IN THE INCOME TAX APPELLATE TRIBUNAL

DELHI BENCH 'A' : NEW DELHI

BEFORE SHRI H.S. SIDHU, JUDICIAL MEMBER

AND

SHRI J. SUDHAKAR REDDY, ACCOUNTANT MEMBER

ITA Nos. 3593 TO 3596/Del/2012
Assessment Years : 2008-09 to 2011-12

Bharti Airtel Limited, Airtel Centre International Taxation, Plot No. 16, Udyog Vihar, Phase-IV, Gurgaon – 122015 (PAN: AAACB2894G)	Vs.	ITO(TDS), Ward 1(1), New Delhi
(Appellant)		**(Respondent)**

AND

ITA Nos. 4076 TO 4079/Del/2012
Assessment Years : 2008-09 to 2011-12

ITO(TDS), Ward 1(1), International Taxation, New Delhi	vs.	Bharti Airtel Limited, Airtel Centre, Plot No. 16, Udyog Vihar, Phase IV, Gurgaon-122015
(Appellant)		**(Respondent)**

Assessee by	:	Sh. S.K. Tulsiyan, Adv., Sh. Sashi Tulsiyan, Ms. Abha Aggarwal, Adv., & Ms. Manisha Aggarwal,Adv.
Department by	:	Sh. Anuj Arora, CIT(DR)

ORDER

PER J. SUDHAKAR REDDY, AM:

These are the cross appeals against the common order passed by the Ld. CIT(A)-XXIX, New Delhi dated 21.5.2012 in Appeal No. 83 to 86/11-12 for assessment years 2008-09, 2009-10, 2010-11 & 2011-12. As issues arising in these appeals are common, for the sake convenience they were heard together and are being disposed of by this common order.

2. The brief facts of the case are:

2.1 The Assessee M/s Bharti Airtel Ltd. is a Company and is a leading Telecom Service Provider in India. It is also a Global Telecommunication Company having operations in several countries. It is engaged internationally in the business of providing Cellular Telephone Facilities to subscribers. The Department of Telecommunication, Govt. Of India has granted the License to the Assessee Company for operating it services in certain specified Circles.

The facts leading to the assessment are brought out at para no. 4.2 to 4.7 of the Ld. CIT(A)'s order at pages 7 to 9. This is below extracted for ready reference:-

> *"4.2 Earlier, in respect of domestic part of business of the assessee, DCIT, Circle 49, New Delhi, passed an order under section 201(1)/201(1A)of the Income-tax. Act, 1961 for the financial years 1995-96 to 2002-03 on 26-03-2004, holding that the payment made by the assessee to MTNL on account of interconnection charges, port/access charges was 'fees for technical services' and tax. was required to be deducted by the appellant u/s. 194J there from. Since MTNL had already filed return of income for the aforesaid financial year, declaring relevant amount received from the appellant on account of interconnection and port/access charges as income and had paid tax thereon, the DCIT, Circle 49, New Delhi did not raise any demand under section 201(1) on the appellant for the tax it had allegedly not deducted, but levied interest U/S 201 (1 A) of the Act for the alleged default in not deducting such taxes for the period of default.*
>
> *4.3 The appellant filed appeal against the order of DCIT, Circle 49, New Delhi before the CIT-(A), New Delhi. The CIT (A), relying on the decision of Hon'ble*

Madras High Court in the case of M/s Skycell Communication Ltd: 251 ITR 253, deleted the interest levied U/S 201(1A) on the ground that the interconnection/port access charges paid by the appellant to MTNL were not in the nature of "fee for technical services" under section 194J read with Explanation 2 to section 9(1)(vii) of the Act. The Revenue preferred appeal against the order of the CIT (A) before the ITAT, which was dismissed.

4.4 Thereupon, the Revenue filed appeal before the Delhi High Court. The Court while examining the scope of the definition of "fee for technical services" in Explanation 2 to section 9(1)(vii) of the Act, observed that the expression "technical services" takes colour from the expressions "managerial services" and "consultancy services" which necessarily involve a human element. Since the services rendered qua interconnection/port access did not involve any human interface, the same could not, therefore, be regarded as "technical services" as contemplated under Section 194J of the said Act. Accordingly, the Revenue's appeal was dismissed. The decision has been reported in 319 ITR 139. The Revenue assailed the order passed by the

Delhi High Court by way of Special Leave Petition (SLP) before the Supreme Court.

4.5 The Supreme Court, vide order dated 12/08/2010, in SLP No. 16452 of2009 while agreeing in principle with the aforesaid observation of the Delhi High Court regarding involvement / presence of human element in order for 'technical services' to be said to have been rendered in terms of Explanation 2 to section 9(1)(vii) of the Act, set-aside the matter and directed the ACIT(TDS), Gurgaon to decide whether the process of carriage of calls requires manual intervention or not, by examining technical experts from the side of the department, allowing opportunity to the appellant for cross examination.

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4.6 In the set aside proceedings, statements of Mr. Ashok Mittal and Mr. Tanay Krishna, from C-DOT, were recorded by the ACIT (TDS), Gurgaon on 29.09.2010. Mr. Tanay Krishna was cross-examined by the representative of the appellant on 04.10.2010.

Mr. Tanay Krishna was also re-examined on 04.10.2010 by the Department. The appellant also submitted evidence by way of opinion, dated 14.12.2010, of Mr. G.S. Grover, Ex-Member, Telecom Commission.

Subsequently, the ACIT (TDS), Gurgaon, vide order dated, 03.01.2011, held that as there was human intervention in installing, monitoring of infrastructure etc., the services provided by BSNL/ MTNL to the appellant were covered within the meaning of "technical services" and tax ought to have been deducted therefrom U/S 194J of the Act. The said order of passed by ACIT (TDS), Gurgaon is challenged by the assessee in appeal.

4.7 Pursuant to the aforesaid order, the ACIT(TDS), Gurgaon, vide letter dated 8th February, 2011, sent information to the Income-tax Officer, TDS Ward 1(1), International Taxation, New Delhi so as to examine the similar issue involved in international part of business of the assessee. On receipt of the aforesaid letter, the ITO, TDS Ward 1(1), International Taxation, New Delhi, issued show cause notice, dated 31st March, 2011, requiring the appellant to show cause as to why the appellant should not be treated as an assessee in default under section 201 (1) for failure to deduct tax at source U/S 195 of the Act in respect of inter connection charges paid by the appellant to various foreign telecom operators. The assessing officer, vide order dated 12th January, 2012, passed under section

201(1)/201(1A) of the Act, which is impugned in the present appeal, holding therein that interconnect charges paid by the appellant to foreign telecom operators were in the nature of fee for technical services under section 9(1)(vii) and alternatively, royalty for use of process under section 9(1)(vi), on which tax was deductible under section 195 of the Act and therefore the appellant was to be treated as an assessee in default under section 201(1) for failure to withhold tax under section 195 of the Act from the impugned payments."

2.2 The AO held that Inter-connect Usage Charges (hereinafter referred "IUC") paid by the Assessee to the Foreign Telecom Operator (hereinafter referred as "FTO"), in the course of carrying out its business as an International Long Distance (hereinafter referred as "ILD") Service Provider are in the nature of Fee for Technical Services ("FTS") u/s. 9(1)(vii) of the Income Tax Act, 1961 (hereinafter referred as "Act") or in the alternative, in the nature of Royalty u/s. 9(1)(vi) of the Act. Hence, he held that the income from the "IUC" is deemed to accrue to arise in India in the case of "FTO". The AO held that the Assessee Company was required to deduct tax at source from such payments u/s. 195 of the Act and for the failure to do so, the Assessee Company was liable u/s. 201 of the Act.

2.3 The reasons/grounds given by the AO for holding the amount of IUC charges, paid by the Assessee to FTO are in the nature of FTS/ royalty are mentioned in paras 6(h) of the assessment order. This para is extracted below for ready reference:-

> *"(i) The assessee company repeatedly submitted that the facility provided by other overseas service providers for international interconnection services are being provided through automatic machinery or equipments automatically but failed to counter the opinion of the experts who have categorically established the human intervention which takes place in areas right from setting up of capacity for interconnect and further in testing, commissioning of interconnect circuit, Interconnect performance standards, interconnect capacity, network interface, interconnect link architecture, configuration of system, testing, interconnect testing, pilot testing, operation and maintenance of hardware/software, supervision/monitoring the functioning of interconnect network, capacity augmentation and reconfiguration and capacity enhancement, monitoring including network monitoring, maintenance, fault identification, repair and ensuring quality of service as per interconnect agreement of interconnect network system to*

provide fault free services according to interconnect standards.

(ii) The whole process for carriage and transfer of calls from the network of one operator to another is not limited to process of carriage of calls though being an automated process undertaken by a series of highly advanced telecom network equipment. The process of interconnection is a composite process involving several aspects which requires constant human intervention to make the process of carriage of calls satisfactory and as per performance standard agreed by the two parties.

(iii) Regarding interconnection to Gateway, it is worth noting that Mobile Switching Centre (MSC) of two different operators is interconnected using any transport technology which involves wires as well as human interface for setting up. Further, it involves different phases like planning, selection of vendor, supply of hardware and software, installation as per vendor guidelines, call configuration/provisioning of system, exhaustive testing on various modes on network portion, interconnect testing and also requires support/consent of other interconnect operator. All these phases require human interventions which are mostly technical in nature.

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(iv) The explanation of the assessee company/deductor that no intervention is required in the process of carriage of calls, is totally half baked as the assessee company/deductor failed to fully appreciate that such process of carriage of calls is automatic only in case of successful calls. When a call gets connected by one operator to another, per se, it is an automatic connection but, there can be instances where there is a problem in the call connect. There may be problems due to call not reaching the destination or the voice not coming/reaching. Failure of call could be due to many reasons like failure in physical hardware, problem due to software bug, problem due to snapping of optic fiber cables etc. which requires resolution through intervention of teams of technical experts to remedy the situation and hence there is no fully automatic operation of this network. Though the carriage of calls from one network to the other network flows automatically, to make the carriage of calls successful, constant network monitoring is required to attain quality of service at Operation Maintenance Centers (QMC) which operates 24 X 7 X 365 wherein technical experts are monitoring physical equipment as well as the network. The process of monitoring-by such professionals is effectively required to provide or to avail fault free services at both ends of the OMCs of operators.

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(v) Though the 'carriage of calls' is automatic, the process of 'carriage of calls' shall not take place unless the systems are made operational or maintained or configured by the service provider at OMCs. Technical help is required to detect certain complicated faults at OMCs like hardware faults which may require change of components, cards, etc. and/or software faults for which patches/rectification of software is required. Such an intervention requires highly qualified and trained technical professional having expertise, experience and acumen in that particular area of relevant technology and is not possible by a general technician or semi skilled person.

(vi) The assessee company/deductor has been considering the issue of call carriage in isolation under process of interconnection which involves many processes, like call connect, call routing and signaling taking place in a network. These processes taken together form interconnection but the assessee company/deductor has failed to counter the opinion of the experts who have categorically established that human, intervention, takes place during carriage of call as the call routing and signaling are predefined as an initial setup or in installation phase and based on this predefined data, which is part of configuration in interconnect system, such phases are selected automatically to call connect and

not just in routing. The process of carriage of call is automatic only for successful and fault free calls (A successful, call is which reaches the desired destination and which carries quality voice). The configuration (predefined data is part of configuration of interconnecting of network) and reconfiguration of data in network system and capacity enhancement etc. also essentially require human intervention of highly qualified and trained technical professional having expertise, experience and acumen in that particular area of relevant technology and it is not possible for a general technician or semi skilled person to determine/manage the entire interconnect process.

(vii) Another contention of the assessee company, that the other mobile service providers monitor/ maintain and repair their own infrastructure. However, for ensuring a seamless service by employing specific set of people to carry out operability and functioning of network, it makes it clear that human intervention is a necessity to provide seamless service .

(viii) Regarding the situation on exhaustion of allotted capacity and allotment of additional capacity, the capacity enhancement is a time consuming exercise by a group of technically skilled professionals with close coordination of both the parties simultaneously.

