infra Soft Pvt. Ltd. as well as New Skies Satellite BV (Shine Satellite)."

10. The questions of law urged by the appellant-Revenue in the present case are thus covered by the decisions of this court in M. Tech India Pvt. Ltd. (supra) and New Skies Satellite BV (supra). Therefore, no substantial question of law arises for our consideration and accordingly, the present appeals are dismissed."

75. The issue pertaining to the applicability of the amendments

introduced in Section 9 and those having an overarching effect over treaty provisions came to be resoundingly rejected in *Engineering Analysis* also. This becomes evident when we take note of the following observations rendered by the Supreme Court: -

> "**78.** The insertion of sub-sections (*v*), (*vi*) and (*vii*) in Section 9(1) of the Income Tax Act, by way of an amendment through the Finance Act, 1976 [Act 66 of 1976, (w.e.f. 1-6-1976).] was to introduce source-based taxation for income in the hands of a non-resident by way of interest, royalty and fees for technical services. In *Carborandum & Co.* v. *CIT* [*Carborandum & Co.* v. *CIT*, (1977) 2 SCC 862 : 1977 SCC (Tax) 391] , this Court, applying residence-based rules of taxation, held that the technical service fees received by the non-resident assessee (relatable to Assessment Year 1957-1958) could only be deemed to accrue in India if such income could be attributed to a business connection in India. In the facts of that case, since no part of the foreign assessee's operations were carried on in India, the technical services being rendered wholly in foreign territory, it was held that no part of the technical service fees received by the foreign assessee accrued in India.
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> xxxx xxxx xxxx
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> **84.** Even if we were to consider the ambit of "royalty" only under the Income Tax Act on the footing that none of the DTAAs apply to the facts of these cases, the definition of "royalty" that is contained in Explanation 2 to Section 9(1)(*vi*) of the Income Tax Act would make it clear that there has to be a transfer of "all or any rights" which includes the grant of a licence in respect of any copyright in a literary work. The expression "including the granting of a licence" in clause (*v*) of Explanation 2 to Section 9(1)(*vi*) of the Income Tax Act, would necessarily mean a licence in which transfer is made of an interest in rights "in respect of" copyright, namely, that there is a parting with an interest in any of the rights mentioned in Section 14(*b*) read with Section 14(*a*) of the Copyright Act. To this extent, there will be no difference between the position under the DTAA and Explanation 2 to Section 9(1)(*vi*) of the Income Tax Act.
>
> **85.** However, the learned Additional Solicitor General presses the application of the amendment made vide the Finance Act, 2012 with retrospective effect from 1-6-1976, which added Explanation 4 to Section 9(1)(*vi*) of the Income Tax Act.
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> **88.** It is equally difficult to accept the learned Additional Solicitor General's submission that Explanation 4 to Section 9(1)(*vi*) of the Income Tax Act is clarificatory of the position as it always stood,

since 1-6-1976, for which he strongly relied upon CBDT Circular No. 152 dated 27-11-1974. Quite obviously, such a circular cannot apply as it would then be explanatory of a position that existed even before Section 9(1)(*vi*) was actually inserted in the Income Tax Act vide the Finance Act, 1976. Secondly, insofar as Section 9(1)(*vi*) of the Income Tax Act relates to computer software, Explanation 3 thereof, refers to "computer software" for the first time with effect from 1-4-1991, when it was introduced, which was then amended vide the Finance Act, 2000. Quite clearly, Explanation 4 cannot apply to any right for the use of or the right to use computer software even before the term "computer software" was inserted in the statute. Likewise, even qua Section 2(*o*) of the Copyright Act, the term "computer software" was introduced for the first time in the definition of a literary work, and defined under Section 2(*ffc*) only in 1994 (*vide* Act 38 of 1994).

89. Furthermore, it is equally ludicrous for the aforesaid amendment which also inserted Explanation 6 to Section 9(1)(*vi*) of the Income Tax Act, to apply with effect from 1-6-1976, when technology relating to transmission by a satellite, optic fibre or other similar technology, was only regulated by Parliament for the first time through the Cable Television Networks (Regulation) Act, 1995, much after 1976. For all these reasons, it is clear that Explanation 4 to Section 9(1)(*vi*) of the Income Tax Act is not clarificatory of the position as of 1-6-1976, but in fact, expands that position to include what is stated therein, vide the Finance Act, 2012."

76. Similar arguments at the behest of the Revenue appear to have been urged before the Karnataka High Court in *Vodafone Idea***.** Taking a cue from the legal position which had been enunciated by the Supreme Court in *Engineering Analysis*, the Karnataka High Court held: -

"**19.** <u>The second question for consideration is whether the Income-tax Appellate Tribunal was correct in holding that the amendment to provisions of section 9(1)(vi) inserting the Explanations will result in amendment of Double Taxation Avoidance Agreement. 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 June 1, 1976 and in fact expands that position to include what is stated therein vide Finance Act, 2012.</u>

20. Explanations 5 and 6 to section 9(1)(vi) of the Act has been inserted with effect from June 1, 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 (page 558 of 432 ITR):

> "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.. ..
>
> 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 Double Taxation Avoidance Agreement, as per section 90(2) of the Income-tax Act read with Explanation 4 thereof, and article 3(2) of the Double Taxation Avoidance Agreement." ”

77. It is thus manifest that the arguments raised by the appellants based on the language employed by Section 9 as well as the Explanations inserted therein are clearly misconceived. Quite apart from us having serious reservations as to whether those Explanations could legitimately be accepted as being clarificatory and designed to remove an existing ambiguity in the statutory position, we are of the firm opinion that those unilateral amendments introduced in a domestic law cannot be accorded an overriding effect over the provisions of the DTAA. Even otherwise and as would be evident from the discussion which ensues, the transaction in question would not become subject to taxation even if it were tested on the anvil of Section 9(1)(vi). However, we defer that discussion to subsequent parts of this decision.

H. <u>THE USE/RIGHT TO USE QUESTION</u>

78. Reverting then to Article 12 of the DTAA itself, we find that

paragraph 3 thereof defines "royalty" to mean the payment of consideration for the use or the right to use, any copyright, patent, trademark, design or model plan, secret formula or process, and other activities mentioned therein. The respondents had sought to contend that the service availed of by customers from the respondent assessee would fall within the ambit of 'secret formula' or 'process'. It is in the aforesaid context that Mr. Sabharwal had commended for our consideration the principle of *noscitur a sociis* and had submitted that the word 'process' must derive colour and meaning from the other intellectual property rights which are spoken of in Para 3 of Article 12. There appears to be significant force in that submission when one views Para 3(a) in its entirety.

79. As noted hereinabove, Article 12(3) defines 'royalty' to mean payments received for the use or right to use copyrighted articles, patents, trademarks, designs, models, secret formulae or processes. The latter part of Para 3(a) also ropes in consideration that may be received from the alienation of any such right, property, or information. The expression "use" or "right to use" must consequently be understood in the aforesaid light and thus contemplating a positive conferral of a right to employ, possess or utilize a patent, trademark, process or equipment. In order to fall within the ambit of the royalty Article, it would be imperative for the Court discerning a right given to make use of the patent, trademark process or equipment. The key element would be effective control or dominion having been conferred upon an individual or entity for consideration. Use or right to use would necessarily entail the grant of a right to exploit or bring into effective use. A mere advantage or benefit derived from a service

provided cannot possibly be countenanced to fall within the meaning of the expression's "use" or "right to use" as they appear in Article 12. What we seek to emphasise is that the use of a service while equipment or process remains with and in the control of the provider cannot attract process or equipment royalty provisions. Similarly, merely because an equipment or process comes to be deployed or used in the course of providing a service would not attract Article 12. This since no dominion or control came to be granted or transferred.

80. While dealing with the issue of "use" and right to use", our Court in *Asia Satellite* had made the following pertinent observations:-

> "**55.** Keeping in view the aforesaid principles, we now embark upon the interpretative process in defining the ambit and scope of the term "royalty" appearing in Explanation 2 to clause (vi) of section 9(1) of the Act. Clause (i) deals with the transfer of all or any rights (including the granting of a licence) in respect of a patent, etc. <u>Thus, what this clause envisages is the transfer of "rights in respect of property" and not transfer of "right in the property". The two transfers are distinct and have different legal effects. In the first category, the rights are purchased which enable the use of those rights, while in the second category, no purchase is involved, only right to use has been grante</u>d. Ownership denotes the relationship between a person and an object forming the subject-matter of his ownership. It consists of a bundle of rights, all of which are rights in rem, being good against the entire world and not merely against a specific person and such rights are indeterminate in duration and residuary in character as held by the Supreme Court in the case of Swadesh Ranjan Sinha v. Hardeb Banerjee, AIR 1992 SC 1590. <u>When rights in respect of a property are transferred and not the rights in the property, there is no transfer of the rights in rem which may be good against the world but not against the transferor. In that case, the transferee does not have the rights which are indeterminate in duration and residuary in character. Lump sum consideration is not decisive of the matter. That sum may be agreed for the transfer of one right, two rights and so on all the rights but not the ownership. Thus, the definition of the term "royalty" in respect of the copyright, literary, artistic or scientific work, patent, invention, process, etc. does not extend to the outright purchase of the right to use an asset. In case of royalty, the ownership on the property or right remains with the owner and the transferee is permitted to use the right in respect of such property.</u> A payment for the absolute assignment and

ownership of rights transferred is not a payment for the use of something belonging to another party and, therefore, no royalty. In an outright transfer to be treated as sale of property as opposed to licence, alienation of all rights in the property is necessary.

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68. We are inclined to agree with the argument of the learned senior counsel for the appellant that in the present case, control of the satellite or the transponder always remains with the appellant. We may also observe at this stage that the terms "lease of transponder capacity", "lessor", "lessee" and "rental" used in the agreement would not be the determinative factors. It is the substance of the agreement which is to be seen. When we go through the various clauses of the said agreement, it becomes clear that the control always remained with the appellant and the appellant had merely given access to a broadband available with the transponder, to particular customers. We may also point out that against the decision of the Authority for Advance Rulings in ISRO case (2008) 307 ITR 59, special leave petition was dismissed by the Supreme Court (see Puran Singh Sahni v. Sundari Bhagwandas Kripalani (1991) 2 SCC 180).