(ix) The contention of the assessee company that every service provider providing any service using its own equipment and infrastructure would always incur such costs to ensure that its equipment and infrastructure is in the best of working condition to ensure provision of services for which it is meant and such act is not undertaken as a service to the recipient of services provided by utilizing the same equipment or infrastructure is not tenable since the assessee company has failed to appreciate the fact that handling of equipment and infrastructure by operators in their own network, is to ensure fault free service and as an obligation for success of interconnect as seen from the clauses of interconnect agreement of interconnect performance standards. This not only takes place on one side but takes place on both the ends in close co-ordination and that is what the experts opined.

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(x) During the process of carriage of calls, the network system of each cellular provider requires monitoring/supervision on several parameters of the network like health, congestion, faults, etc. for which, reconfiguration of system is required to handle such congestion by way of increasing the transport capacity, increasing hardware, modifying the required software, reconfiguring the systems, etc. On all the above areas of

intervention, technical expert is persistently required to make the process of carriage of call victorious. Persons involved in these areas cannot be merely a technician but are to be professionally and highly qualified experts having good knowledge of network management, knowledge of hardware & software, knowledge of network configuration, etc. as no service provider does take the risk of leaving the network systems unattended, when the networks are interconnected with each other during the process of carriage of calls, for the simple reason that even a small fault can cascade into large faults. which could finally lead to entire collapse of the systems and fail the process of carriage of calls .

(xi) The technical experts have clearly stated that the entire process of call processing and capacity augmentation, i.e. additional capacity when capacity gets exhausted, is essentially/necessarily human intervention and cannot be done without the services of humans. The interconnect / access / port facility is regarded as technical services and all payments made on account of interconnect charges/access/port charges falls within the meaning of the technical services. In fact, the combined environment of both men and machinery is needed for providing technical services. Even sophisticated and automated

machinery/equipment cannot work without a human interface, as these are regularly required to monitoring of performance and maintenance. A machine or instrument even if automatic cannot become or replace human mind. In fact, there are a number of articles in the interconnect agreement. which itself provide various specifications for quality of services or performances.

(xii) The agreement entered between both the operators is for composite services and not just one part of carriage of calls. Carriage of calls is the end result to be achieved through the Interconnection consisting of many processes. It has also been clarified by the C.DOT expert in reference to question No 1.0 during re-examination that even if after initial setup and after making the interconnected network functional, if human intervention in the form of operation and maintenance is taken away, the interconnected network will not function indefinitely and further the purpose of interconnection along with the quality of service will not be achieved (Ans. 11 & 12). Lastly, it is also important to mention here that;-.

- *The assessee company/deductor itself is deducting TDS on these interconnect payments to domestic mobile service providers with effect from April 2003.*

- *There is no difference in flow of calls for an international call or a national call, except the fact that the interconnect operator being national or international. All the processes involved in establishing a call and to make it successful in international flow of traffic to earn revenue, are the same as in the case of domestic calls, as opined by the technical expert vide his second opinion dated 28/12/2011.*
- *It was confirmed by the assessee company itself vide letters dated 01/11/11 and 09/11/11 that technically there is no difference between the domestic IUC and international IUC, except that in domestic IUQ, the network and the equipment of the other telecom operators are located in India, whereas, in international IUC, the network and the equipment of the other telecom - operators are located outside India."*

2.4 The AO alternatively and without prejudice to his finding that, the said payment is payment for FTS u/s. 9(1)(vii) of the Act had held that the payment was 'Royalty' in Clause (iii) of Explanation 2 to Section 9(1)(vi) of the Act.

2.4.1 The AO vide order dated 12.1.2012 raised the demand u/s. 201 as well as 201(IA) to the assessment years 2008-09 to 2011-12 for non-deduction of tax at source u/s. 195 of the Income Tax Act, 1961 (hereinafter referred as "The Act" of 'IUC' payment made to "FTO's". He levied tax on higher rate of 20%

(plus Surcharge & Cess) on the gross amount of payment made to the FTO for all the years under consideration by applying the provisions of section 206AA of the Act. Aggrieved the assessee carried the matter in the Appeal before the Ld. First Appellate Authority. The First Appellate Authority upheld the order of the AO to the extent of the finding that the payment of IUC are in the nature of FTS under the Act. He has held as follows:-

> *"9.7 The whole controversy is whether any human intervention exists at time of picking up of call from ILD gateway of the appellant by ILD gateway of foreign operators and it has to be understood and resolved by examining the statements of the experts, which have been reproduced supra. Scrutiny of the statements reveal following facts:*
>
> - *When a call gets connected from one operator to other, per se it is an automatic connection, but there can be instances when there is problem in call connect which requires human intervention.*
> - *Successful and fault free call happens without manual intervention.*
> - *Intervention by technical experts is required when there is failure in hardware, problem due to software bug or snapping of fibre optic cables.*

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- *Per se processing of a successful call has many aspects like call connect, call routing and signaling. Call connect component cannot be dissected.*

- *Beside these faults, constant network monitoring is required to be done by technical experts to ensure fault free connection. The network system cannot be left un-attended .*

- *Human intervention is required for capacity augmentation.*

- *There is no network system which can work continuously without any kind of human intervention. Machines cannot work on their own. There has to be man - Machine interface.*

- *Above mentioned human interventions cannot be made by semi-skilled personnel or mere technicians. Such persons are highly qualified technical experts having good knowledge of software, network management and configuration.*

- *For a fault free running calls, operation and maintenance has to be at both the ends and if the second operator does not maintain it then the call will fail.*

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9.8 Now, if we have to just see whether there is any human intervention at the time of interconnect, then the answer is quite obvious that for a successful call, the interconnect is automatic. This has been accepted by the AO also. As already discussed supra, this cannot be the intention/essence of direction of Hon'ble Supreme Court as the interconnect of call takes place in fraction of a second and during that period, no effective human intervention is possible. Therefore, we have to see the process of interconnect of call in a holistic manner. The agreement between the appellant and foreign telecom operators is to provide facility of successful interconnect of call at port/interconnection location of two net works. The clause 3.1 of agreement, which is standard one for all operators, says,

> *"Each party shall be responsible to connect to other part's network at one of the other part's network interconnection locations, and the parties shall be responsible to procure, at their own expense, the necessary facilities or equipment required to interconnect to such locations."*

9.9 Though, the ultimate purpose of the agreement is to achieve successful carriage of call at the interconnection location, the process of establishing

interconnection itself is elaborate one. It involves making the two network systems compatible, configuration & reconfiguration of system, allotment of capacity & capacity augmentation whenever required, re-routing of call in event of overflow, fault finding and repair and over & above, constant monitoring of the network system so as to ensure un-interrupted carriage of call. All these activities are performed by highly qualified professionals and not merely technicians or unskilled workers. All these human interventions are pre-requisite for successful connect of the call. Without such human intervention, the service of successful connection of call cannot be provided. Now, it is undisputed that with advent of latest technology, the call connect process has become software based and substantially automatic. Over a period of time, the automation has increased and correspondingly human intervention has decreased progressively. If the quantum of human intervention involved is the only criterion for determining whether a particular service is in nature of technical service, then what used to be a technical service a few years ago, has ceased to be so now with progressive automation; This however does not mean that the machine has replaced the man. In case under consideration, it is clear from contents of

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statements that human intervention is essential in areas right from setting up of capacity for interconnect and further in testing, commissioning of interconnect circuit, Interconnect performance standards, interconnect capacity, network interface, configuration of system, testing, interconnect testing, pilot testing, operation and maintenance of hardware/software, supervision/monitoring the functioning of interconnect network, capacity augmentation and reconfiguration and capacity enhancement, constant monitoring & maintenance, fault identification, repair etc. All this is required to ensure quality of service as per interconnect agreement to provide fault free services. Call is not something which can be carried in person by a technical person. It has to pass through a configured network and technical personnel are required to see that net work functions properly. The direction contained in Hon'ble Supreme Court's order can not be construed in such a manner to suggest that technical persons do not have any role in carriage of call from one network to another. In view of these, I agree with the view taken by the AO that payments made by the appellant are in nature of Fee for technical services:

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9.10 The definition of fee for technical service is given in Explanation 2 to section 9(1)(vii) of the Act, which is reproduced as under:

"Explanation 2 - For the purposes of this clause, ''fees for technical services" means any consideration (including any lump sum consideration) for the rendering of any managerial, technical or consultancy services (including the provision of services of technical or other personnel) but does not include consideration for any construction, assembly, mining or like project undertaken by the recipient or consideration which would be income of the recipient chargeable under the head "Salaries".

9.11 The definition of FTS as per DTAA is the same as in the Act. Just to take an example, FTS as Indo-UK treaty is given in Article 13(4), which is reproduced as below:

> *4. For the purposes of paragraph (2) of this Article, and subject to paragraph 5, of this Article, the term ''fees for technical services" means payments of any kind to any person in consideration for the rendering of any technical or*

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consultancy services (including the provision of services of technical or other personnel) which :

The definition says that FTS consists of two parts:

a) Consideration for the rendering of any managerial, technical or consultancy services.

b) consideration for provision of services of technical or other personnel 9.12 The second part of definition talks about technical personnel whereas first part does not mention about technical personnel. It can reasonably be inferred that first part of definition is concerned with technical services provided in any manner, may be mainly through automated machine. In case under consideration, there is practically no human intervention at the time of connect of successful call and this is the position which has been accepted even by the AO. This situation is taken care of by the first part of definition of FTS. There is ample human intervention involved at different stages as discussed supra and this situation falls within purview of second part of definition of FTS.

9.13 Another argument taken by the appellant is that payments made by it are in nature of revenue sharing and hence not FTS. It has been argued that the

appellant has entered into agreement with various international telecom operators for the purpose of two way carriage of call internationally. Whatever revenue is charged from the subscribers is shared between network operators depending upon flow of successful calls and therefore no network operator is providing services to other network operator. Therefore, the amount paid to the foreign telecom operator is not qua the service provided by the foreign telecom operator to the appellant, but is a share of revenues calculated on the basis of per call / pulse.

9.14 This contention of the appellant has been duly considered and is found to be fallacious. It is undisputed that as a result of agreement between the appellant and non- resident telecom operator, no joint venture, AOP or partnership comes into existence. It is also evident from Clause 18 of the agreement which is regarding relationship of the parties. It says that,

> *"The relationship between the parties shall not be that of partners, and nothing herein contained shall be deemed to constitute a partnership between them, a joint venture, or a merger of their assets or their fiscal or other liabilities or undertakings. Neither party shall have right to*

bind the other party, except as expressly provided for herein."

9.15 Therefore, agreement does not create a new 'Person' as defined in section 2(31) of the Act. The obligations of the appellant have to be seen in its separate capacity. When a call is carried by the appellant's network from NLD network, the appellant becomes entitled to revenue from NLD network operator. Further, when call from ILD gateway of appellant is taken over by gateway of non-resident operator, the non-resident gets right to receive revenue from the appellant and that payment becomes expenditure in hands of the appellant. The non-resident operator is not entitled to get revenue directly from NLD operator in India. So it is not a situation where revenue from NLD operator comes to a common pool and both appellant and the non-resident operator are entitled to share it according to some formula. The payments made by the appellant to non-resident telecom operators are in nature of expenditure in books of accounts of the appellant and such payments are in nature of FTS as discussed supra. Therefore, this contention of the appellant is rejected.

9.16 The appellant has taken another argument that it makes payment only for a successful call and other activities of foreign operator like maintenance of network system are not remunerated by it. Therefore, other incidental activities where some human intervention is involved, are not in nature of services from perspective of the appellant. This contention of the appellant is misleading. The payment on basis of successful call is only a mode of calculating the payment for provision of service of transmission of call. The service provided by non-resident operator cannot be restricted by adopting a particular mode of making the payment.

9.17 It is also pertinent to note that the appellant is deducting tax on IV C payments made to domestic telecom operators, which clearly indicates that the appellant is conscious of legal provisions applicable. Then, why such deduction is not being made in respect of IUC payments made to foreign telecom operators is not explainable.

9.18 In view of discussion supra, I hold that the IUC payments made by the appellant to the non-resident telecom operators are in nature of FTS both under IT Act, 1961 and under relevant DT AA and hence

chargeable to tax in India. Accordingly, the appellant is held to be assessee in default u/s 201 (1) in respect of these payments. This disposes off ground of appeal no. 2,3,4,7,9,10,11,12,13,14,15,16,18. "

3. Ld. CIT(A) held that the IUC payment cannot be pleaded as royalty. The alternative finding of the Assessing was reversed by the Ld. CIT(A). He has held as follows:-

"11.0 Finding:

11.1 The submissions made by the appellant have been carefully considered. The AO has held that the payments made by the appellant amount to royalty U/S 9(1)(vi)(iii) as these are for use of process. The contentions of the appellant are summarized as under:

- The payments are in nature of revenue sharing.

- The appellant has not been given 'use or right to use' of process by foreign operators.

- Proposed amendments in the Act do not override the treaty definition of royalty.

- In any case, the appellant cannot be held to be assessee in default because of retrospective amendment.

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11.2 The argument of the appellant that the payments are in nature of revenue sharing _ and hence do not partake character of royalty is fallacious as it has been discussed supra under Issue no. 1. In order to characterize the payments made by the appellant, we have to see the legal provisions and relevant clauses of agreement between the appellant and non-resident telecom operators. The definition of term 'royalty' is provided in Explanation 2 to section 9(1)(vi) of the Act, which is being reproduced as below:-

> *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;*

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(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;

(iva) the use or right to use any industrial, commercial or scientific equipments but not including the amount referred to in section 44BB;

(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, but not including consideration for the sale, distribution or exhibition of cinematographic films; or

(vi) the rendering of any services in connection with the activities referred to in sub- clauses (i) to (iv), (iva) and (v).

The definition of royalty as per Article 13(3) of Indo-UK treaty is as under:

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

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

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

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11.3 According to AO, the payments are made for use of process and hence in nature of royalty under clause (iii) of 9(1)(vi) of the Act. In the said clause, the word employed is 'use of'. The factum of 'use of process' has to be established before a payment can be characterized as royalty. The clause 3.1 of agreement, which is standard one for all operators, says, "Each party shall be responsible to connect

to other part's network at one of the other part's network interconnection locations, and the parties shall be responsible to procure, at their own expense, the necessary facilities or equipment required to interconnect to such locations. "

11.4 Thus, the essence of the agreement is that each party to the contract shall connect to network of other party at port locations. It is not a case of lease or licence of network of foreign operator in favour of the appellant. Once two networks are interconnected, the flow of call is completed. A foreign operator connects his network with network of the appellant and call coming from appellant's network is taken up by network of foreign operator for further transmission. In this model, only foreign operator is using his network and appellant is not using or is not allowed to use network of foreign operator. Thus, there is no 'use' on part of the appellant. Whether taking-up of call by network of foreign operator from network of the appellant is a 'process', is another issue to be looked into. The AO has not given a finding to the effect that it constitutes a 'process'. According to Explanation 6, which is proposed to be incorporated in section 9(1)(vi) of the Act by Finance Act 2012, the process shall include transmission by optic fibre or similar technology. Thus, after this amendment, the transmission of

call across gateway/interconnect shall be a 'process' under domestic law. However, even if there is a 'process' involved; there is no use of it by the appellant. In discussion supra under Issue no. 1, it has been held that non-resident telecom operator has provided technical services to the appellant. This is possible only when non-resident operator is using his network. Without using his network, non-resident cannot provide services to the appellant. Now, when non-resident is using his network, it cannot be said that the appellant is using the network of non-resident operator. Therefore, two situations are mutually exclusive. Only one of them, either non-resident operator or the appellant is using the network of non-resident while transmission of call through optic fiber. It has already been held that non-resident operator has provided technical services to the appellant as is the case made by the AO, consequently it cannot be said that payments made by the appellant are for 'use of process' and hence in nature of royalty. The appellant has further contended that reliance placed by the AO on decision in case of Verizon Communications Singapore Pvt. Ltd. v. ITO: [2011] 45 SOT 263(Chennai) is misplaced. I have carefully gone through facts of the case law. <u>In that case, the Indian payer company had obtained 'leased lines' on hire basis under a contract from non-resident Verizon Communication. This is a</u>

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vital fact which makes all the difference. When an Indian Co. takes leased line on hire, then it can be said that it had 'used' it. In present appeal under consideration, the appellant has neither been leased nor been given on hire network of foreign operator, then it cannot be said that the appellant has 'used' the network belonging to foreign operator. Therefore, reliance of AO on the said case law is misplaced.

11.5 It is seen from proposed Explanation 5 & 6 and Memorandum of explanation that meaning of word 'process' has been widened, the 'process' need not be secret and situs of control & possession of right, property or information has been rendered irrelevant. However, all these changes do not affect the definition of royalty as per DTAA. In Article 13 (3)(a) of Indo-UK tax treaty, the word employed is 'use or right to use' in contradistinction to the word 'use' in domestic law. The meaning attached to phrase 'use or right to use' has been explained in various judicial decisions in case of Mis Yahoo India Pvt Ltd vs. DCIT (ITAT Mumbai), Standard Chartered Bank v.' DDIT, Mumbai, ISRO Satellite Centre [2008 307 ITR 59 AAR] and Dell International Services (India) P. Ltd. [2008305 ITR 37 AAR]. All these judicial pronouncements say that in order to satisfy 'use or right to use'; the control and possession of right, property or

information should be with payer. Therefore, under DT AA, the restricted meaning of royalty shall continue to operate despite amendments in domestic law.

11.6 The appellant has further argued that even if it is assumed that payments partake the character of royalty after retrospective amendment in the act, the appellant cannot be held to be assessee in default in respect of those payments. I find force in this argument in view of various judicial decisions relied upon by the appellant. The obligation imposed upon the appellant u/s 195 to deduct tax is 'at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier '. Therefore time of credit or actual payment of sum is relevant to see the obligation of the payer. Thus, subsequent amendment though retrospective in effect, cannot create any obligation upon payer which did not exist at time of crediting or actual payment of the sum.

11.7 In view of discussion supra, I have no hesitation to hold that payments made by the appellant are not in nature of royalty under domestic law and relevant DTAA. This disposes off ground of appeal no. 19 which is accordingly allowed.”

3.1 On Section 206AA, the Ld. CIT(A) held that this Section is applicable only prospectively.

4. Aggrieved with the finding of the ld. CIT(A), that the payment for 'IUC' is 'FTS', the assessee filed these Appeals. The Revenue has filed the Cross Appeals against the finding of the Ld. CIT(A) that IUC cannot be treated as royalty and also the finding that section 206AA is applicable only prospectively.

5. Ld. Counsel of the Assessee Sh. S.K. Tulsiyan, filed an Application for admission of additional evidence under Rule 29 of the ITAT Rules, 1963 dated 06.11.2013.The additional evidence sought to be produced by the assessee, is an Opinion dated 03.9.2013 of Sh. SH Kapadia, Former Chief Justice of India, on the applicability of withholding tax provisions u/s. 194J read with Section 9(1)(vii) of the Income Tax Act, in the case of the assessee. The Ld. DR, Mr. Anuj Arora, CIT(DR) strongly objected to the admission of this opinion as an evidence on the ground that Shri Kapadia delivered the judgment in the assessee's own case when he was the Chief Justice of the Supreme Court of India setting aside the matter to the Assessing Officer for fresh consideration and adjudication and after retirement, he had given an opinion in the very same case in favour of the assessee, which is impropriety and unethical. He argued that the conduct of Sh. S.H. Kapadia was not ethical, specifically when he was the author of the judgment in the case of the assessee where he had set

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aside the matter. He referred to the Code of Conduct laid down by the Hon'ble Supreme Court for Judges.

6. As what is sought to be produced is an opinion of Former Chief Justice of India, we hold that this is not additional evidence which could be admitted for the purpose of adjudication of these Appeals. We do not wish to express any opinion as the conduct of the Former Hon'ble Chief Justice of India who delivered the judgment in the case of the assesee company, and had given an opinion on the very same issue after retirement. Hence, this Application is rejected.

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7. Ld. Counsel for the assessee Mr. Tulsiyan, submitted as follows:-

a) "IUC" paid to the "FTOs" are neither in the nature of "FTS" nor in the nature of "Royalty" both under the Act as well as the Tax Treaties. Both the issues are covered in favour of the Assessee by a number of judgments including the judgment of the Jurisdictional High Court in the assessee's own case. That these issues are no more res-integra.

b) Inter-connect Agreements are basically revenue sharing arrangement between the Telecom operators for pooling in their services. The object of these agreement are to provide seamless facility to the subscribers and income accrues to both the networks and both net works have a right to share the revenue generated from successful calls between the inter connected operators.

c) IUC have been in the nature of sharing of revenue generated from successful calls. This is business incomes of such operators.

d) The operations of the FTOs in the form of carriage and termination of calls over their respective network, are carried out entirely outside India and hence, are not taxable in India, in terms of Explanation 1(a) to Section 9(1)(i) of the Act.

e) IUC cannot be deemed to accrue or arise in the hands of the FTOs u/s. 9(1) read with section 5(2) of the Act.

f) As income in question is the business income, and as the FTOs do not have any Permanent Establishment in India, the income is not taxable in India even under Article 7 of the Double Taxation Avoidance Act. Hence, the assessee is not required to withhold the tax u/s. 195 of the Act for such payments and consequently, cannot be held liable u/s. 201 of the Act.

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g) Section 206AA cannot be applied retrospectively and that the beneficial provisions of the DTAA's have to be applied.

h) The Ld. CIT(A) was right in admitting additional evidence.

8. Ld. Counsel for the Assessee Sh. Tulsiyan, made elaborate submissions, filed paper books as well as written submissions and relied upon various case laws in support of his contentions. We would be dealing with all these arguments as well as the case law during the course of our finding.

9. Ld. DR, Sh. Anuj Arora, on the other hand, vehemently controverted the submissions of the Ld. Counsel for the assessee. He relied on the order of the AO and submitted that payment in question is FTS. He submitted that the human intervention is one of the issue which was considered by the Hon'ble Supreme Court of India and an open remand was made to the AO for examining this issue, without due restrictions or conditions. He argued that the Assessee's contention that the AO should have restricted himself only to this aspect is not correct and does not flow from the judgment of the Hon'ble Supreme Court and submitted that the AO could examine many other issues. He further submitted that the judgment of the Hon'ble Supreme Court of India in question, wherein the matter was remanded to the AO, pertaining to a particular assessment year is not yet finalized and that the assessment of many other cases were being finalized based on this Supreme Court Judgment. He

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argued that the issue before the Hon'ble Supreme Court was relating to Domestic Telephone Operators whereas the case in hand, the AO was examining the payments made to FTOs. He argued that the regulation of the Telecom Regulatory Authority of India (TRAI) do not bind FTOs and hence the decision cited by the Assessee's counsel based on payments to Domestic Telephone Operations, cannot be applied to the facts of the case.

10. Ld. DR further argued that all the agreements the assessee entered with the FTOs were not with the AO. Referring to Page No. 22 of the Ld. CIT(A)'s order as well as Page no. 35, he drew the attention of the Bench to the questions and answers recorded from Sh. Ashok Mittal as well as Sh. Tanai Krishnan on oath. Specifically he drew the attention of the Bench to Question No. 4, 5 and 6 which are at pages 35 & 36 of the CIT(A)'s order and to the answers to question no. 7 & 30 and argued that in this case there is human intervention where there is 'capacity augmentation' and the function of the personnel include testing, supervising and monitoring etc. and supported the findings of the Ld. CIT(A) that there was human intervention. He referred to the cross examination done by the assessee as well as the re-examination done by the AO and the conclusions drawn by the AO and supported the conclusions of the AO as confirmed by the Ld. CIT(A). He further pointed out that the assessee company has itself deducted TDS on this "IUC" from domestic mobile

service provider w.e.f. April, 2003 and argued that there is no difference in flow of calls or operations for a national call or an international call and under these circumstances tax should have been deducted on payment made to FTOs also.

11. Ld. DR further argued that services has been provided by the FTOs to the assessee. He vehemently contended that the submissions of the Assessee that services are connected with successful calls only is fallacious. He argued that services are obtained from FTOs even in a case where a call has not materialized and that successful calls are taken into account only for the purpose of billing. He contended that method of billing cannot be equated with type of services obtained by the assessee. He submitted that the operations are described in the composite agreement and it includes host of service. He submitted that the call drop is also considered in these agreements and it is provided that in case of call drop, a penalty would be attracted. He pleaded that the pith and substance of these services should be considered and not the mode of billing and the agreement should be viewed in a holistic manner. He referred to the definition of FTS u/s. 9(1)(viii) and submitted that it does not exclude lumsum consideration.