69. We may also refer to the following distinction brought out by the Karnataka High Court between leasing out of equipment and the use of equipment by its customer. This was done in the case of Lakshmi Audio Visual Inc. v. Asst. CCT 124 STC 426 (Karn) in the following terms (page 433):

> "9. Thus if the transaction is one of leasing/hiring/letting Simpliciter under which the possession of the goods, i.e., effective and general control of the goods is to be given to the customer and the customer has the freedom and choice of selecting the manner, time and nature of use and enjoyment, though within the frame work of the agreement, then it would be a transfer of the right to use the goods and fall under the extended definition of 'sale'. On the other hand, if the customer entrusts to the assessee the work of achieving a certain desired result and that involves the use of goods belonging to the assessee and rendering of several other services and the goods used by the assessee to achieve the desired result continue to be in the effective and general control of the assessee, then, the transaction will not be a transfer of the right to use goods falling within the extended definition of 'sale'. Let me now clarify the position further, with an illustration which is a variation of the illustration used by the Andhra Pradesh High Court in the case of Rashtriya Ispat Nigam Ltd. v. CTO 77 STC 182 (AP).
>
> Illustration:

> (i) A customer engages a carrier (transport operator) to transport one consignment (a full lorry load) from place A to B, for an agreed consideration which is called freight charges or lorry hire. The carrier sends its lorry to the customer's depot, picks up the consignment and proceeds to the destination for delivery of the consignment. The lorry is used exclusively for the customer's consignment from the time of loading, to the time of unloading at destination. Can it be said that right to use of the lorry has been transferred by the carrier to the customer ? The answer is obviously in the negative, as there is no transfer of the 'use of the lorry' for the following reasons : (i) the lorry is never in the control, let alone effective control of the customer ; (ii)the carrier decides how, when and where the lorry moves to the destination, and continues to be in effective control of the lorry ; (iii)the carrier can at any point (of time or place) transfer the consignment in the lorry to another lorry ; or the carrier may unload the consignment en-route in any of his godowns, to be picked up later by some other lorry assigned by the carrier for further transportation and delivery at destination.
>
> (ii) On the other hand, let us consider the case of a customer (say a factory) entering into a contract with the transport operator, under which the transport operator has to provide a lorry to the customer, between the hours 8.00 a.m. to 8.00 p.m. at the customer's factory for its use, at a fixed hire per day or hire per km subject to an assured minimum, for a period of one month or one week or even one day ; and under the contract, the transport operator is responsible for making repairs apart from providing a driver to drive the lorry and filling the vehicle with diesel for running the lorry. The transaction involves an identified vehicle belonging to the transport operator being delivered to the customer and the customer is given the exclusive and effective control of the vehicle to be used in any manner as it deems fit ; and during the period when the lorry is with the customer, the transport operator has no control over it. The transport operator renders no other service to the customer. Therefore, the transaction involves transfer of right to use the lorry and thus be a deemed sale.""

81. As we go through that decision, it appears that one of the submissions which was addressed before the Court in *Asia Satellite* was that "use" should be understood as contemplating usage "simpliciter" and that consequently the derivation of any benefit from

a process also being liable to be understood as falling within the definition of royalty. It also appears to have been urged that the word "secret" which stands prefixed to "formula" would not stand attached to the word "process". While dealing with the aforesaid submissions, the Court in *Asia Satellite* held that the royalty article as appearing in the Treaty is concerned with the conferment of rights "in respect of property" as distinguished from rights "in property". It then went on further to observe that in order to correctly answer the question which stood posited, one would have to examine whether control over equipment or property had been accorded to potential customers. It proceeded to hold that the correct test would be whether *"effective and general control"* over goods had been given to the customers. It thus follows that a mere benefit that may accrue to a user or a service that may be availed of by a customer cannot possibly fall within the ambit of the expressions "use" or "right to use".

82. A lucid explanation of the meaning liable to be ascribed to those expressions appear in the decision of the Constitution Bench in *Bharat Sanchar Nigam Ltd*. Though rendered in the context of Article 366(29A) of the Constitution, the following observations appear pertinent to the question that stands posed before us: -

> "**64.** The second reason is more basic. A subscriber to a telephone service could not reasonably be taken to have intended to purchase or obtain any right to use electromagnetic waves or radio frequencies when a telephone connection is given. Nor does the subscriber intend to use any portion of the wiring, the cable, the satellite, the telephone exchange, etc. At the most the concept of the sale in a subscriber's mind would be limited to the handset that may have been purchased for the purposes of getting a telephone connection. As far as the subscriber is concerned, no right to the use of any other goods, incorporeal or corporeal, is given to him or her with the telephone connection.
>
> xxxx xxxx xxxx

95. The petitioner Bharat Sanchar Nigam Ltd. (for short "BSNL") is a licensee under the Telegraph Act, 1885. The licence of the petitioner is obtained from the Government of India which is the same as the licence given also to various private telecom operators which entitles BSNL to carry the activity of operating telegraph limited to the scope of telecommunication facilities.

xxxx xxxx xxxx

97. To constitute a transaction for the transfer of the right to use the goods, the transaction must have the following attributes:

(*a*) there must be goods available for delivery;

(*b*) there must be a consensus ad idem as to the identity of the goods;

(*c*) the transferee should have a legal right to use the goods—consequently all legal consequences of such use including any permissions or licences required therefor should be available to the transferee;

(*d*) for the period during which the transferee has such legal right, it has to be the exclusion to the transferor—this is the necessary concomitant of the plain language of the statute viz. a "transfer of the right to use" and not merely a licence to use the goods;

(*e*) having transferred the right to use the goods during the period for which it is to be transferred, the owner cannot again transfer the same rights to others.

xxxx xxxx xxxx

108. The contract between the telecom service provider and the subscriber is merely to receive, transmit and deliver messages of the subscriber through a complex system of fibre optics, satellite and cables.

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111. Traditionally, a contract for carriage of goods or passengers is by roadways, railways, airways and waterways. This is associated with carriage of tangible goods. Such a carrier has no right over the goods of the customer and does not effect transfer of right to use any goods used by the carrier for goods. On this analogy, the petitioners carry messages. They are only carriers and have neither property in the message nor effect any transfer to the subscriber. The advancement of technology should be so absorbed in the interpretation that this method of carriage of message should also be understood as carriage of goods and not a transfer of a right to use goods, if any.

112. The licence clearly manifests that it is one for providing telecommunication service and not for supply of any goods or transfer of right to use any goods. It expressly prohibits transfer or assignment. The integrity of the licence cannot be broken into pieces nor can the telecommunication service rendered by them be so mutilated. Not only does this position flow from the terms of contract, this also flows from Section 4 of the Telegraph Act which provides for grant of licence on such conditions and in consideration of such payments as it thinks fit, to any person "to establish, maintain or work a telegraph". The integrity of establishing, maintaining and working is not to be mutilated.

113. Clause 9 clearly interdicts the licensee provided that the licensee will not assign or transfer his rights in any manner whatsoever under the licence to third party. It is impossible to contend that the right to use goods, assuming without conceding that they are goods, which are essential for the rendition of service can never be a transaction or transfer of right to use goods. Nor can the contract between subscribers and licensee viz. service provider be interpreted as involving transfer of right to use goods."

83. The AAR in *Dell International* pertinently observed that the word "use" cannot possibly be interpreted as contemplating availing of a benefit of equipment or property. This becomes clearer from the following discussion which appears in that decision: -

"**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 praesenti 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.

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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 equip-ment 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.

xxxx xxxx xxxx

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. <u>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 (iv.a) in such a case because the element of service predominates</u>.

13.2 <u>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</u>. <u>The applicant does not in any sense possess nor does it</u>

> 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"

84. The aforesaid principles came to be reiterated by the AAR in *Cable & Wireless Networks* as would be evident from the following extracts of that decision: -

> "According to the applicant, in the proposed business model, no intellectual property rights are involved; C&W UK has not granted to it any right to use any intellectual property or any equipment. The Commissioner, on the other hand, states that the payment made by the applicant is clearly for using secret process. According to him the technology involved in the process of transmission of voice/data contains proprietary resources. It is not a case of mere rendition of service, but the quality of service and secrecy are also material. It is further stated that the services to be availed by the applicant would amount to the use of a secret process and thus is covered by royalty as stipulated in article 13(3) of the treaty. But, no material has been placed before us to show that C&W UK uses any secret process in the transmission of the international leg of the service, or that the applicant pays towards the use or right to use that secret process. It is well-settled that telecom services are standard services. The arrangement between the applicant and C&W UK is for rendition of service and the applicant pays for the same. It is for C&W UK to see how it will provide that service. The applicant is not concerned with the same. This Authority has dealt with this issue in the case of Dell International Services India (P.) Ltd. (supra). In that case BT America provided two way transmission of voice and data to Dell India between India and USA. For providing this service, BT

America had tied up with VSNL in India and other telecom service providers outside India. Dell India had an agreement with BT America for the entire service for which it made payment directly to BT America. One of the issues that arose for consideration was whether the payment made by the applicant to BT America was in the nature of royalty falling either under clause (iii) of Explanation 2 of section 9(1) or article 12(3) of the tax avoidance treaty between India and USA, which is materially similar to the provisions of article 13(3) of the treaty between India and UK. The Authority held—

> "14. Whether the payment made by the applicant to BTA is in the nature of royalty falling under clause (iii) of Explanation 2 and/or article 12(3) of the Treaty ?
>
> 14.1 It is one of the contentions of the Revenue that the applicant makes use of or is conferred with the right to use a 'process' within the meaning of clause (iii) to Explanation (2) to section 9(1) of the Act. That clause speaks of 'the use of any patent, invention, model, design, secret formula or process or trade mark or similar property'. It is contended, relying on the decision of ITAT in the case of Asia Satellite Telecommunications Co. Ltd. v. Dy. CIT [2003] 85 ITD 478 (Delhi) that the word 'secret' only qualifies the expression 'formula' and cannot be read before the word 'process'. On such interpretation, it is submitted by the revenue in its comments that the services provided to the applicant are clearly in the nature of a process and not in the nature of standard facility and the applicant has used and has been conferred with the right to use such process. However, this contention has not been urged before us by the learned Counsel for the Department for the obvious reason that the language used in the relevant clause of the Treaty does not support any such interpretation. The expression in article 12(3) (referred to at para 7.1 (supra) is 'for the use of or the right to use any copyright, patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience'. It is, thus, clear that formula/process are part of the same group and the adjective 'secret' governs both. The reasoning of ITAT in the aforementioned case, based on the absence of comma after process and the impact of the immediately following word, 'trade mark', does not hold good in view of the clear language in article 12(3) of the Treaty. It has been so pointed out very rightly by another Bench of ITAT in Panamsat International Systems Inc. v. Dy. CIT (IT Appeal No. 1796/Delhi/2001, dated 11-8-2006) at paragraph 6.18. Going by such Interpretation, it cannot be held that there is, in the instant case, the use of or the right to use a secret

process. In fact it is nobody's case that any secret process is involved here and the applicant makes use of it. The use of secret process is alien to the minds of contracting parties. Incidentally, we may mention that it was brought to our notice that similar bandwidth services; through private circuits are being provided by many other telecom operators. Hence, the royalty definition under the treaty relating to secret process is not attracted here. We may mention that the applicant contended that the decision of ITAT in Asia Satellite Telecommunication Co. Ltd.'s case (supra) is distinguishable on facts. It is unnecessary to deal with this aspect." (p. 494)"

85. Our Court in *Asia Satellite* had also noticed with approval the following passages from the OECD Commentary on Article 12:-

"**9.1** <u>Satellite operators and their customers (including broadcasting and telecommunication enterprises) frequently enter into 'transponder leasing' agreements under which the satellite operator allows the customer to utilize the capacity of a satellite transponder to transmit over large geographical areas. Payments made by customers under typical 'transponder leasing' agreements are made for the use of the transponder transmitting capacity and will not constitute royalties under the definition of paragraph 2 : these payments are not made in consideration for the use of, or right to use, property, or for information, that is referred to in the definition (they cannot be viewed, for instance, as payments for information or for the use of, or right to use, a secret process since the satellite technology is not transferred to the customer).</u> As regards treaties that include the leasing of industrial, commercial or scientific (ICS) equipment in the definition of royalties, the characterization of the payment will depend to a large extent on the relevant contractual arrangements. <u>Whilst the relevant contracts often refer to the 'lease' of a transponder, in most cases the customer does not acquire the physical possession of the transponder but simply its transmission capacity : the satellite is operated by the lessor and the lessee has no access to the transponder that has been assigned to it. In such cases, the payments made by the customers would therefore be in the nature of payments for services, to which article 7 applies, rather than payments for the use, or right to use, ICS equipment</u>. A different, but much less frequent, transaction would be where the owner of the satellite leases it to another party so that the latter may operate it and either use it for its own purposes or offer its data transmission capacity to third parties. In such a case, the payment made by the satellite operator to the satellite owner could well be considered as a payment for the leasing of industrial, commercial or scientific equipment. Similar considerations apply to payments made to lease or purchase the capacity of cables for the transmission of electrical power or

communities (e.g. through a contract granting an indefeasible right of use of such capacity) or pipelines (e.g. for the transportation of gas or oil).""

86. Additionally, we find the following passages from that Commentary which too would have a bearing on the question which stands posited before us: -

"**9.2** Also, payments made by a telecommunications network operator to another network operator under a typical "roaming" agreement (see paragraph 9.1 of the Commentary on Article 5) will not constitute royalties under the definition of paragraph 2 since these payments are not made in consideration for the use of, or right to use, property, or for information, referred to in the definition (they cannot be viewed, for instance, as payments for the use of, or right to use, a secret process since no secret technology is used or transferred to the operator). This conclusion holds true even in the case of treaties that include the leasing of industrial, commercial or scientific (ICS) equipment in the definition of royalties since the operator that pays a charge under a roaming agreement is not paying for the use, or the right to use, the visited network, to which it does not have physical access, but rather for the telecommunications services provided by the foreign network operator.

9.3 Payments for the use of, or the right to use, some or all of part of the radio frequency spectrum (e.g. pursuant to a so-called "spectrum license" that allows the holder to transmit media content over designated frequency ranges of the electromagnetic spectrum) do not constitute payments for the use of, or the right to use, property, or for information, that is referred in the definition of royalties in paragraph 2. This conclusion holds true even in the case of treaties that include the leasing of industrial, commercial or scientific (ICS) equipment in the definition of royalties since the payment is not for the use, or the right to use, any equipment"

87. A similar explanation appears in the Commentary pertaining to the UN Model Convention and relevant parts whereof are reproduced hereinbelow: -

"**17.** The definition of royalties in paragraph 2 of Article 12 of the OECD Model Tax Convention (which corresponds to the definition in paragraph 3 of Article 12 of the United Nations Model Tax Convention) was amended in 1992 by deleting the words "for the use of, or the right to use, industrial, commercial or scientific equipment" as a result of the OECD report entitled The Revision of the Model Convention adopted by the Council of the OECD on 23 July 1992. However, a number of OECD member countries have entered reservations on this point.

18. The reference, in paragraph 3 of Article 12 of this Model, to payments received as consideration "for the use of, or the right to use, industrial, commercial or scientific equipment" addresses circumstances in which the owner of the equipment earns profits from letting another person use that equipment, without having the owner establish any presence in the State where it is used, or where the user resides, which would satisfy the requirements of Article 5 for the existence of a permanent establishment. For this kind of business the equipment itself, when used by another person, is treated in the United Nations Model Tax Convention as having significance similar to that of a permanent establishment.

19. <u>The term "equipment" is not defined in this Model. Accordingly, the provisions of paragraph 2 of Article 3 apply, which means that the term may have different meanings in different States. However, a feature that is always present is that the equipment will be used in the performance of a task. It is a tool used by a business in the sense that it is not enjoyed for its own sake. Thus, for example, a car rented by a tourist will not be considered to be "equipment." Neither can equipment include intellectual property, immovable property covered by Article 6, or property covered by Article 8. Industrial, commercial or scientific equipment is clearly a subset of equipment and may, outside of a consumer context, include (this is not an exhaustive list) ships, aircraft, cars and other vehicles, cranes, containers, satellites, pipelines and cables etc</u>.

20. A clear distinction must be made between royalties paid for the use of equipment, which fall under Article 12, and payments constituting consideration for the sale of equipment, some or all of which may, depending on the case, fall under Articles 7, 11, 13, 14 or 21. Some contracts combine the lease element and the sale element, so that it sometimes proves difficult to determine their nature and economic substance. In the case of credit sale agreements, hire purchase agreements and other forms of finance leases, it seems clear that the sale element is paramount, because the parties have from the outset agreed that the ownership of the property in question shall be transferred from one to the other, although they have made this dependent upon the payment of the last instalment. Consequently, the instalments paid by the purchaser/hirer do not, in principle, constitute royalties. In the case, however, of an operating lease, the sole, or at least the principal, purpose of the contract is normally that of lease, even if the lessee has the right thereunder to opt during its term to purchase the equipment in question outright.

Article 12 therefore applies in the normal case to the rentals paid by the lessee, including all rentals paid up to the date the lessee exercises any right to purchase. Indications for a finance lease rather than an operating lease might include, for example:

— the lease is long term and non-cancellable;

— the term of the lease is likely to cover a substantial part (or all) of the equipment's useful life;

— there is no other likely user of the equipment, or it is not feasible for the equipment to be leased to another lessee;

— the lessee of the equipment behaves as owner;

— the lessee carries positive and / or negative residual value risk or utility in respect of the equipment;

— the lease payments to use the equipment are high particularly at the beginning such that they constitute an inordinately large proportion of the amount needed to secure the acquisition;

— the lease payments materially exceed the current fair rental value and thus compensate for more than just the use of property; and

— some portion of the lease payments is specifically designated as interest or is otherwise readily recognizable as the equivalent of interest.

21. With regard to satellite operators and their customers, the characterization of a payment by the customer to the satellite operator as a royalty will depend to a large extent on the specific contractual arrangements. If the owner of the satellite leases it to another person and that person operates it, the payment for the lease would be a royalty payment for the use of industrial, commercial or scientific equipment. However, in many cases the customer does not acquire the possession or control of the satellite, but makes use of part or all of its transmission capacity. The satellite would continue to be operated by the lessor. In such cases, members are of the opinion that the payments made would be in the nature of transmission services to which Article 7, 12A or 12B, as the case may be, applies. Other members are of the opinion that a payment for the use of the transmission capacity (or transport or transmission capacity in the case of pipelines or cables) could be regarded as payments made for the leasing of industrial, commercial or scientific equipment.

22. When the former Group of Experts considered the part of the definition of royalties dealing with payments received as consideration for "information concerning industrial, commercial or scientific experience", it addressed the problems of distinguishing royalties from types of income properly subject to other Articles of the Convention. A member from a developed country asserted that

> the problem was that the "royalties" definition makes an imperfect distinction between revenues that constituted royalties in the strict sense and payments received for brain-work and technical services, such as surveys of any kind (engineering, geological research etc.). The member also mentioned the problem of distinguishing between royalties akin to income from capital and payments received for services. Given the broad definition of "information concerning industrial, commercial or scientific experience", some countries tend to regard the provision of brain-work and technical services as the provision of "information concerning industrial, commercial or scientific experience" and to regard payment for such information as royalties."