12. On the argument that it is a case of revenue sharing the Ld. DR relied on Page No. 59 of the Ld. CIT(A)'s order vide para no. 9.13 to 9.18 and submitted that the agreements between the

assessee and FTOs are not joint venture agreements or partnership concerns and that they are not a 'person' under the Act for being separately assessed. On the issue whether the services can be treated as FTS under the Treaty with certain countries, he drew attention of the Bench to Page No. 95 of the ld. CIT(A)'s and relied on the same. He further relied upon on certain case laws, which we would be dealing in the course of our finding, as and when required.

13. On the Revenue's Appeals, the Ld. DR submitted that the Ground No. 1 is against the admission of additional evidence by the Ld. CIT(A). He pleaded that there was violation of Rule 46A and submitted that the Ld. CIT(A) should not be admitted the evidence in the form of (i) copy of the agreements with various Overseas Telecom Operator, (ii) Resident Certificate, (iii) no PE Certificate of those non-residents operators and (iv) copies of vouchers regarding the payment made to them. He relied upon the decision of the Delhi ITAT Bench in the case of JCIT, Circle 17(1) vs. Venus Financial Services Ltd. (2012) 21 Taxman.com 436 (Delhi).

14. The Ground nos. 2 to 6 of the Revenue Appeals are on the issue as to whether the payment for "IUC" to "FTOs" are royalty or not. The Ld. DR basically relied upon the finding of the AO from pages 32 to 40 and submitted that without prejudice to the finding that these payments are for FTS, the AO came to the

conclusion that the payments in question should in the alternative be classified as "royalty". Ld. DR further contended that the amendments brought to Section 9(1)(vii) are retrospective and are clarificatory in nature and were only brought in to clarify the unintended interpretation of the Courts of Law. Referring to the Hon'ble Delhi High Court decision on this issue, he submitted that the Hon'ble High Court has not adjudicated the issues post amendment, as the same was not before it. He submitted that the payment is for use of a process and hence covered by Explanation 5 & 6 of Section 9(1)(vi)(b) of the Act. He specifically relied upon the orders of the ITAT, Bangalore Bench in the case of Vodafone South Ltd. vs. DDIT (Int. Taxation) reported (2015) 53 taxmann.com 441 (Bangalore-Trib.) and argued that the issue in question is squarely covered in favor of the Revenue by this decision. He further relied upon the decision of the ITAT, Mumbai Bench in the case of Viacom 18 Media (P) Ltd. vs. ADIT (International Taxation), Mumbai Tribunal reported in (2014) 44 taxmann.com 1 wherein it was held that, the payment of Fees for use of Satellite Transponder Service by assessee to one US Company was taxable as royalty under Article 12 of the DTAA.

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15. In reply thereto, Ld. Counsel of the assessee distinguished the case laws relied upon by the Ld. DR and distinguished each and every case law on facts as well as on law. He submitted that the proposition of law laid down by the Jurisdictional High Court

on the very same issue are in favor of the Assesee and hence the orders even if they were in favour of the Revenue from other jurisdiction cannot bind the Tribunal. He further made detailed submissions to the effect that the ITAT should not follow the decision of the Bangalore Bench of the ITAT in the case of Vodafone South Ltd. vs. DDIT (Int. Taxation) (supra) and the decision of the Mumbai, ITAT in the case of Viacom 18 Media Pvt. Ltd. etc. We will deal with these arguments in detail in our findings.

FINDING:-

16. Rival contention heard. On a careful consideration of the facts and circumstances of the case and on a perusal of the papers on record and the orders of the authorities below as well as the case law cited, we hold as follows:-

17. The Ld. CIT(A) has classified the issues as follows:-

I. Whether the assessee is liable to be treated as assessee in default u/s. 201(1).

II. Whether payments made by the assessee are taxable as Fee for Technical Services (hereinafter referred as FTS).

III. Whether the payment made by the assessee are taxable in India as royalty u/s. 9(1)(vi) of the Act.

IV. Whether the payment made by the assessee can be deemed to accrue or arise in India u/s. 9(1)(vi)(b)/ 9(1)(vii)(b) of the Act.

V. Whether "make available" clause under DTAA is satisfied.

VI. Whether there is no FTS clause in the relevant DTAA, where the payment are taxable in India in the absence of the FTS.

VII. Whether section 206AA of the Act is applicable with retrospectively.

18. The Assessee filed these Appeal on the issues which were adjudicated against it by the Ld. CIT(A) and the Revenue has filed the Appeals on the issue which were adjudicated in favour of the Assessee by the Ld. CIT(A).

ASSESSEE'S APPEALS

19. The grounds in the assessees' appeal are summarized as follows:-

i). Whether the assessee is liable to be treated as the assessee in default u/s. 201(1).

ii) Whether inter-connected agreements between the assessee and the FTOs are in the nature of revenue sharing arrangements.

iii) Whether the payment made by the assessee to Foreign Telecom Operators under inter-connection agreements are taxable in India as FTS.

iv) Whether payment made by the assessee to FTOs, can be deemed to accrue or arise in India u/s. 9(1)(vi) & 9(1)(vii) of the Act.

v) Whether beneficial rate provided under DTAA would override the provisions of section 206AA.

20. We summarize the grounds in the Revenue's Appeals as follows:-

i) Whether the payment made by the Assessee to FTOs are taxable as royalty for the use of process under section 9(1)(vii) of the Act and relevant DTAA's.

ii) Whether the assessee can be treated as "assessee in default" u/s. 201 of the Act in respect of the liability imposed by virtue of retrospective amendment to law.

iii) Whether "make available" clause under relevant DTAA are satisfied.

iv) Whether section 206AA of the Act is applicable retrospectively.

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v) Whether the Ld. CIT(A) acted in violation of the provision of Rule 46A in admitting additional evidence by the assessee.

20.1 We now frame the following issues for our adjudication:-

ISSUE NO. 1

WHETHER THE PAYMENT OF IUC BY ASSESSEE TO FTOS ARE TAXABLE AS FEE FOR TECHNICAL SERVICES U/S. 9(1)(VII) OF THE ACT.

ISSUE NO. 2

WHETHER THE PAYMENT TO FTOS FOR 'IUC'S ARE IN THE NATURE OF ROYALTY UNDER SECTION 9(1)(VI) OF THE ACT.

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ISSUE NO. 3

WHETHER THE ASSESSEE IS LIABLE TO BE TREATED AS ASSESSEE IN DEFAULT U/S. 201 OF THE I.T. ACT.

ISSUE NO. 4

WHETHER THE PAYMENT MADE BY THE ASSESSEE TO THE FTO CAN BE DEEMED TO ACCRUE OR ARISE IN INDIA.

ISSUE NO. 5

WHETHER BENEFICIAL RATE PROVIDED UNDER DTAA OVERRIDE THE PROVISIONS OF SECTION 206AA AND WHETHER SECTION 206AA OF THE ACT IS APPLICABLE RETROSPECTEVELY.

ISSUE NO. 6

Whether the ld. CIT(A) acted in violation of the provisions of Rule 46A in admitting the additional evidence filed by the assessee.

ISSUE NO. 7

Whether the payment is revenue sharing or not.

21. Before we adjudicate each of the issue, it would be relevant to discuss as to what is the Inter-connection, Inter-Connection Usage charges (IUC), International Long Standing Distance Services (ILD) etc.

22. The Ld. CIT(A)'s in this impugned order at para no. 8.1 to 8.4 at pages 16 to 19 has explained the meaning of the aforesaid technical terms. For the sake of convenience, the same are reproduced hereunder:-

> *"8.1 The appellant is carrying on the business of providing telecommunication services to its subscribers. In order to provide international connectivity to its subscribers, the appellant has been granted license to provide International Long Distance services (ILD) [License Agreement No.10-Q7/2002-BS-I(ILD-02) dated 14th March 2002]. Clause 2.2 (a)*

of the said License is reproduced below [refer page 36 of letter dated 28.03.2012]:

"2.2(a) The ILD Service is basically a network carriage service (also called Bearer), providing International connectivity to the Network operated by foreign carriers. The ILD service provider is permitted full flexibility to offer all types of bearer services from an integrated platform. ILD service providers will provide bearer services so that end-to-end tele-services such as voice, data, fax, video and multi-media etc. can be provided by Access Providers to the customers.

.... ILD service providers would be permitted to offer international bandwidth to other operators. ILD service provider shall not access the subscribers directly which should be through NLD service provider or the Access Provider. Resellers are not permitted."

Clause 1 of the "DEFINITIONS AND INTERPRETATIONS' of the said license defines Access Providers as follows:

"ACCESS PROVIDERS" means Basic, Cellular, and cable service providers who have a direct access with the subscribers.

8.2 Thus, ILD business is nothing but provision of connectivity to the subscriber for international portion of a call, which may or may not originate domestically. The local connectivity [within India] is provided by Access Providers and National Long Distance

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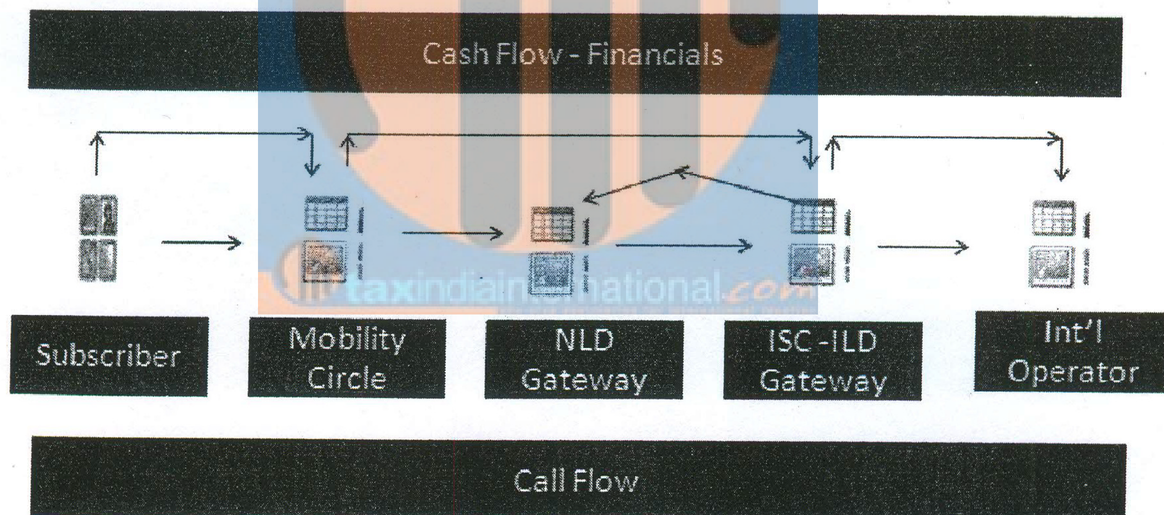
(NLD) operators, and the international leg of the connectivity is provided by the ILD operator in conjunction with a foreign telecom operator(s), who provide the last mile connectivity. The following are three illustrations of carriage of calls provided by the ILD operator:

a) Carriage of calls from India to outside India:

To give an example, if a cellular subscriber is located in Delhi and seeks to make a call to New York, through his cell phone, the call will be routed as follows:



In the above diagram, the call moves from Aurangabad mobility circle to the NLD gateway (say at Nagpur), travels on

NLD network till ILD gateway (say Mumbai) from where it is transported to international operator(s) outside India.