I. SCOPE OF THE OSS/GBSA

88. If one were to test the OSS Agreement or the GBSA on the aforenoted precepts, it becomes apparent that the contention of the appellant is clearly misconceived and untenable. A bare reading of the OSS Agreement would establish that it was primarily concerned with Telstra and Bharti seeking to provide international roaming services to their respective customers in a coordinated manner. The primary objective of the OSS Agreement was to provide seamless and uninterrupted connectivity to the customers of Telstra and Bharti when present in the respective regions where the two entities operated. This becomes evident when one views the bouquet of services which were covered under the definition of "International Services" and which extended to internet access, global ATM services, global IP VPN and others. Similar is the position which emerges when we bear in mind the definition of expressions such as OSS Services, SEB [Single End Billing], SEO [enabling a customer in Administration A obtaining International Service from Administration B] or for that matter SPFR [Single Point Fault Reporting].

89. It thus becomes apparent that the agreements were essentially representative of a reciprocal arrangement between Telstra, Bharti and others to facilitate their customers being enabled to avail of communication services while they moved between territories. We find ourselves unable to discern or acknowledge any "right to use" which could be said to have been transferred to either the Telecom Operator or the customer. The equipment remained under the effective control of the concerned operator. It would be preposterous to hold that the customer or the partnering telecom operator was conferred with control over a process or equipment. As has been consistently held by our Courts and Tribunals, the mere enjoyment of a service or facility does not constitute a right to use. The consideration received for rendering of a service thus cannot possibly be construed as falling within the royalty provision of the DTAA. Roaming agreements have been specifically evaluated in both the OECD as well as the UN Commentaries and which have unequivocally observed that the royalty provisions are not attracted to such agreements. This since there is neither a right to use of a process which is intended to be conferred nor is there a transfer of technology or for that matter control and dominion over equipment. We thus come to the unequivocal conclusion that Article 12 is neither attracted to the OSS Agreement/GBSA nor do the concepts of process or equipment royalty have any application to the transactions in question. This since they were quintessentially concerned with the rendering of services as distinct from the grant of effective control over a process or equipment. The mere utilisation of a process or equipment in the

course of providing a service would not qualify the test of use or right to use as contemplated under Article 12 of the DTAA.

J. ARTICLE 3(2)

90. Turning then to the argument addressed on Article 3(2) of the DTAA we find that the submission quite apart from being fallacious is fundamentally flawed. It becomes pertinent to note that the said Article bids us to refer to the domestic law of one of the Contracting States in order to discern the meaning to be assigned to a particular term used in the Convention. However, Article 3(2) would be triggered only if one was seeking to find a defining term for an expression appearing in the DTAA and which has not been explicated therein. This becomes evident from that Article using the phrase "any term not defined therein". Undisputedly, royalty is a term which stands duly defined by the DTAA.

91. The other hurdle in the acceptance of the broad submission which was advanced in this respect by Mr. Chawla arises when we bear in consideration that Article 3(2) does not envisage a heedless or wholesale adoption or importation of domestic legislation. This since resort to domestic legislation is itself hedged by the Article stipulating that such a course could be adopted provided the context does not dictate otherwise. In our considered opinion, while it is now universally acknowledged that the theory of ambulatory reference would apply to treaty interpretation, the same cannot be countenanced as empowering a Contracting State to undertake a wholesome amendment to basic and fundamental concepts which stand embodied in the Treaty and constitute the foundational understanding of the two Contracting States. If the aforesaid fetter were to be totally

disregarded, it would go against the very grain of the principles of reciprocity and permanency of commitment. While the ambulatory approach bids us to bear in consideration contemporary developments to sustain relevancy of Treaty provisions, it is not intended to fundamentally alter the essential bargain struck by parties. We find ourselves unable to acknowledge the precept of ambulatory reference as sanctioning an expansion of the subject matters of taxation and that too based solely upon amendments introduced in domestic legislation. Unilateral amendments which travel beyond explaining an obscure or doubtful expression appearing in a convention and which enlarge or broaden the scope of taxation itself would clearly not fall within the permissible scope of this rule of interpretation. It becomes important to bear in mind the words of caution that were entered in the *New Skies* decision with it being pertinently observed that amendments in the domestic law attempting to restrict or expand definitions in that statute cannot axiomatically extend to the DTAA provision.

92. We also take note of the the Commentary on the UN Model Convention which adopts the position articulated by the OECD as would be evident from a reading of the following explanation appearing therein:-

> "**12.** <u>Two modifications made in 1995 to paragraph 2 of the OECD Model were also made to this Model in 1999. First, the paragraph was amended to make it explicit that when the domestic law of a Contracting State is referred to in order to determine the meaning of terms that are not defined in the treaty, the relevant domestic law is that in force at the time of the application of the treaty rather than at the time the treaty was signed</u>. The second modification clarified that the reference to the domestic law is not restricted to the domestic tax laws but, in case of variations in the meaning given to a term under different domestic laws, the meaning that prevails is that given to the term for the purposes of the laws imposing the taxes to which the Convention applies. The Committee considers that the following

part of the Commentary on Article 3 of the 2017 OECD Model Tax Convention, which explains these two modifications, is applicable to paragraph 2 of Article 3 of the United Nations Model Tax Convention (the modifications that appear in italics between square brackets, which are not part of the Commentary on the OECD Model Tax Convention, have been inserted in order to provide additional explanations or to reflect the differences between the provisions of the OECD Model Tax Convention and those of this Model):

> 11. This paragraph provides a general rule of interpretation for terms used in the Convention but not defined therein. However, the question arises which legislation must be referred to in order to determine the meaning of terms not defined in the Convention, the choice being between the legislation in force when the Convention was signed or that in force when the Convention is being applied, i.e. when the tax is imposed. *[It was]* concluded that the latter interpretation should prevail, and in 1995 *[the OECD Model Tax Convention was]* amended *[…]* to make this point explicitly.
>
> 12. <u>However, paragraph 2 specifies that the domestic law meaning of an undefined term applies only if the context does not require an alternative interpretation […] The context is determined in particular by the intention of the Contracting States when signing the Convention as well as the meaning given to the term in question in the legislation of the other Contracting State (an implicit reference to the principle of reciprocity on which the Convention is based). The wording of the Article therefore allows the competent authorities some leeway.</u>
>
> 13. <u>Consequently, the wording of paragraph 2 provides a satisfactory balance between, on the one hand, the need to ensure the permanency of commitments entered into by States when signing a convention (since a State should not be allowed to make a convention partially inoperative by amending afterwards in its domestic law the scope of terms not defined in the Convention) and, on the other hand, the need to be able to apply the Convention in a convenient and practical way over time (the need to refer to outdated concepts should be avoided).</u>
>
> 13.1 Paragraph 2 was amended in 1995 to conform its text more closely to the general and consistent understanding of member states. For purposes of paragraph 2, the meaning of any term not defined in the Convention may be ascertained by reference to the meaning it has for the

purpose of any relevant provision of the domestic law of a Contracting State, whether or not a tax law. However, where a term is defined differently for the purposes of different laws of a Contracting State, the meaning given to that term for purposes of the laws imposing the taxes to which the Convention applies shall prevail over all others, including those given for the purposes of other tax laws.

93. The scope of Article 3(2) was explained by the Court in *New Skies Satellite* as would be evident from the following observations appearing in that decision:-

> "**45.** At the very outset, it should be understood that it is not as if the double taxation avoidance agreements completely prohibit reliance on domestic law. Under these, a reference is made to the domestic law of the Contracting States. Article 3(2) of both double taxation avoidance agreements state that in the course of application of the treaty, any term not defined in the treaty, shall, have the meaning which is imputed to it in the laws in force in that State relating to the taxes which are the subject of the Convention.
>
> …………………
>
> The treaties therefore, create a bifurcation between those terms, which have been defined by them (i.e the concerned treaty), and those, which remain undefined. It is in the latter instance that domestic law shall mandatorily supply the import to be given to the word in question. In the former case however, the words in the treaty will be controlled by the definitions of those words in the treaty if they are so provided.
>
> **46.** Though this has been the general rule, much discussion has also taken place on whether an interpretation given to a treaty alters with a transformation in, or amendments in, domestic law of one of the State parties. At any given point, does a reference to the treaty point to the law of the Contracting States at the time the treaty was concluded, or relate to the law of the States as existing at the time of the reference to the treaty ? The former is the "static" approach while the latter is called the "ambulatory" approach. One opportunity for a State to ease its obligations under a tax convention comes from the ambulatory reference to domestic law. States seeking to furtively dodge the limitations that such treaties impose, sometimes, resort to amending their domestic laws, all the while under the protection of the theory of ambulatory reference. It thereby allows itself an adjustment to broaden the scope of circumstances under which it is allowed to tax under a treaty. A convenient opportunity sometimes presents itself in the form of ambiguous technical formulations in the concerned treaty. States attempting to clarify or concretise any one of these meanings,

(unsurprisingly the one that benefits it) enact domestic legislation which subserves such purpose."

94. The Court in *New Skies Satellite* then approvingly referred to the decisions handed down by the Supreme Court of Canada as would be evident from the following passages of that decision:-

> "**47.** In this context, recently in Sanofi Pasteur Holding SA v. Department of Revenue (2013) 354 ITR 316 (AP), the Andhra Pradesh High Court discussed and subscribed to the ratio of the Supreme Court of Canada in R. v. Melford Developments Inc. 82 DTC 6281 (1982) with respect to the applicability of domestic amendments to international instruments. In R. v. Melford Developments Inc. 82 DTC 6281 (1982), the Canadian Supreme Court held that the ambulatory approach is antithetical to treaty obligations:
>
> > "There are 26 concluded and 10 proposed tax conventions, treaties or agreements between Canada and other nations of the world. If the submission of the appellant is correct, these agreements are all put in peril by any legislative action taken by Parliament with reference to the revision of the Income-tax Act. For this practical reason one finds it difficult to conclude that Parliament has left its own handiwork of 1956 in such inadvertent jeopardy. That is not to say that before the 1956 Act can be amended in substance it must be done by Parliament in an Act entitled 'An act to Amend the Act of 1956'. But neither is the converse true, that is that every tax enactment adopted for whatever purpose, might have the effect of amending one or more bilateral or multilateral tax conventions without any avowed purpose or intention so to do."
>
> **48.** In CIT v. Siemens Aktiongesellschaft (2009) 310 ITR 320 (Bom), the Bombay High Court citing R. v. Melford Developments Inc. held that (page 333 of 310 ITR):
>
> > "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.""

95. The Court ultimately held:-

"**50.** There are therefore two sets of circumstances. First, where there exists no definition of a word in issue within the double taxation avoidance agreements itself, regard is to be had to the laws in force in the jurisdiction of the State called upon to interpret the word. The Bombay High Court seems to accept the ambulatory approach in such a situation, thus allowing for successive amendments into the realm of "laws in force". We express no opinion in this regard since it is not in issue before this court. This court's finding is in the context of the second situation, where there does exist a definition of a term within the double taxation avoidance agreements. When that is the case, there is no need to refer to the laws in force in the Contracting States, especially to deduce the meaning of the definition under the double taxation avoidance agreements and the ultimate taxability of the income under the agreement. That is not to say that the court may be inconsistent in its interpretation of similar definitions. What that does imply however, is that just because there is a domestic definition similar to the one under the double taxation avoidance agreement, amendments to the domestic law, in an attempt to contour, restrict or expand the definition under its statute, cannot extend to the definition under the Double Taxation Avoidance Agreement. In other words, the domestic law remains static for the purposes of the double taxation avoidance agreement. The court in Sanofi (supra) had also held similarly (page 442 of 354 ITR):

"We are in agreement with the petitioners and in the light of our preceding analyses, discern no textual, grammatical or syntactic ambiguity in article 14(5), warranting an interpretive recourse. In the circumstances, invoking the provisions of article 3(2) by an artificial insemination of ambiguity (to accommodate an expanded meaning to the double tax avoidance agreement provision), would be contrary to good faith interpretation. A further problematic of contriving an ambiguity to unwarrantedly invite application of domestic law of a Contracting State would be that while India would interpret an undefined double taxation avoidance agreement provision according to the provisions of the Act, France could do so by reference to its tax code. As a consequence, the purpose of entering into a treaty with a view to avoiding double taxation of cross-border transactions would be frustrated."

51. Pertinently, this court in DIT v. Nokia Networks OY (2013) 358 ITR 259 (Delhi) specifically dealt with the question of the effect of amendments to domestic law and the manner of their operation on parallel treaties. The court delivered its judgment in the context of the very amendments that are in question today ; the Explanations to section 9(1)(vi) vis a vis the interpretation of a double taxation avoidance agreement. This court rejected that any amendment could change the situation and render the service or activity taxable, in the following observations (page 281 ITR 358 ITR):

> "He, thus submitted that the question of 'copyrighted article' or actual copyright does not arise in the context of software both in the double taxation avoidance agreement and in the Income-tax Act since the right to use simpliciter of a software program itself is a part of the copyright in the software irrespective of whether or not a further right to make copies is granted. The decision of the Delhi Bench of the Income-tax Appellate Tribunal has dealt with this aspect in its judgment in Gracemac Corporation v. Asst. DIT [2010] 134 TTJ (Delhi)257 ; (2011) 8 ITR (Trib) 522 (Delhi) pointing out that even software bought off the shelf, does not constitute a 'copyrighted article' as sought to be made out by the Special Bench of the Income-tax Appellate Tribunal in the present case. However, the above argument misses the vital point namely 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 v. Siemens Aktiongesellschaft (2009) 310 ITR 320 (Bom) that the amendments cannot be read into the treaty. On the wording of the treaty, we have already held in Ericsson A. B. (2012) 343 ITR 470 (Delhi) that a copyrighted article does not fall within the purview of royalty. Therefore, we decide question of law Nos. 1 and 2 in favour of the assessee and against the Revenue."

52. Thus, an interpretive exercise by Parliament cannot be taken so far as to control the meaning of a word expressly defined in a treaty. Parliament, supreme as it may be, is not equipped, with the power to amend a treaty. It is certainly true that law laid down by Parliament in our domestic context, even if it were in violation of treaty principles, is to be given effect to ; but where the State unilaterally seeks to amend a treaty through its Legislature, the situation becomes one quite different from when it breaches the treaty. In the latter case, while internationally condemnable, the State's power to breach very much exists; courts in India have no jurisdiction in the matter, because in the absence of enactment through appropriate legislation in accordance with article 253 of the Constitution, courts do not possess any power to pronounce on the power of the State to enact a law contrary to its treaty obligations. The domestic courts, in other words, are not empowered to legally strike down such action, as they cannot dictate the executive action of the State in the context of an international treaty, unless of course, the Constitution enables them to. That being said, the amendment to a treaty is not on the same footing. Parliament is simply not equipped with the power to, through domestic law, change the terms of a treaty. A treaty to begin with, is not drafted by Parliament; it is an act of the executive. Logically therefore, the executive cannot employ an amendment within the domestic laws of the State to imply an amendment within the treaty. Moreover, a treaty of this nature is a carefully negotiated economic bargain between two States. No one party to the treaty can ascribe to itself the power to unilaterally change the terms of the treaty and annul this economic bargain. It may decide to not follow the treaty, it may chose to renege from its obligations under it and exit it, but it cannot amend the treaty, especially by employing domestic law. The principle is reciprocal. Every treaty entered into be the Indian State, unless self-executory, becomes operative within the State once Parliament passes a law to such effect, which governs the relationship between the treaty terms and the other laws of the State. It then becomes part of the general conspectus of domestic law. Now, if an amendment were to be effected to the terms of such treaty, unless the existing operationalising domestic law states that such amendments are to become automatically applicable, Parliament will have to by either a separate law, or through an amendment to the original law, make the amendment effective. Similarly, amendments to domestic law cannot be read into treaty provisions without amending the treaty itself. ”

K. SUMMATION

96. In our considered opinion, the aforesaid enunciation of the legal position in *New Skies Satellite* constitutes a resounding negation of the submission that was addressed based on Article 3(2) of the DTAA. The ancillary argument relating to the DTAA having not defined the word “process” must consequently and for reasons aforenoted suffer a similar fate. All that need be additionally observed is that the broad intent of the amendments comprised in Explanation 6 would not override the use and the right to use tests which form the bedrock of

the royalty Article comprised in the DTAA. In any event, the essay of Explanation 6 cannot be interpreted in a manner which would essentially amount to a reintroduction of Section 9(1)(vi) yet again through a secretive back door.

97. Of equal significance are the doubts which were expressed in respect of the amendments which were introduced in Section 9 and which was sought to be described to be clarificatory of the statutory position. Section 9(1)(vi) speaks of situations where income by way of "royalty" would be deemed to have accrued or arisen in India. Explanation 2 of Section 9(1)(vi) while defining the word "royalty" in Clause (i), provides for taxation of consideration received for 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 trademark for similar property). In clause (iii), the word "royalty" is conferred a further expansive meaning, extending its coverage to the use of any patent, invention, model, design, secret formula or process.

98. Explanation 6 of Section 9(1)(vi) stipulates by way of a purported clarification that the expression "process" would include and shall be deemed to have always included transmission by satellite, cable, optic fibre or by any other similar technology irrespective of whether or no such process was secret. It becomes pertinent to note that the Court in *Asia Satellite* while explaining the phrase 'secret formula' or 'process' had made the following pertinent observations:-

> "**55.** Keeping in view the aforesaid principles, we now embark upon the interpretative process in defining the ambit and scope of the term "royalty" appearing in Explanation 2 to clause (vi) of section 9(1) of the Act. Clause (i) deals with the transfer of all or any rights (including the granting of a licence) in respect of a patent, etc. Thus, what this clause envisages is the transfer of "rights in respect of

property" and not transfer of "right in the property". The two transfers are distinct and have different legal effects. In the first category, the rights are purchased which enable the use of those rights, while in the second category, no purchase is involved, only right to use has been granted. Ownership denotes the relationship between a person and an object forming the subject-matter of his ownership. It consists of a bundle of rights, all of which are rights in rem, being good against the entire world and not merely against a specific person and such rights are indeterminate in duration and residuary in character as held by the Supreme Court in the case of Swadesh Ranjan Sinha v. Hardeb Banerjee, AIR 1992 SC 1590. When rights in respect of a property are transferred and not the rights in the property, there is no transfer of the rights in rem which may be good against the world but not against the transferor. In that case, the transferee does not have the rights which are indeterminate in duration and residuary in character. Lump sum consideration is not decisive of the matter. That sum may be agreed for the transfer of one right, two rights and so on all the rights but not the ownership. Thus, the definition of the term "royalty" in respect of the copyright, literary, artistic or scientific work, patent, invention, process, etc. does not extend to the outright purchase of the right to use an asset. In case of royalty, the ownership on the property or right remains with the owner and the transferee is permitted to use the right in respect of such property. A payment for the absolute assignment and ownership of rights transferred is not a payment for the use of something belonging to another party and, therefore, no royalty. In an outright transfer to be treated as sale of property as opposed to licence, alienation of all rights in the property is necessary.

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68. We are inclined to agree with the argument of the learned senior counsel for the appellant that in the present case, control of the satellite or the transponder always remains with the appellant. We may also observe at this stage that the terms "lease of transponder capacity", "lessor", "lessee" and "rental" used in the agreement would not be the determinative factors. It is the substance of the agreement which is to be seen. When we go through the various clauses of the said agreement, it becomes clear that the control always remained with the appellant and the appellant had merely given access to a broadband available with the transponder, to particular customers. We may also point out that against the decision of the Authority for Advance Rulings in ISRO case (2008) 307 ITR 59, special leave petition was dismissed by the Supreme Court (see Puran Singh Sahni v. SundariBhagwandasKripalani (1991) 2 SCC 180).