In order to provide seamless services to its subscribers, the appellant enters into agreement with overseas network operators, to connect the call over their network. Therefore, call traffic originating from India is carried first by the Access Provider, then by the NLD operator, then by the ILD operator and finally by the foreign telecom operator, and/or last mile service provider. The factual position, therefore, is that the entire chains of operator(s) pool their network/infrastructure to provide integrated and seamless connectivity service to the subscriber(s). The Access Provider, due to practical/legal considerations, enters into contract to provide seamless end to end connectivity to the subscriber, and earns revenue from the subscriber. The entire revenue paid by the subscriber to the Access Provider and collected by the Access Provider is shared with the NLD operators (where the NLD operator is different from the Access Provider) and with ILD operator, who in turn shares the revenue with the foreign telecom operator(s).

b) Carrying calls from outside and terminating such calls in India:

The call in this case originates from outside India. The call may originate from, say, a subscriber of AT & T, USA. The call will

travel automatically on the network of AT & T, USA and will be handed over at the Point of Presence (POP) / landing station in New York of the appellant. From such landing station, the call is carried to the landing station of the appellant, in say, Mumbai, where it is handed over to the network of NLD service provider in India for further carriage/transportation to its destination. It is also possible that the network of the NLD service provider may transfer the call to the Access Provider, (if the two are different), who may transport it to the customer. As can be observed from the above, the role of ILD operator is to transport the call from outside India till the first landing station in India. As submitted earlier, the ILD operator is not allowed to transport calls within India.

c) Carrying calls from a telecom service provider in one country outside India to another telecom service provider and its subscriber in a third country (Hubbing'):

To illustrate, the subscriber of a US telecom service provider, in New York wants to make a call to Singapore. The call will originate at the local network of the US telecom subscriber which telecom network will carry the calls for interconnect to the landing station of the appellant in New York. Here the call is transported to the ILD network. The call will then be automatically carried on the network of the ILD operator to Singapore and then transported to the local operator in

Singapore. The ILD operator will earn income from the US telecom service provider but will have to pay the IUC/access charges to the local Singaporean telecom service provider.

8.3 It may be noted that the appellant is not authorized, under the ILD license, to carry call traffic from one place to another within India which can be carried only by a NLD license holder. In this regard, the relevant clause of the NLD license is given below:

> *"2.2(a) The NLD Service refers to the carriage of switched bearer telecommunications service over a long distance and NLD Service Licensee will have a right to carry inter circle traffic excluding intra-circle traffic except where such carriage is with mutual agreement with originating service provider.*

(b) The LICENCEE can also make mutually agreed arrangements with Basic Service Providers for picking up, carriage and delivery of the traffic from different legs between long Distance Charging Center (LDCe) and Short Distance Charging Centers (SDCCs).

(c) In the case of Cellular Mobile Telephone Service traffic, the inter-circle traffic shall be handed/taken over at the Point of Presence (POP) situated in LDCA at the location of level I TAX in originating/terminating service area. For West Bengal,

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Himachal Pradesh and Jammu & Kashmir such locations shall be Asansol, Shimla & Jammu respectively.

(d) NLD service licensee shall be required to make own suitable arrangements / agreements for leased lines with the Access Providers for last mile. Further, NLD Service Providers can access the subscribers directly only for provision of leased Circuits/Close User Groups (CUGs). leased circuit is defined as virtual private network (VPN) using circuit or packet switched (IP Protocol) technology apart from point to point non-switched physical connections/transmission bandwidth. Public network is not to be connected with leased circuits/CUGs. It is clarified that NLD service licensee can provide bandwidth to other telecom service licensee also."

8.4 <u>*It will thus be appreciated that the entire services are provided by the appellant as an ILD operator, outside India. From the ILD gateway of the appellant in India, the call is carried to the gateway of the appellant outside India and if the appellant has no gateway outside India, the call is carried on the telecom network of the foreign operator(s}. The call from the gateway outside India is transported to the customer destination by the local foreign telecom operator(s).”*</u> (Emphasis ours)

23. A perusal of the above extracted paras leads to the following conclusions:

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The Assessee, as part of its ILD Telecom Services business, is responsible for providing services to its subscribers in respect of calls originated/terminated outside India. Thus, for the provisions of ILD services, the Assessee is required to obtain the services of FTOs for provision of Carriage Connectivity Services over the last leg by the communication channel i.e. the lack of communication channel where the assessee does not have a Licence/ capacity to provide connectivity services. Thus, the ILD business is the provisions of connectivity to the subscribers for international portion of the call, which may or may not originate domestically. The local connectivity within India is provided by the Access Providers and the National Long Distance Operators (NLD operators) and the International connectivity by the ILD Operators interconnection with FTO, who provide the last mile connectivity. An international call has to be routed through NLD/ILD using the International Gate way. For termination of the international calls in India, ILD have commercial arrangements with foreign carriers who deliver the Traffic using the international connectivity and calls are delivered to the Indian ILD Operator. The assessee entered into an agreement with Overseas Network Corporate to connect the call over the network. This is done to provide seamless connectivity services to the subscribers. The Access Provider provide seamless end to end connectivity to the subscribers and the entire revenue arise out of such services is paid by the subscribers to the Access

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Provider. If the NLD Operator is difference from Access Provider, then the NLD Operator Bills the Access Provider for his part of service rendered. The ILD Operator is in turn billed by the FTO in the form of Inter-connected Usage Charges (IUC).

24. The basic issue before us is whether such Interconnected Charges Billed by the FTOs and paid by the Assessee are in the nature of Fee of Technical Services (FTS) or in the nature of Royalty. We would first take up the adjudication of these two issues and then we would be reverting to other issues.

25. <u>ISSUE NO. 1</u>

WHETHER THE PAYMENT OF IUC BY ASSESSEE TO FTOS ARE TAXABLE AS FEE FOR TECHNICAL SERVICES U/S. 9(1)(VII) OF THE ACT. *(As the Section 9(1)(vii) has already been extracted in the earlier paragraphs, we do not repeat the same.)*

26. The Hon'ble Delhi High Court on this issue held as follows in the assessee's own case i.e. CIT vs. Bharti Cellular Ltd. (2009) 319 ITR 139 (Delhi):-

> *"The expression 'fees for technical services' as appearing in s. 194J has the same meaning as given to the expression in Expln. 2 to s. 9(1)(vii). In the said Explanation. the expression 'fees for technical services' means any consideration. for rendering any (managerial, technical or consultancy services'. The word (technical' is preceded by the word (managerial' and*

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succeeded by the word 'consultancy'. Since the expression (technical services' is in doubt and is unclear, the rule of noscitur a sociis is clearly applicable. This would mean that the word 'technical' would take colour from the words 'managerial' and 'consultancy', between which it is sandwiched. A managerial service would be one which pertains to or has the characteristic of a manager. It is obvious that the expression (manager' and consequently (managerial service' has a definite' human element attached to it. To put it bluntly, a machine cannot be a manager. The service of consultancy also necessarily entails human intervention. The consultant, who provides consultancy service, has to be a human being. A machine cannot be regarded as a consultant. From the above discussion, it is apparent that both the words 'manaqerial" and 'consultancy' involve a human element. And, both, managerial service and consultancy service, are provided by humans. Consequently, applying the rule of noscitur a soccis, the word 'technical' as appearing in Expln. 2 to s. 9(1)(vii) would also have to be construed as involving a human element. But, the facility provided by MTNL/ other companies for interconnect/ port access is one which is provided automatically by machines. It is independently provided by the use of technology and that too, sophisticated technology, but that does not mean that MTNL/ other companies which provide such facilities are rendering any technical services as contemplated

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in Expln. 2 to s. 9(l)(vii). This is so because the expression 'technical services' takes colour from the expressions 'managerial services' and 'consultancy services' which necessarily involve a human element or, what is nowadays fashionably called, human interface. In the facts of the present appeals, the services rendered qua interconnection port access do not involve any human interface and, therefore, the same cannot be regarded as 'technical services' as contemplated under s. 194J. The interconnect/ port access facility is only a facility to use the gateway and the network of MTNL/ other companies. MTNL or other companies do not provide any assistance or aid or help to the respondents/ assessees in managing, operating, setting up their infrastructure and networks. No doubt, the facility of interconnection and port access provided by MTNL/ other companies is 'technical' in the sense that it involves sophisticated technology. The facility may even be construed as a 'service' in the broader sense such as a 'communication service'. But, while interpreting the expression 'technical service', the individual meanings of the words 'technical' and 'service' have to be shed. And only the meaning of the whole expression 'technical services' has to be seen. Moreover, the expression 'technical service' would have reference to only technical service rendered by a human. It would not include any service provided by machines or robots.

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Thus, the interconnect charges/ port access charges cannot be regarded as fees for technical services." [emphasis supplied]

27. The judgment of the Hon'ble Delhi High Court in the aforesaid case may thus be summarized as under:

- The rule of noscitur a sociis is clearly applicable and the word 'technical' would take colour from the words 'managerial' and 'consultancy', between which it is sandwiched.

- Both managerial service and consultancy service are provided by humans.

Consequently, applying the rule of noscitur a soccis, the word 'technical' as appearing in Expln. 2 to s. 9(1)(vii) would also have to be construed as involving a human element

- The expression 'technical service' would have reference to only technical service rendered by a human.

- MTNL or other companies do not provide any assistance to the assessee in managing, operating, setting up their infrastructure and networks.

- No doubt, such a facility is 'technical' in the sense that it involves sophisticated technology and may even be construed as 'communication service' but while interpreting the entire expression 'technical service', the individual meanings of the words 'technical' and 'service' have to be shed and only the

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<u>meaning' of the whole-expression 'technical services' has to, be seen.</u>

- The services rendered qua interconnection/ port access do not involve any human interface and, therefore, the same cannot be regarded as 'technical services' as contemplated under s. 194J."

28. The phraseology of Fees for Technical Services covers only such technical services provided for Fees. There should be a direct co-relation between the Services which are on technical nature and the consideration received in lieu of rendering the services. The services can be said to be of technical nature is the special skills and knowledge relating to technical field which required for the provisions of such services. These are required to be rendered by humans. The services provided by machines and robust do not fall within the ambit of technical services as provided u/s. 9(1)(vii) of the Act.

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29. On appeal by the Revenue, the Hon'ble Supreme Court in the case reported as CIT vs. Bharti Cellular Ltd. (2011) 330 ITR 239 upheld the proposition of law laid down by the Hon'ble Delhi High Court. The Hon'ble Supreme Court has held as under:-

> *"The question basically involved in the lead case is: whether TDS was deductible by M/s. Bharti Cellular Limited when it paid interconnect charges/access/port charges to BSNL? For that purpose, we are required to*

examine the meaning of the words "fees for technical services" under Section 194J read with clause (b) of the Explanation to Section 194J of the Income Tax Act, 1961, [`Act', for short] which, inter alia, states that "fees for technical services" shall have the same meaning as contained in Explanation 2 to clause (vii) of Section 9(1) of the Act. Right from 1979 various judgments of the High Courts and Tribunals have taken the view that the words "technical services" have got to be read in the narrower sense by applying the rule of Noscitur a sociis, particularly, because the words "technical services" in Section 9(1)(vii) read with Explanation 2 comes in between the words "managerial and consultancy services".

The problem which arises in these cases is that there is no expert evidence from the side of the Department to show how human intervention takes place, particularly, during the process when calls take place, let us say, from Delhi to Nainital and vice versa. If, let us say, BSNL has no network in Nainital whereas it has a network in Delhi, the Interconnect Agreement enables M/s. Bharti Cellular Limited to access the network of BSNL in Nainital and the same situation can arise vice versa in a given case. During the traffic of such calls whether there is any manual intervention, is one of the points which requires expert

evidence. Similarly, on what basis is the "capacity" of each service provider fixed when Interconnect Agreements are arrived at? For example, we are informed that each service provider is allotted a certain "capacity". On what basis such "capacity" is allotted and what happens if a situation arises where a service provider's "allotted capacity" gets exhausted and it wants, on an urgent basis, "additional capacity"? Whether at that stage, any human intervention is involved is required to be examined, which again needs a technical data. We are only highlighting these facts to emphasise that these types of matters cannot be decided without any technical assistance available on record. There is one more aspect that requires to be gone into. It is the contention of Respondent No.1 herein that Interconnect Agreement between, let us say, M/s. Bharti Cellular Limited and BSNL in these cases is based on obligations and counter obligations, which is called a "revenue sharing contract". According to Respondent No.1, Section 194J of the Act is not attracted in the case of "revenue sharing contract". According to Respondent No.1, in such contracts there is only sharing of revenue and, therefore, payments by revenue sharing cannot constitute "fees" under Section 194J of the Act. This submission is not accepted by the Department. We leave it there because this

submission has not been examined by the Tribunal. In short, the above aspects need reconsideration by the Assessing Officer. We make it clear that the assessee(s) is not at fault in these cases for the simple reason that the question of human intervention was never raised by the Department before the CIT. It was not raised even before the Tribunal; it is not raised even in these civil appeals. However, keeping in mind the larger interest and the ramification of the issues, which is likely to recur, particularly, in matters of contracts between Indian Companies and Multinational Corporations, we are of the view that the cases herein are required to be remitted to the Assessing Officer (TDS).