69. We may also refer to the following distinction brought out by the Karnataka High Court between leasing out of equipment and the use of equipment by its customer. This was done in the case of Lakshmi Audio Visual Inc. v. Asst. CCT 124 STC 426 (Karn) in the following terms (page 433):

> "9. Thus if the transaction is one of leasing/hiring/letting Simpliciter under which the possession of the goods, i.e., effective and general control of the goods is to be given to the customer and the customer has the freedom and choice of selecting the manner, time and nature of use and enjoyment, though within the frame work of the agreement, then it would be a transfer of the right to use the goods and fall under the extended definition of 'sale'. On the other hand, if the customer entrusts to the assessee the work of achieving a certain desired result and that involves the use of goods belonging to the assessee and rendering of several other services and the goods used by the assessee to achieve the desired result continue to be in the effective and general control of the assessee, then, the transaction will not be a transfer of the right to use goods falling within the extended definition of 'sale'. Let me now clarify the position further, with an illustration which is a variation of the illustration used by the Andhra Pradesh High Court in the case of RashtriyaIspat Nigam Ltd. v. CTO 77 STC 182 (AP).
>
> Illustration:
>
> (i) A customer engages a carrier (transport operator) to transport one consignment (a full lorry load) from place A to B, for an agreed consideration which is called freight charges or lorry hire. The carrier sends its lorry to the customer's depot, picks up the consignment and proceeds to the destination for delivery of the consignment. The lorry is used exclusively for the customer's consignment from the time of loading, to the time of unloading at destination. Can it be said that right to use of the lorry has been transferred by the carrier to the customer? The answer is obviously in the negative, as there is no transfer of the 'use of the lorry' for the following reasons : (i) the lorry is never in the control, let alone effective control of the customer ; (ii)the carrier decides how, when and where the lorry moves to the destination, and continues to be in effective control of the lorry ; (iii)the carrier can at any point (of time or place) transfer the consignment in the lorry to another lorry ; or the carrier may unload the consignment en-route in any of his godowns, to be picked up later by some other lorry assigned by the carrier for further transportation and delivery at destination.

> (ii) On the other hand, let us consider the case of a customer (say a factory) entering into a contract with the transport operator, under which the transport operator has to provide a lorry to the customer, between the hours 8.00 a.m. to 8.00 p.m. at the customer's factory for its use, at a fixed hire per day or hire per km subject to an assured minimum, for a period of one month or one week or even one day ; and under the contract, the transport operator is responsible for making repairs apart from providing a driver to drive the lorry and filling the vehicle with diesel for running the lorry. The transaction involves an identified vehicle belonging to the transport operator being delivered to the customer and the customer is given the exclusive and effective control of the vehicle to be used in any manner as it deems fit ; and during the period when the lorry is with the customer, the transport operator has no control over it. The transport operator renders no other service to the customer. Therefore, the transaction involves transfer of right to use the lorry and thus be a deemed sale."

70. The argument was addressed on the meaning which is assigned to the term "royalty" occurring in clause (iii) of Explanation 2. The learned counsel for the appellant had argued that the doctrine of noscitur a sociis would apply and the process should be treated as item of intellectual property. On this it was argued that the process employed in the transponder of a satellite, i.e., changing of frequency and amplifying the signal, is not at all an item of intellectual property. Though there appears to be some force in this argument, it is not necessary to answer it conclusively. The fact remains that there is no use of "process" by the television channels. Moreover, no such purported use has taken place in India. It is stated at the cost of repetition that the telecast companies/customers are situated outside India and so is the appellant. Even the agreements are executed abroad under which the services are provided by the appellant to its customers. The transponder is in the orbit. Merely because it has its footprint on various continents would not mean that the process has taken place in India. This aspect now stands concluded by the Supreme Court in the case of Ishikawajima-Harima Heavy Industries Ltd. v. DIT (2007) 288 ITR 408. In that case, the appellant, a non-resident company incorporated in Japan, along with five other enterprises formed a consortium. The consortium was awarded by Petronet a turnkey project for setting up a liquefied natural gas (LNG) receiving, storage and regasification facility in Gujarat. The contract specified the role and responsibility of each member of the consortium and the consideration to be paid separately for the respective work of each member. The appellant was to develop, design, engineer, procure equipment, materials and supplies to erect and construct storage tanks including marine facility (jetty and island breakwater) for transmission and supply of LNG to purchasers, to test and commission the facilities, etc. The contract involved : (i) offshore supply, (ii) offshore services, (iii) onshore supply, (iv)onshore services and (v) construction and erection. The price for offshore supply and offshore services was payable in US dollars, that for onshore supply and onshore services and construction and erection partly in US dollars and partly in Indian rupees. The payment for offshore supply of equipment and materials supplied from outside India was received by the appellant by credit to a bank account in Tokyo and the property in the goods passed to Petronet on the high seas outside India. Though the appellant unloaded the goods, cleared them from customs and transported them to the site, it was for and on behalf of Petronet and the expenditure including the customs duty was reimbursed to it. The price of offshore services for design and engineering including detailed engineering in relation to the supplies, services and construction and erection and the cost of any other services to be rendered from outside India, was also paid in US dollars in Tokyo. On these facts the appellant applied to the Authority for Advance Rulings (Income-tax) for a ruling on the following points:

(a) Whether the amounts received/receivable by the appellant from Petronet for offshore supply of equipment, materials, etc., were liable to tax in India under the provisions of the Income-tax Act, 1961, and the Double Taxation Avoidance Convention between India and Japan ;

(b) Whether the amounts received/receivable form Petronet for offshore services were chargeable to tax in India under the Act and the Convention; and

(c) Would the appellant be able to claim deduction for expenses incurred in computing the income from offshore services.

The Authority ruled:

(i) That though property in the goods passed to Petronet while the goods were on the high seas, and in so far as the activities of the appellant for taking delivery of the goods from the ship, payment of customs duty and transportation of the goods to the site were concerned, these facts did not militate against the property in the goods passing to the appellant. In connection with the offshore supply, certain operations were inextricably interlinked in India, such as, signing of the contract in India which imposed liability on the appellant to procure equipment and machinery in India and receiving, unloading, storing and transporting, paying demurrage and other incidental charges on account of delay in clearance. The price of the goods covered not only their price but also of all these operations which were carried out in India and from which income accrued to the appellant. Therefore, income accrued to the appellant from the offshore supply through business connection in India and some operations of the business were carried out in India. Profits were deemed to accrue/arise in India would be only such part of the profits as was reasonably attributable to the operation carried out in India.

(ii) That having regard to article 7(1) of the Convention For Avoidance of Double Taxation and Fiscal Evasion with respect to taxes on income between India and Japan (1990) 182 ITR (St.) 380, 407, read with paragraph 6 of the Protocol supply of equipment or machinery (sale of which was completed around, the order having been placed directly by the overseas office of the enterprise) would be within the meaning of the phrase "directly or indirectly attributable to that permanent establishment" and, therefore, so much of the amount received or receivable by the appellant as was directly or indirectly attributable to the permanent establishment as postulated in paragraph 6 of the Protocol would be taxable in India. The price of the offshore services would be deemed to accrue or arise under section 9(1)(vii) of the Income-tax Act, 1961. And inasmuch as fees for technical services were specifically provided in article 12 of the Convention, they would not fall under article 7. Therefore, the price of the offshore services was taxable in India under the Act as well as the Convention.

(iii) That, however, in view of section 115A(1)(b)(B) of the Act and article 12(2) of the Convention, tax was payable at the fixed rate of 20 per cent of the gross amount of fees for technical services and the applicant would not be able to claim any deduction from the gross amount.

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74. Even when we look into the matter from the standpoint of Double Taxation Avoidance Agreement (DTAA), the case of the appellant gets a boost. The Organisation of Economic Co-operation and Development (OECD) has framed a model of Double Taxation Avoidance Agreement (DTAA)
entered into by India are based. Article 12 of the said model DTAA contains a definition of "royalty" which is in all material respects virtually the same as the definition of "royalty" contained in clause (iii) of Explanation 2 to section 9(1)(vi) of the Act. This fact is also not in dispute. The learned counsel for the appellant had relied upon the commentary issued by the OECD on the aforesaid model DTAA and particularly, referred to the following amendment proposed by the OECD to its commentary on article 12, which reads as under:

"9.1 Satellite operators and their customers (including broadcasting and telecommunication enterprises) frequently enter into 'transponder leasing' agreements under which the satellite operator allows the customer to utilize the capacity of a satellite transponder to transmit over large geographical areas. Payments made by customers under typical 'transponder leasing' agreements are made for the use of the transponder transmitting capacity and will not constitute royalties under the definition of paragraph 2 : these payments are not made in consideration for the use of, or right to use, property, or for information, that is referred to in the definition (they cannot be viewed, for instance, as payments for information or for the use of, or right to use, a secret process since the satellite technology is not transferred to the customer). As regards treaties that include the leasing of industrial, commercial or scientific (ICS) equipment in the definition of royalties, the characterization of the payment will depend to a large extent on the relevant contractual arrangements. Whilst the relevant contracts often refer to the 'lease' of a transponder, in most cases the customer does not acquire the physical possession of the transponder but simply its transmission capacity: the satellite is operated by the lessor and the lessee has no access to the transponder that has been assigned to it. In such cases, the payments made by the customers would therefore be in the nature of payments for services, to which article 7 applies, rather than payments for the use, or right to use, ICS equipment. A different, but much less frequent, transaction would be where the owner of the satellite leases it to another party so that the latter may operate it and either use it for its own purposes or offer its data transmission capacity to third parties. In such a case, the payment made by the satellite operator to the satellite owner could well be considered as a payment for the leasing of industrial, commercial or scientific equipment. Similar considerations apply to payments made to lease or purchase the capacity of cables for the transmission of electrical power or communities (e.g. through a contract granting an indefeasible right of use of such capacity) or pipelines (e.g. for the transportation of gas or oil)." ”

99. It appears that an identical argument, namely, of Explanations 2 and 6 of Section 9(1)(vi) eclipsing or at least being liable to be read as influencing the concept of royalty under the DTAA came to be raised

yet again in *New Skies Satellite*. While dealing with the aforesaid, the Court had observed as follows:-