Accordingly, we are directing the Assessing Officer (TDS) in each of these cases to examine a technical expert from the side of the Department and to decide the matter within a period of four months. Such expert(s) will be examined (including cross-examined) within a period of four weeks from the date of receipt of the order of this Court. Liberty is also given to Respondent No.1 to examine its expert and to adduce any other evidence. Before concluding, we are directing CBDT to issue directions to all its officers, that in such cases, the Department need not proceed only by the contracts placed before the officers." (Emphasis ours)

29.1 Thus in our view the proposition of law laid down in the judgment of the Hon'ble Delhi High Court have attained finality. The Hon'ble Supreme Court held that the issue as to whether there is involvement / presence of human element or not was a factual and technical matter and required to be examined. The other proposition have been accepted by the Hon'ble Supreme Court. As the Hon'ble Supreme Court was of the opinion that this factual aspect of human intervention was not examined by the AO, the matter was remanded to the AO for factual examination only. The AO in pursuance of the directions of the Hon'ble Supreme Court examined witness on oath and also gave the assessee the opportunity to cross examine them. He also re-examined the expert witness. Our decision will be based on the evidence so collected by the AO on this aspect of human intervention in the services rendered. It held that the word "technical services" have got to be read in the narrower sense by applying the rule of noscitur a sociis, particularly, because the words "technical services" in Section 9(1)(vii) r/w Expln. 2 comes in between the words "managerial and consultancy services". Hence, there should be involvement/ presence of human element for coming to a conclusion that "technical services" can be said to have been rendered in terms of Explanation 2 to Section 9(1)((vii) of the Act. In our view the Hon'ble Supreme Court of India has approved the proposition laid down by the Hon'ble High Court, that this is a service and that if would be FTS as defined

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u/s. 9(1)(vii) if there is human interference in such communication service. Hence the issue to be considered is narrow and based on evidence collected by the Revenue post the Hon'ble Supreme Court judgment. All other issues are no more res-integra.

29.2 This aspect as to whether a human element is involved in such interconnect services or not, has been examined by different Benches of the Tribunal based on the evidence collected by the AO in the above stated set-aside proceedings. The facts that are on record are the same as the facts and evidence which have been examined by various Coordinate Benches of the Tribunal. These include the statement of experts recorded by the Assessing Officer and the cross examination done by the Representative of the Company. For the sake of brevity, we do not extract the statement and cross examination etc. of the various experts, as these were considered in detail by the Coordinate Benches and it was held as follows:

29.3 The Kolkata Bench of the Tribunal in the case of Vodafone East Ltd. vs. Addl. CIT in ITA No. 243/Kol/2014, vide order dated 15.9.2015 held as follows:-

> *"From the aforesaid statement recorded from technical experts pursuant to the directions of the Supreme Court in CIT Vs. Bharti Cellular Ltd. (330 ITR 239) which has been heavily relied upon by the Learned CITA, we find that human intervention is*

required only for installation! setting up/ repairing/ servicing/ maintenance/ capacity augmentation of the network. But after completing this process, mere interconnection between the operators while roaming, is done automatically and does not require human intervention and accordingly cannot be construed as technical services. It is common knowledge that when one of the subscribers in the assessee's circle travels to the jurisdiction of another circle, the call gets connected automatically without any human intervention and it is for this, the roaming charges is paid by the assessee to the Visiting Operator for providing this service. Hence we have no hesitation to hold that the provision of roaming services do not require any human intervention and accordingly we hold that the payment of roaming charges does not fall under the ambit of TDS provisions u/ s 194J of the Act."

30. The Jaipur Bench of the Tribunal in the case of Bharti Hexacom Ltd. vs. ITO (TDS) in ITA 656/JP/2010 dated 12.6.2015 held as follows :

> *"11. We have heard the rival contentions of both the parties and perused the material available on the record. After going through the order of the Assessing Officer, ld CIT(A); submissions of the assessee as well as going through the process of providing roaming services; examination of technical experts by the ACIT TDS, New Delhi in the case of Bharti Cellular Ltd.; thereafter cross*

examination made by M/s Bharti Cellular Ltd.; also opinion of Hon'ble the then Chief Justice of India Mr. S.H. Kapadia dated 03/09/2013 and also various judgments given by the ITAT Ahmadabad Bench in the case of Canara Bank on MICR and Pune Bench decision on Data Link Services. We find that for installation/ setting up/ repairing/ servicing/ maintenance capacity augmentation are require human intervention but after completing this process mere interconnection between the operators is automatic and does not require any human intervention. The term Inter Connecting User Charges (IUC) also signifies charges for connecting two entities. The Coordinate Bench also considered the Hon'ble Supreme Court decision in the case of Bharti Cellular Ltd. in the case of i-GATE Computer System Ltd. and held that Data Link transfer does not require any human intervention and charges received or paid on account of this is not fees for technical services as envisaged in Section 194J read with Section 9(1)(vii) read with Explanation-2 of the Act. In case before us, the assessee has paid roaming charges i.e. IUC charges to various operators at Rs. 10,18,92,350/-. Respectfully following above judicial precedents, we hold that these charges are not fees for rendering any technical services as envisaged in Section 194J of the Act. Therefore, we reverse the order of the ld CIT(A) and assessee's appeal is allowed on this ground also."

31. The AO as well as the Ld. CIT(A) has recorded that there is no human intervention when the call is successfully completed. It is also not disputed that there is no difference in the technology,

system and methodology used by Telecom Companies in providing inter-connection of domestic calls or of international calls. So what decision is applicable for use of local calls also applies to "IUC" of international calls. Thus the view taken on the deductibility of TDS on IUC charges paid for local inter connectivity service would on all fours apply to charges paid for "IUC" for international inter connectivity.

32. The Chennai Bench of the ITAT in the case of M/s Dishnet Wireless Ltd. vs. DCIT in ITA No. 320 to 329/Mad/ 2014 vide order dated 20.7.2015 on the aspect of human intervention held as follows:-

> *"25. Now coming to roaming charges, the contention of the assessee is that human intervention is not required for providing roaming facility, therefore, it cannot be considered to be a technical service. We have gone though the judgment of Apex Court in Bharti Cellular Limited (supra). The Apex Court after examining the provisions of Section 9(l)(vii) of the Act, found that whenever there was a human intervention, it has to be considered as technical service. In the light to the above judgment of the Apex Court, the Department obtained an expert opinion from Sub-Divisional Engineer of BSNL. The Sub-Divisional Engineer clarified that human intervention is required for establishing the physical connectivity between two operators for doing necessary system configurations. After*

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necessary configuration for providing roaming services, human intervention is not required. Once human intervention is not required as found by the Apex Court, the service provided by the other service provider cannot be considered to be a technical Service. It is common knowledge that, when one' of the subscribers in the assessee's circle travels to the jurisdiction of another circle, the call gets connected automatically without any human intervention. It is due to configuration of software system in the respective service provider's place. In fact, the Sub-Divisional Engineer of BSNL has explained as follows in response to

Question No. 23:-

"Regarding roaming services as explained to question no. 21. Regarding interconnectivity, initial human intervention is required for establishing the physical connectivity and also for doing the required configuration. Once it is working fine, no intervention is required. In case of any faults human intervention is required for taking necessary corrective actions." In view of the above, once configuration was made, no human intervention is required for connecting roaming calls. The subscriber can make and receive calls, access and receive data and other services without human intervention. Like any other machinery, whenever the system breakdown, to set right the same, human intervention is required. However, for

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connecting roaming call, no human intervention is required except initial configuration in system. This Tribunal is of the considered opinion that human intervention is necessary for routine maintenance of the system and machinery. However, no human intervention is required for connecting the roaming calls. Therefore, as held by the Apex Court in Bharti Cellular Limited (supra), the roaming connections are provided without any human intervention and therefore, no technical service is availed by the assessee. Therefore, TDS is not required to be made in respect of roaming charges paid to other service providers."

33. All the Benches of the Tribunal are unanimous in their view on this issue. We see no reason whatsoever to deviate from these views. Hence consistent with the view taken in the above referred orders, we hold that the payment in question cannot be characterized as Fee for Technical Services u/s. 9(1)(vii) of the Act. There is no manual or human intervention during the process of transportation of calls between two networks. This is done automatically. Human intervention is required only for installation of the network and installation of other necessary equipments/ infrastructure. Human intervention is also necessary for maintaining, repairing and monitoring each operator or individual network, so that they remain in a robust condition to provide faultless services to the customers. Human

intervention is also required in case where the network capacity has to be enhanced by the telecom operators. Such human intervention cannot be said to be for inter-connection of a call.

34. Where routing of every call has been decided, the exhaustive standard of capacity of the transporter network will automatically re-route through another channel through another operator. Human intervention in setting up enhanced capacity has no connection or relation with the traffic of call. Thus it is clear that in the process of actual calls, no manual intervention is required. The finding of the revenue authorities that interconnection is a composite process, involving several processes which require human intervention is erroneous. The test laid down by the Hon'ble Supreme Court of India in its order when the case was remanded to the AO is to find out as to whether "during traffic of calls, is there was any manual intervention?". There is no reference to the issues of set up, installation or operation maintenance or repair of network as explained by the Ld. CIT(A). These decisions of the various Benches of the ITAT, when read with the judgment of the Hon'ble Delhi High Court as well as the Hon'ble Supreme Court, would settle this matter in favour of the assessee. But as a number of other decisions have been relied upon, we examine the same.

35. The Hon'ble Madras High Court in the case of Skycell Communications Ltd. vd. DCIT (2001) 251 ITR 53 (Mad.) has

held that call charges received from telecom operators from firms and companies subscribing to cellular mobile services provided by them do not come within the definition of technical services u/s. 194J read with section 9(1)(vii) Expln. 2, as it a mere collection of Fee for use of standard facility provided to all those willing to pay for it. Applying the proposition laid down in this case law to the facts of this case, we have to hold that inter connection facility and the service of the FTO in picking up, carrying and successful termination the call over their respective network is a standard facility and the and FTO in question does not render any technical services to the assessee under interconnect agreement.

36. The Hon'ble High Court of Delhi in the case of CIT vs. Estel Communications (P) Ltd. (2008) 217 CTR (Del) 102 held as follows:-

> *"Tribunal considered the agreement that had been entered into by the assessee with T and came to the conclusion that there was no privity of contract between the customers of the assessee and T. In fact, the assessee was merely paying for an internet bandwidth to T and then selling it to its customers. The use of internet facility may require sophisticated equipment but that does not mean that technical services were rendered by T to the assessee. It was a simple case of purchase of internet bandwidth by the*

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assessee from T. Under the circumstances, the Tribunal came to the conclusion that there were no technical services provided by T to the assessee and, therefore, the provisions of s. 9(l)(vii) did not apply. Tribunal has rightly dismissed the appeal after taking into consideration the agreement between the assessee and T and the nature of services provided by T to the assessee. It was a simple case of payment for the provision of a bandwidth. No technical services were rendered by T to the assessee. On a consideration of the material on record, no substantial question arises in the matter."

37. In the case of ACIT vs. Hughes Software Systems Ltd. (2013) 35 CCH 416 Del. Trib, the Tribunal has held as under:-

"Deduction. of tax at source-Fees for technical services-Assessee was engaged in business of software development of products and providing software services in India and overseas-Assessee was treated as "assessee in default" u/s 201(1) on account of non-deduction of TDS u/ s 194J from payment made for use of tele-communication services i.e telephone charges, link charges and band width charges as 'fee for technical services" u/ s 9(1}(vii}-CIT(A} reversed findings of AO-Held, payments were made to MTNL & BSNL etc. for providing space for transmission of data for carriage of voice and for availing service of inter-communication, port

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access for which no human intervention was necessary-Payment cannot be characterized as "fee for technical services"-Thus, assessee cannot be held to be in default -for non- deduction of tax at source from payment of telecommunication. charges in terms of section 194J-Revenue's ground dismissed.

38. The Bangalore ITAT in the case of Wipro Ltd. vs. ITO (2003) 80 TTJ (Bang) 191 held as follows:-

"Income deemed to accrue or arise in India-Fees for technical services/ royalty-Payment for transmission of data and software through uplink and down link services-Assessee engaged, inter alia, in the business of development of software providing on line software services through customer based circuits with the help of VSNL and foreign telecom companies outside India-As per the agreements with such telecom companies assessee is to use the standard facility having standard pricing patterns-There is nothing to show that assessee was provided with any technology or technical services- Therefore, the amounts paid by assessee-company to non-resident telecom companies for downlinking and transmitting of data to the assessee's customers located outside India cannot be considered as 'fees for technical services' under s. 9(l)(vii), moreso when similar services offered by VSNL is not

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regarded as technical services-Further, no process has been made available to the assessee-Hence, there is no question of applicability of s. 9(l)(vi) too-So long as the amount paid is not taxable under the Act, the clause in the DTAA cannot bring the charge-Hence, there was no liability to deduct tax under s. 195"

39. In view of the above discussions, respectfully following the binding judgment of the Hon'ble Supreme Court of India, we have no hesitation in upholding the submissions of the Ld. Counsel of the Assessee that, the payment in question cannot be considered as "Fee for Technical Services" in terms of section 9(1)(vii) read with Expln. 2 of the Act.

40. The second aspect of the issue are before us, is without prejudice to the finding under the Domestic Law, whether the payment to FTOs for "IUC" is fee for technical services under the DTAA, wherever 'make available clause' is found in these agreements. In view of our finding that the payment is not fee for technical services under the Act, it would be an academic exercise to examine whether the payment in question would be fee for technical services under DTAA's. Suffice to say wherever treaties contain "making available" clause, then in terms of the judgment of the Hon'ble Karnataka High Court in the case of CIT & Ors. vs. De Beers India Minerals Pvt. Ltd. (2012) 346 ITR 0467; the payment cannot be treated as FTS under the DTAA as

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there is no imparting as contemplated in the Treaties. Similar are the propositions on the issue of "make available" in the decisions in the case of Mahindra & Mahindra Ltd. vs. DCIT 313 ITR 263; Ramond Limited vs. DCIT 86 ITD 791; Cable and Wireless Networks India P. Ltd. (2009) 315 ITR 72.

41. The next aspect of this issue, which is raised as Ground No. 8 in the Department's Appeal is that, when the treaties do not contain FTS clause, what is the impact on taxability. Wherever FTS clause is not available in the treaty with a country, then the income in question would be assessable as business income and it can be brought to tax in India, only if the FTO has the permanent establishment in India and if the earning of income is attributable to activities or functions performed by such permanent establishment. This view is supported by the decision of the Coordinate Bench.

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42. The Delhi Bench of the Tribunal in the case of ACIT vs. Paradigm Geophysical Pty. Ltd. 122 ITD 155 (2010) held as follows:-

> *"What art. 7(7) seems to convey is that where the business profits of the non-resident include items of income for which specific or separate provisions have been made in other articles of the treaty, then those provisions would apply to those items. Per contra, if it is" found that those provisions*

are not applicable to those items of income, then the logical result would be that those items of income will remain in art. 7 and will not go out of the same. Such items of income which do not fall under any other provision of the double tax treaty, would continue to be viewed as business profits covered by art. 7. The position canvassed by the counsel for the assessee seems to be more logical than the view canvassed on behalf of the Department. Fees for technical services are essentially business profits since the rendering of such services is the business of the non-resident. In order to take out an item of income from the business profits, it is necessary under art. 7(7) that there should be some other provision in the treaty dealing specifically with the item of income sought to be taken out from the business profits. If there is no other provision in the treaty or if the provision made in the treaty is not found applicable or to cover the item of income sought to be taken out from the business profits, for whatever reason, then it follows that the particular item of income should continue to remain under art. 7. In light of the above discussion, the amount received by the assessee company from RIL under the contract did not represent consideration for any technical services rendered to RIL which made available technical knowledge, experience, skill, etc. or consisted of the development and transfer of any technical plan or design within the meaning of art. 12(3)(g) of the Indo Australian

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Treaty. The consideration will continue to be viewed as business profits under art. 7 of the treaty and since the assessee had no PE in India the business profits cannot be taxed in India."

43. Similarly, the Hon'ble Bombay High Court in the case of CIT vs. Siemens Aktiongesellschaft (2009) 310 ITR 320 (Bom)

> *"Double taxation relief Agreement between India' and' Federal Republic of Germany-Royalty vis-a-vis industrial and commercial profits-Even though s. 9 would apply, provisions of DTAA, if more beneficial, would prevail- Assessee having no PE in India, amount of royalty, sought to be assessed as industrial or commercial profit, is not assessable to tax in India-If the consideration received by the assessee for grant of the patents and license is regarded as royalty as the grant admittedly took place outside India; the question of applying deeming provisions of Explanation to s. 9 inserted by the Finance Act, 2007 would not arise and further, assessee having no PE in India, such income would not be taxable in India as industrial and commercial profits in terms of art. III of Indo-German DTAA-Income from activities covered by arts. V to XII by virtue of art. 111(3) are specifically excluded from the expression 'industrial or commercial profits' in art. III as they are to be taxed in the manner provided under arts. V to XII-Therefore, income other than of the nature provided in arts. V to XII, if relatable to industrial or commercial profits would fall under art. III, not chargeable to tax in the absence ofPE-This view is further fortified by the fact that art. III of the 1960 DTAA has been substituted by DTAA of 1995 and a new art. VIIIA has been inserted explaining the expression 'royalties '"*

44. In view of the above reasons, we hold that wherever under the DTAA's. Make available clause is found, then as there is no imparting, the payment in question is not 'FTS' under the Treaty and when there is no 'FTS' clause in the treaties, the payment falls under Article 7 of the Treaty and is business income.

45. **<u>ISSUE NO. 2</u>**

WHETHER THE PAYMENT TO FTOS FOR 'IUC'S ARE IN THE NATURE OF ROYALTY UNDER SECTION 9(1)(VI) OF THE ACT.

46. The specific charge of the AO is that taking up a call by the FTO from the assessee is a use of 'process' and hence the payment for the same is "Royalty" in terms of Clause (iii) of Explanation 2 to Section 9(1)(iv) of the Act.

47. We analyse the finding of the Ld. CIT(A) on this issue.

a) Section 9(1)(vi)(iii) employs the word "use of". The factum of "use of process" has to be established before the payment can be characterized as royalty. A perusal of the agreements between the parties demonstrate that it is not a case of lease or licence of network of foreign operator in favour of the assessee. The foreign operator connects his network to that of the assessee for further transmission. Hence, in this model, only the foreign operator is using his network and the assessee is not using or is not allowed to use network of foreign operator. Therefore, the definition of royalty is not attracted.

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b) The AO has not given a finding as to whether taking up a call by the "FTO" from the Assessee is a "process". The definition of the term "process" rather the meaning of word "process" has been expanded by insertion of Explanation 6 to Section 9(1)(vi) of the Income Tax Act, introduced by the Finance Act, 2012 to include transmission by optic fibre or similar technology. Thus, after the amendment, transmission of call across gateway shall be a process under the Domestic Law. Even it is considered a process, as there is no use of it by the assessee, the definition of royalty is not attracted.

c) The FTO provides technical services to the assessee by using its network. When the FTO is using its network, it cannot be said that assessee is using the network of the Non-Resident Operator. Hence, both the situations are mutually exclusive. As the assessee is not using the network of the FTO, the payment made is not for "use of process", hence, not in the nature of royalty.

d) The AO's reliance on the judgment of the Chennai Bench of the Tribunal in the case of Verizon Communications Singapore Pte. Ltd. vs. ITO (2011) 45 SOT 263 (Chennai) is misplaced, as in that case the Indian Company obtained 'Leased Lines' on hire/lease basis under the contract. The facts are different.

e) Explanation 5 & 6 incorporated in Section 9(1)(vi) by the Finance Act, 2012 do not affect the definition of royalty, as per DTAA. The Indo UK Tax Treaty, employs the word "use or right to use" in contra distinction to the word 'use' in domestic law. As per various judicial pronouncements, in order to satisfy the word "use or right to use", the control and possession of right, property or information should be with the payer. Thus under the DTAA royalty has a much restricted meaning.

f) Without prejudice to the above findings, even if the payments partake the character of royalty after retrospective amendment in the Act, the assessee cannot be held to be an assessee in default in respect of those payments made prior to the amendment, as brought out in the Finance Act, 2012.

g) The obligation imposed upon the assessee u/s. 195 to deduct tax specifies that it should be at the time of credited of such income to the account or at the time of payment thereof whichever is earlier and both these events had taken place much prior to the amendment brought in by the Finance Act.

48. We uphold the finding of the 1st Appellate Authority fo the following reasons.

The AO has taken a contradictory stand that the payments in question may be treated as "royalty" for "use of process" in terms of Section 9(1)(vi) of the Act, if in case the Appellate Authorities

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hold that the payment to FTOs are in the nature of "Fee for Technical Services". As the AO has held that the payment in question is royalty, as it is for the "use of process", as per clause (iii) to Explanation 2 to Section 9(1)((iv) of the Act, we restrict our finding to this issue only. The term "Process" occurs under clause (i), (ii) and (iii) to Explanation 2 to Section 9(vi). It reads as under:-

> *"Explanation 2. -For the purposes of this clause, "royalty" means consideration (including any lump sum consideration but excluding any consideration which would be the income of the recipient chargeable under the head "Capital gains") for-*
>
> *(i) the transfer of all or any rights (including the granting of a licence) in respect of a patent, invention, model, design, secret formula or process or trade mark or similar property;*
>
> *(ii) the imparting of any information concerning the working of, or the use of, a patent, invention, model, design, secret formula or process or trade mark or similar property;*
>
> *(iii) <u>the use of any patent, invention, model, design, secret formula or process or trade mark or similar property;</u>* *(emphasis ours)*

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49. By the Finance Act, 2012, Explanation 5 & 6 are added with retrospective effect from 1.6.1976 which reads as under:-

> *"Explanation 5 – For the removal of doubts, it is hereby clarified that the royalty includes and has always included consideration in respect of any right, property or information, whether or not –*
>
> *(a) The possession or control of such right, property or information is with the payer;*
> *(b) Such right, property or information is used directly by the payer;*
> *(c) The location of such right, property or information is in India.*
>
> *Explanation 6.- For the removal of doubts, it is hereby clarified that the expression "process" includes and shall be deemed to have always included transmission by satellite (including up-linking, amplification, conversion for down-linking of any signal), cable, optic fibre or by any other similar technology, whether or not such process is secret."*

50. Before we deal the issue as to whether the payment is question for use of "process", we feel it relevant to extract certain clauses of the agreements (a) Agreement between Bharti Airtel Ltd. and Sunrise Communications AG, which reads as under:-

"1. Object of the Agreement

1.1 Each Party agrees to provide the other Party with connecting, transit and termination services (hereinafter referred to as ''the Services") allowing the conveyance of international and/ or national calls on a non-exclusive basis as defined in the Service Description(s) associated with this Agreement.

1.2 This Agreement shall not be construed to constitute a partnership or agency relationship between the Parties. The parties are entering into this agreement on a principal to principal basis. Each Party acts in its own name and operates for its own benefit and risk while performing its obligations under this Agreement.

1.3 Neither of the Parties hereto shall have any rights in the equipments or in the network of the other Party (eg. liens or pledges). Each Party is and remains responsible for its network and for the provision of services relating to it, unless specifically stated otherwise in this Agreement. "

3. Definition of Services

The Parties shall connect, and keep connected, for the duration of this agreement, their systems at Points of Interconnection (POI) in order to convey calls to and from those systems and to provide voice Services to each other in accordance with this Agreement and as specified in the Schedules hereto.

5. Technical Standards and Interconnection

5.1 …………………..

5.2 Each Party shall at its own cost, unless otherwise agreed, be responsible for providing, installing, testing, making operational and maintaining all equipment on its side of each Point of Interconnection (POI) as defined in the TFD.

5.3…………..

7. Equipment

7.1 Each Party shall at its own cost, unless otherwise agreed by both Parties, be responsible for providing, installing, testing, making operational and maintaining all equipment on its side of each Point of Interconnection.

7.2

9. Charges

9.1 Each Party shall notify the other in writing of its 'per minute' rates for the Service(s]on a regular basis, as defined in the Service. Description(s) (see Schedule 1). All rates shall be stated in DOLLAR ($). Each Party shall invoice the other Party for the Service(s) provided based on actual call duration and number of calls (where applicable), which will be calculated in the relevant Service Descriptions.