> "**36.** A clarificatory amendment presumes the existence of a provision the language of which is obscure, ambiguous, may have made an obvious omission, or is capable of more than one meaning. In such case, a subsequent provision dealing with the same subject may throw light upon it. Yet, it is not every time that the Legislature characterises an amendment as retrospective that the court will give such effect to it. This is not in derogation of the express words of the law in question, (which as a matter of course must be the first to be given effect to), but because the law which was intended to be given retrospective effect to as a clarificatory amendment, is in its true nature one that expands the scope of the section it seeks to clarify, and resultantly introduces new principles, upon which liabilities might arise. Such amendments though framed as clarificatory, are in fact transformative substantive amendments, and incapable of being given retrospective effect. In R. Rajagopal Reddy v. Padmini Chandrasekharan (1995) 213 ITR 340 (SC) ; (1995) 2 SCC 630, it was held that the use of the words "it is declared" is not conclusive that the Act is declaratory because it may be used to introduce new rules of law. If the amendment changes the law it is not presumed to be retrospective irrespective of the fact that the phrase used is "it is declared" or "for the removal of doubts". In determining, therefore, the nature of the Act, regard must be had to the substance rather than to form. While adjudging whether an amendment was clarificatory or substantive in nature, and whether it will have retrospective effect or not, it was held in CIT v. Gold Coin Health Food (P.) Ltd. (2008) 304 ITR 308 (SC) ; (2008) 9 SCC 622 and CIT v. Podar Cement (P.) Ltd. [1997] 226 ITR625 (SC) ; (1997) 5 SCC 482 that, (i) the circumstances under which the amendment was brought in existence, (ii) the consequences of the amendment, and (iii) the scheme of the statute prior and subsequent to the amendment will have to be taken note of.
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> **37.** An important question, which arises in this context, is whether a "clarificatory" amendment remains true to its nature when it purports to annul, or has the undeniable effect of annulling, an interpretation given by the courts to the term sought to be clarified. In other words, does the rule against clarificatory amendments laying down new principles of law extend to situations where law had been judicially interpreted and the Legislature seeks to overcome it by declaring that the law in question was never meant to have the import given to it by the court ? The general position of the courts in this regard is where the purpose of a special interpretive statute is to correct a judicial interpretation of a prior law, which the Legislature considers inaccurate, the effect is prospective. Any other result would make

the Legislature a court of last resort. United States v. Gilmore 8 Wall (75 US) 330, 19 L Ed 396 (1869), Peony Park v. O'Malley 223 F.2d 668 (8th Cir. 1955). It does not mean that the Legislature does not have the power to override the judicial decisions which in its opinion it deems as incorrect, however to respect the separation of legal powers and to avoid making a Legislature a court of last resort, the amendments can be made prospective only (Ref. County of Sacramento v. State of California 134 Cal. App. 3d 428, In re, Marriage of Davies, In re 105 Ill App 3d 661 [1982]).

38. The circumstances in this case could very well go to show that the amendment was no more than an exercise in undoing an interpretation of the court which removed income from data transmission services from taxability under section 9(1)(vi). It would also be difficult, if not impossible to argue, that inclusion of a certain specific category of services or payments within the ambit of a definition alludes not to an attempt to illuminate or clarify a perceived ambiguity or obscurity as to interpretation of the definition itself, but towards enlarging its scope. Predicated upon this, the retrospectivity of the amendment could well be a contentious issue. Be that as it may, this court is disinclined to conclusively determine or record a finding as to whether the amendment to section 9(1)(vi) is indeed merely clarificatory as the Revenue suggests it is, or prospective, given what its nature may truly be. The issue of taxability of the income of the assessees in this case may be resolved without redressal of the above question purely because the assessee has not pressed this line of arguments before the court and has instead stated that even if it were to be assumed that the contention of the Revenue is correct, the ultimate taxability of this income shall rest on the interpretation of the terms of the double taxation avoidance agreements. Learned Counsel for the assessee has therefore contended that even if the first question is answered in favour of the Revenue, the income shall nevertheless escape the Act by reason of the double taxation avoidance agreement. The court therefore proceeds with the assumption that the amendment is retrospective and the income is taxable under the Act.

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40. In Asia Satellite the court, while interpreting the definition of royalty under the Act, placed reliance on the definition in the OECD Model Convention. Similar cases, before the tax tribunals through the nation, even while disagreeing on the ultimate import of the definition of the word royalty in the context of data transmission services, systematically and without exception, have treated the two definitions as parimateria. This court cannot take a different view, nor is inclined to disagree with this approach for it is imperative that definitions that are similarly worded be interpreted similarly in order to avoid incongruity between the two. This is, of course, unless law mandates that they be treated differently. The Finance Act of 2012 has now, as observed earlier, introduced Explanations 4, 5, and 6 to the section 9(1)(vi). The question is therefore, whether in an attempt to interpret the two definitions uniformly, i.e. the domestic definition and the treaty definition, the amendments will have to be read into the treaty as well. In essence, will the interpretation given to the double taxation avoidance agreement fluctuate with successive Finance Act amendments, whether retrospective or prospective ? The Revenue argues that it must, while the assessees argue to the contrary. This court is inclined to uphold the contention of the latter.

41. This court is of the view that no amendment to the Act, whether retrospective or prospective can be read in a manner so as to extend in operation to the terms of an international treaty. In other words, a clarificatory or declaratory amendment, much less one which may seek to overcome an unwelcome judicial interpretation of law, cannot be allowed to have the same retroactive effect on an international instrument effected between two sovereign states prior to such amendment. In the context of international law, while not every attempt to subvert the obligations under the treaty is a breach, it is nevertheless a failure to give effect to the intended trajectory of the treaty. Employing interpretive amendments in domestic law as a means to imply contoured effects in the enforcement of treaties is one such attempt, which falls just short of a breach, but is nevertheless, in the opinion of this court, indefensible."

100. Proceeding then to deal with the expression "process" specifically, the Court rendered the following pertinent observations:-

"**54.** Neither can an act of Parliament supply or alter the boundaries of the definition under article 12 of the Double Taxation Avoidance Agreement by supplying redundancy to any part of it. This becomes especially important in the context of Explanation 6, which states that whether the 'process' is secret or not is immaterial, the income from the use of such process is taxable, none the less. Explanation 6 precipitated from confusion on the question of whether it was vital that the "process" used must be secret or not. This confusion was brought about by a difference in the punctuation of the definitions in the double taxation avoidance agreements and the domestic definition. For greater clarity and to illustrate this difference, we reproduce the definitions of royalty across both double taxation avoidance agreements and clause (iii) to Explanation 2 to 9(1)(vi).

Article 12(3), Indo-Thai Double Taxation Avoidance Agreement:

"3. The term 'royalties' as used in this article means payments of any kind received as a consideration for the alienation or the use of, or the right to use, any copyright of literary, artistic or scientific work (including cinematograph films, phonographic records and films or tapes for radio or television broadcasting), any patent, trade mark, design or model, plan, secret formula or process, or for the use of, or the right to use industrial, commercial or scientific equipment, or for information concerning industrial, commercial or scientific experience." (emphasis supplied)

Article 12(4), Indo-Netherlands Double Taxation Avoidance Agreement:

"4. 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, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience." (emphasis supplied)

Section 9(1)(vi), Explanation 2, Income-tax Act, 1961

"(iii) the use of any patent, invention, model, design, secret formula or process or trade mark or similar property ;" (emphasis1 supplied)

55. The slight but apparently vital difference between the definitions under the double taxation avoidance agreements and the domestic definition is the presence of a comma following the word process in the former. In the initial determinations before various Income-tax Appellate Tribunals across the country, much discussion took place on the implications of the presence or absence of the "comma". A lot has been said about the relevance or otherwise of punctuation in the context of statutory construction. In spoken English, it would be unwise to argue against the importance of punctuation, where the placement of commas is notorious for diametrically opposite implications. However in the realm of statutory interpretation, courts are circumspect in allowing punctuation to dictate the meaning of the provisions. Judge Caldwell once famously said "The words control the punctuation marks, and not the punctuation marks the words." Holmes v. Pheonix Insurance Co. 98 F 240 (1899). It has been held in CGT v. BudurThippaiah (1976) 103 ITR 189 (AP) and Hindustan Construction Co. Ltd. v. CIT (1994) 208 ITR 291 (Bom) that while punctuation may assist in arriving at the correct construction, yet it cannot control the clear meaning of a statutory provision. It is but, a minor element in the construction of a statute, Hindustan Construction Co. Ltd.

xxxx **xxxx** **xxxx**

58. Nevertheless, whether or not punctuation plays an important part in the statute interpretation, the construction Parliament gives to such punctuation, or in this case, the irrelevancy that it imputes to it, cannot be carried over to an international instrument where such comma may or may not have been evidence of a deliberate inclusion to influence the reading of the section. There is sufficient evidence for us to conclude that the process referred to in article 12 must in fact be a secret process and was always meant to be such. In any event, the precincts of Indian law may not dictate such conclusion. That conclusion must be the result of an interpretation of the words employed in the law and the treatises, and discussions that are applicable and specially formulated for the purpose of that definition. The following extract from Asia Satellite takes note of the OECD Commentary and Klaus Vogel on Double Taxation Conventions, to show that the process must in fact be secret and that specifically, income from data transmission services do not partake of the nature of royalty (page 391 of 332 ITR):

> "Even when we look into the matter from the standpoint of double taxation avoidance agreement (DTAA), the case of the appellant gets boost. The Organisation of Economic Co-operation and Development (OECD) has framed a model of Double Taxation Avoidance Agreement (DTAA) entered into by India are based. Article 12 of the said model double taxation avoidance agreement contains a definition of royalty which is in all material respects virtually the same as the definition of 'royalty' contained in clause (iii) of Explanation 2 to section 9(1)(vi) of the Act. This fact is also not in dispute. The learned counsel for the appellant had relied upon the commentary issued by the OECD on the aforesaid model double taxation avoidance agreements and particularly, referred to the following amendment proposed by the OECD to its commentary on article 12, which reads as under:
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> > '9.1 Satellite operators and their customers (including broadcasting and telecommunication enterprises) frequently enter into transponder leasing agreements under which the satellite operator allows the customer to utilize the capacity of a satellite transponder to transmit over large geographical areas. Payments made by customers under typical transponder leasing agreements are made for the use of the transponder transmitting capacity and will not constitute royalties under the definition of paragraph 2 ; these payments are not made in consideration for the use of, or right to use, property, or for information, that is referred to in the definition (they cannot be viewed, for instance, as payments for information or for the use of, or

right to use, a secret process since the satellite technology is not transferred to the customer). As regards treaties that include the leasing of industrial, commercial or scientific (ICS) equipment in the definition of royalties, the characterization of the payment will depend to a large extent on the relevant contractual arrangements. Whilst the relevant contracts often refer to the lease of a transponder, in most cases the customer does not acquire the physical possession of the transponder but simply its transmission capacity: the satellite is operated by the lessor and the lessee has no access to the transponder that has been assigned to it. In such cases, the payments made by the customers would therefore be in the nature of payments for services, to which article 7 applies, rather than payments for the use, or right to use, industrial, commercial or scientific equipment. A different, but much less frequent, transaction would be where the owner of the satellite leases it to another party so that the latter may operate it and either use it for its own purposes or offer its data transmission capacity to third parties. In such a case, the payment made by the satellite operator to the satellite owner could well be considered as a payment for the leasing of industrial, commercial or scientific equipment. Similar considerations apply to payments made to lease or purchase the capacity of cables for the transmission of electrical power or communities (e.g., through a contract granting an indefeasible right of use of such capacity) or pipelines (e.g. for the transportation of gas or oil).'

Much reliance was placed upon the commentary written by Klaus Vogel on Double Taxation Conventions (3rd Edition)'. It is recorded therein:

'The use of a satellite is a service, not a rental (thus correctly, Rabe, A., 38 RIW 135 (1992), on Germany's Double Taxation Convention with Luxembourg) ; this would not be the case only in the event the entire direction and control over the satellite, such as its piloting or steering, etc. were transferred to the user.'

Klaus Vogel has also made a distinction between letting an asset and use of the asset by the owner for providing services as below:

'On the other hand, another distinction to be made is letting the proprietary right, experience, etc., on the one hand and use of it by the licensor himself, e.g., within the framework of an advisory activity. Within the range from services', viz. outright transfer of the asset involved (right, etc.) to the payer of the royalty. The other, just as clear-cut extreme is the exercise by the payee of activities in the service of the payer, activities for which the payee uses his own proprietary rights, know-how, etc., while not letting or transferring them to the payer.'

The Tribunal has discarded the aforesaid commentary of OECD as well as Klaus Vogel only on the ground that it is not safe to rely upon the same. However, what is ignored is that when the technical terms used in the double tax avoidance agreements are the same which appear in section 9(1)(vi), for better understanding all these very terms, OECD commentary can always be relied upon. The apex court has emphasized so in number of judgments clearly holding that the well-settled internationally accepted meaning and interpretation placed on identical or similar terms employed in various double taxation avoidance agreement should be followed by the courts in India when it comes to construing similar terms occurring in the Indian Income-tax Act. ..
There are judgments of other High Courts also to the same effect.
(a) CIT v. Ahmedabad Manufacturing and Calico Printing Co. (1983) 139 ITR 806 (Guj) at pages 820-822.
(b) CIT v. Visakhapatnam Port Trust (1983) 144 ITR 146 (AP) at pages 156-157.
(c) N. V. Philips v. CIT (No. 1) (1988) 172 ITR 521 (Cal) at pages 527 and 538-539.""

101. The Court ultimately held as under:-

"**60.** Consequently, since we have held that the Finance Act, 2012 will not affect article 12 of the double taxation avoidance agreement, it would follow that the first determinative interpretation given to the word "royalty" in Asia Satellite, when the definitions were in fact parimateria (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 taxation avoidance agreement, unless the said double taxation avoidance agreement are amended jointly by both parties to incorporate income from data transmission services as partaking of the nature of royalty, or amend the definition in a manner so that such income automatically becomes royalty. It is reiterated that the court has not returned a finding on whether the amendment is in fact retrospective and applicable to cases preceding the Finance Act of 2012 where there exists no double taxation avoidance agreement. "

102. As would be evident from the above, the Court in *New Skies Satellite* while expressing 'serious doubt' as to whether the amendments could either be viewed as being clarificatory, ultimately desisted from rendering a conclusive answer to that question, since it ultimately came to hold that the amendments would have no impact on the provisions of the DTAA. The Court's conclusion in this behalf was based on it having found in law that Parliament could not be said to be empowered to amend a provision of a treaty. It was significantly observed that an act of Parliament can neither supply nor alter the boundaries of the definition under Article 12. It was also found that the Explanations could not be countenanced to be clarificatory, since they were introduced principally to overcome the basis of a verdict rendered by the Court, namely *Asia Satellite* and which had held that both "secret formula" and "process" were to be read in conjunction. It is this which appears to have weighed upon the Court to observe that the Explanations appear to have been introduced primarily to overcome binding judicial decisions. We, on an overall analysis of all of the above, find no justification to either draw a different line or doubt the correctness of the decisions handed down in *Asia Satellite* and *New Skies*.

103. We find ourselves unconvinced with the submissions addressed on this score by the appellants for the following additional reason. The amendments in Section 9 which were alluded to came to be introduced by virtue of Finance Act, 2012 with retrospective effect from 01 June 2012. It is pertinent to recall that the DTAA between Singapore and India, and with which we are concerned, originally came into force on 27 May 1994. The 3rd Protocol to that Convention came to be signed

on 30 December 2016 and which entered into force on 27 February 2017. The MLI Convention came to be signed by the two nations on 07 June 2017 and was ratified on 21 December 2018 and 25 June 2019 respectively. However, and even though Section 9 in its amended form had come to exist on the statute book, no corresponding amendments were introduced in Article 12. In fact the category of activities which are spoken of in Explanation 6 were also not included in the Hong Kong, Romania, Latvia, Malaysia and Sri Lanka Treaties which came to be enforced thereafter. A provision seeking to encompass subjects covered by Explanation 6 is however found in the DTAA pertaining to the United Mexican States. These facts further fortify the view that we have taken in respect of the Section 9 amendments.

104. On an overall conspectus of the above, we have no hesitation in holding that the issues which were sought to be canvassed on these set of appeals stand conclusively answered and settled by this Court in *Asia Satellite* and *New Skies Satellite*. Any doubt that could have been possibly harboured with respect to the amendments introduced in Section 9 stand laid to rest by virtue of the binding declaration of the law by the Supreme Court in *Engineering Analysis*. We also find ourselves unable to either discern a distinction that could be legitimately acknowledged to exist or draw a wedge between "satellite" and "telecom" cases as was suggested at the behest of the appellants. We note that the assessments in these cases was based on the decision of the Madras High Court in *Verizon* and the Special Bench of the Tribunal in *New Skies Satellite*. The latter decision no longer holds the field having been set aside by our Court in appeal.

Insofar as Verizon as an individual assessee is concerned, the issue came to be answered in its favour at least by this Court in *Verizone Communications*. Although the appellants would contend that the said decision came to be rendered on the basis of a concession made by the appellant there, as we read that order, we find that the Court appeared to be convinced that the issue in any case stood settled in light of the judgment of the Court in *New Skies Satellite* and which had by then been affirmed by the Supreme Court in *Engineering Analysis*.

105. That only leaves us to deal with the decision of the Madras High Court in *Verizon* and which constituted the sheet anchor for the appellants. The said decision firstly proceeds on the premise that the definition of royalty under the DTAA as well as the Act are *pari materia*. However, this premise clearly appears to be incorrect as is borne out from the preceding discussion. The Madras High Court then proceeded to rest its judgment principally on Section 9 and the Explanations forming part of that statutory provision. The issue of the extent to which that provision would be applicable as well as the degree to which it could influence Article 12 of the DTAA, however, does not appear to have been critically evaluated. The tenor of that decision appears to suggest that it proceeded on the basis that Section 9 undoubtedly applied. With due respect, and for reasons aforenoted, we find ourselves unable to agree with or affirm the position as struck in *Verizon*.

106. We are also of the firm opinion that even if one were to assume that Explanations 2 and 6 to Section 9 of the Act applied, the position would remain unaltered. This since there was no transfer or conferment of a right in respect of a patent, invention or process.

Customers and those availing of the services provided by Telstra were not accorded a right over the technology possessed or infrastructure by it. The underlying technology and infrastructure remained under the direct and exclusive control of Telstra. Parties availing of Telstra's services were not provided a corresponding general or effective control over any intellectual property or equipment. The agreements merely enabled them to avail of the services offered by it. Similarly, the expressions *"use"* or *"right to use"* as they appear in clauses (iii) and (iva) of Explanation 2 would have to be understood in light of the principles that we have enunciated hereinabove. A person who is provided mobile communication services or access to the internet does not stand vested with a right over a patent, invention or process. The consideration that the service recipient pays also cannot possibly be recognised as being intended to acquire a right in respect of a patent, invention, process or equipment. The word "process" being liable to be construed *ejusdem generis* is lent added credence by clause (iii) employing the expression *"or similar property"* which follows. It thus clearly appears to be intended to extend to a host of intellectual properties. This we observe only as an aside since the question raised in these appeals stands conclusively answered in any case in light of our conclusions rendered in the context of the extent of the applicability of Section 9 of the Act and the scope of Article 12 of the DTAA as explained in the preceding parts of this judgment.

L. OPERATIVE DIRECTIONS

107. Accordingly and for all the aforesaid reasons, we would answer the question posited in the negative and against the appellants. We hold that neither the concept of process nor equipment royalty stand

attracted and the consideration is thus not taxable as per Article 12 of the DTAA.

108. The appeals consequently fail and shall stand dismissed.

YASHWANT VARMA, J.

PURUSHAINDRA KUMAR KAUROV, J.

JULY 24, 2024/kk