(b). Agreement between Bharti Airtel Ltd. (Bharti) and Airtel Tanzania Ltd. (Airtel) (copy enclosed at pages 39 to 74 of the PB):

WHEREAS Bharti and Airtel are providers of international telecommunications services and WHEREAS, Bharti desires to procure certain telecommunications services provided by AIRTEL and AIRTEL desires to procure certain telecommunications services provided by Bharti; and WHEREAS, Parties, which are already providing carrier-to-carrier traffic, is now interested in creating a non-exclusive carrier-to-carrier relationship with Bharti; and

WHEREAS, the Parties have agreed to enter into this Agreement to set out the arrangement between the parties in respect of the exchange of international telecommunication services as also the settlement rates in respect of the Service(s) listed in relevant Annexures attached.

3. OPERATIONAL MATTERS

3.1 Each Party shall be responsible to connect to the other Party's network at one of the other Party's network interconnection locations, and the Parties shall be responsible to procure, at their own expense, the necessary facilities or equipment required to interconnect to such locations.

3.2…………….

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3.3………….

3.4 The Parties shall coordinate the management of their respective system facilities, with each Party being responsible for providing and operating, at its own expense, its respective network facilities. The Parties also shall interface on a 24 hours/ 7 days a week basis to assist each other with the isolation and repair of any facility fault in their respective networks."

"ANNEX 1 - [BHARTI VOICE TERMINATION SERVICES,

THIS ANNEX to International Telecommunication Services is subject to the terms and conditions of the RECIPROCAL TELECOMMUNIA TIONS SERVICES AGREEMENT entered into between AIRTEL TANZANIA LIMITED ('AIRTEL") and BHARTI AIRTEL LTD. ('Bharti") effective as of SERVICES Bharti will terminate international telecommunications traffic (IDD type), which AIRTEL has delivered to one of Bharti's interconnection locations to those Destinations as agreed from time to time."

"ANNEX 3 [AIRTEL TANZANIA LIMITED, VOICE TERMINATION SERVICES,

THIS ANNEX for domestic and International Telecommunication Services is subject-to the terms and conditions of the RECIPROCAL TELECOMMUNIATIONS SERVICES AGREEMENT entered into between AIRTEL TANZANIA LIMITED ('AIRTEL") and BHARTI AIRTEL LTD. ((Bharti") effective as of SERVICES AIRTEL

will terminate international telecommunications traffic (IDD Type), which Bharti has delivered to one of AIRTEL'S interconnection locations to those international Destinations."

51. A perusal of these agreements demonstrate that, each party under the agreement remains responsible for its own network and for the provision of services related to it. The Telecom Operator provide connecting, transit and termination services to each other on a reciprocal basis and neither of the parties shall have any rights in the equipments or in the network of other parties. The charges under the agreement are also levied for the services provided under the agreement, based on the actual call duration and number of calls successfully delivered to the other parties. The agreement are not for renting, hiring, letting or leasing out of any of the network elements or resources to the other parties or for rendering telecommunication services on a reciprocal basis. The assessee merely delivers the call that originates on its network to one of the inter connection locations of the FTO and FTO carries and terminates the call on its network. The Assessee is nowhere concerned with the route, equipment, process or network elements used by the FTO in the course of rendering such services.

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 Expl 2 to section 9(1)(vi) means a "process" which is an item of intellectual property. Clause (iii) of the said Explanation reads as follows:

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

Clauses (i) & (ii) of the said explanation also use 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 Vs. Bharti Cellular Ltd. (2011) 330 ITR 239]. 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

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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 marketplace." [as per definition provided in BusinessDictionary.com]

53. The term "process" is therefore to be understood as an item of intellectual property resulting from the discovery, specialized 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.

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

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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 Vs. Nayveli Lignite Corporation Ltd. (2000) 243 ITR 0459 held that *"the term (royalty' normally connotes the payment made to a person who has exclusive right over a thing for allowing another to make use of that thing which may be either physical or intellectual property or thing. The exclusivity of the right in relation to the thing for which royalty is paid should be with the grantor of that right. Mere passing of information concerning the design of machine which is tailor-made to meet the requirement of a buyer does not by itself amount to transfer of any right of exclusive user, so as to render the payment made therefor being regarded as royalty".*

The Hon'ble High Court of Calcutta in the case of N.V. Philips

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Gloeilampenfabrieken Eindhoven Vs. CIT (1988) 172 ITR 0521 held as under:

> *"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 right in respect of publications. It is possible that a person*

who invests may not take out a patent for his invention but unless some there inventor independently and by his own efforts come to duplicate the invention the original invention remains exclusive to the investor 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 product 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 us. Butterioorth. 19 Tax Cases 322 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, specialized 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 NV Philips Gloeilampenfabrieken Eindhoven Vs. 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 specialized 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 assessee royalty, 'exclusivity' of the subject matter is of crucial relevance.

54. The Dictionary meaning of the term ‘process’ (as defined in Business Dictionary.com) is as under:-

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> "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 equipments 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 equipments 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

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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 IP by the manufacturing company in contradistinction to the equipments or resources deployed in the execution of such 'process'. The payer must therefore use the IP on its own and bear the risk of its exploitation. If the IP 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 IP 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 991)(vi) Explanation (iii).

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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 equipments, 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 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 business income and not royalty.

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 1.6.1976. As per this Explanation, the “expression ‘process’ includes and shall be deemed to have always included transmission by satellite

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(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 Section 2 of Section 9(1)(vi). When a process is widely available in the public domain and is not exclusively owned by anyone the 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 Ld. DR 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 DR 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 vs. Bharati Cellular Ltd. reported in 319 ITR 139* 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 inter-connection 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 FTO's to the assessee but that such "Technical Service" is not FTS as defined u/s. 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 AO. 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 assesse 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 u/s. 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.

59.1 Even under the DTAA, as held by the Ld. First Appellate Authority we are of the view that the payment in question cannot be termed as royalty.

59.2 The assessee company has entered into interconnect agreements with various foreign telecom operators who are residents of countries like Australia, Canada, France, Israeal,

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Netherlands, Portuguese, Republic, Singapore, Spain, Sweden, United Kingdom, United States of America, Bangladesh, Indonesia, Mauritius, Nepal, Philippines, Saudi Arabia, Sri Lanka, Thailand, UAE etc. India has Double Taxation Avoidance Agreements with all the aforesaid countries.

59.3 The definition of 'royalties' (simply referred to as 'royalty' under the Income-tax Act, 1961) is mostly contained in Articles 12 & 13 of the DTAAs between India and the aforesaid countries. The definitions of 'royalties' contained in the Treaties with the aforesaid countries are almost pari materia insofar as the royalty is for 'use of process' is concerned. We quote from Article 13(3) of Indo-UK treaty defining the term 'royalties' hereunder:

> "3. For the purpose of this Article, the term (royalties' means:
>
> (a) payments of any kind received as a consideration for the use of, or the right to use, any copyright of a literary, artistic or scientific work, including cinematography films or work on films, tape or other means of reproduction for use in connection with radio or television broadcasting, any patent, trademark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience; and (b) payments of any kind

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

(Emphasis ours)

59.4 Further, as per Article 12(3) of the Indo-US treaty, the term 'royalties' has been defined as under:

"3. The term "royalties" as used in this Article means:

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

(b) payments of any kind received as consideration for the use of, or the right to use, any industrial,

commercial or scientific equipment, other than payments derived by an enterprise described in paragraph 1 of Article 8 (Shipping and Air Transport) from activities described in paragraph 2(c) or 3 of Article 8. "

(Emphasis ours)

The definition of 'royalties' under Indo-Canada treaty is the same as above.

59.5 Similarly, Article 13(3) of the Indo-France Treaty defines 'royalties' as under:

> “3. The term “royalties" as used in this article means payments of any kind received as consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work including cinematograph films, or films or tapes used for radio or television broadcasting, any patent, trade mark, design or model, plan, secret formula or process, of for information concerning industrial, commercial or scientific experience."

(Emphasis ours)

The definition of royalties under Indo-Netherlands Treaty is the same as above.

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59.6 The term 'royalties', has been similarly defined in all other treaties. On a perusal of the definition of 'royalties' provided in various treaties, it is clear that, all the treaties use the expression 'secret formula or process' is separated by a comma before and after the expression. This implies that" formula/ process is a part of the same group and the adjective 'secret' governs both. Thus, under the treaties, in order to constitute royalty for use of or the right to use of a process, the process has to be 'secret'. In the case of telecom industry, however, telecommunication services as already observed by us are rendered through standard facilities and no 'secret process' is involved.

60. A perusal of the wording of these Treaties show that only payments received as consideration for the "use of", or "the right to use" is necessary for the payment to be termed as Royalty. This is much narrower to the definition of royalty under the Act. As held by the Ld. CIT(A) there is no 'use of' or 'right to use' of any process in the facts and circumstances of the case on hand and hence, even under the DTAA's, the payment in question cannot be termed as royalty.

60.1 The Hon'ble High Court of Delhi in the case of Asia Satellite Telecommunications Co. Ltd. vs. Director of Income Tax (2011) 332 340 considered this issue and held as follows :-

"The taxpayer, a Hong Kong based company, was engaged in the business of satellite communications and broadcasting facilities. This business: was carried out through the medium of satellites, owned and leased, which are placed in geostationary orbits. These satellites did not use Indian orbital slots. They also did not get placed over the Indian sky space on any occasion. The assessee entered into agreements with TV Channels & communication companies so that they are able to utilize its transponder capacity for data transmission. They could plink their signals on the transponder through their own earth stations. Such earth stations are located outside India. On receipt of the signals, the transponder amplifies the signal and sends it to the target area. The area so covered, called the footprint area, included the territory of India. The assessee held that its income was not chargeable to tax in India because it does not have any permanent establishment in India. In particular, it was argued that there was no office or customers in India. The Delhi Tribunal in the said case held that despite the fact that the assessee could have business connection in India, none of its operations were carried out in India. In addition, the payment made by the customers was not for use of the equipments so that there was no equipment royalty angle in this case. However, the Hon'ble Tribunal also held that in the facts of the case, the

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customers were making payment to the non-resident for use of a process. It was observed that to constitute royalty, the process need not be a secret process. The income of the non-resident was ruled to be 'process royalty.' The Court held, (i) that under the agreement with television channels, the role attributed to the assessee was as follows: (i) programmes were uplinked by the television channels (admittedly not from India); (ii) after receipt of the programmes at the satellite (at locations not situated in Indian airspace), these were amplified through complicated process; and (iii) the programmes so amplified were relayed in the footprint area including India where the cable operators caught the waves and passed them over to the Indian population. The first two steps were not carried out in India. Merely because the footprint area included India and the programmers by ultimate consumers/viewers watched the programmes in India, even when they were uplinked and relayed outside, India, that would not mean that the assessee was carrying out its business 'Operations in India. The expressions "operations" and "carried out in India'' occurring in Explanation l(a) to section 9(1)(i) signify that it was necessary' to establish that any part of the aseeseee's operations were carried out in India. No machinery or computer was installed by the assessee in India through which the programmes reached India. The process of

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amplifying and relaying she programmes was performed' in the satellite which was not situated in Indian airspace. Even the tracking, telemetry and control operations to be performed outside India in Hong Kong. There was no contract or agreement between the assessee either with the cable operators or viewers for reception of signals in India. Thus, section 9(1)(i) was not attracted.

(ii) 'That the process of transmission of television programmes started with television channels (customers of the assessee) uplinking the signals containing the television programmes ; thereafter the satellite received the signals and after amplifying 'and changing their frequency relayed it down in India and other countries where the cable operators caught the signals and distributed them to the public. Any person who had a dish antenna, could also catch the signals relayed from these satellites: 'The role of the assessee was that of receiving the signals, amplifying them and after changing the frequency relaying them on the earth. For this service, the television channels made payment to the assessee. The assessee was the operator of the satellites and was in control of the satellite. It had not leased out the equipment to the customers. The assessee had merely given access to a broadband width available in a transponder which can be utilized for the purpose of transmitting the

signals of the customer. A satellite is not a mere carrier, nor is the transponder some- thing which is distinct and separable from the satellite as such. The trans-ponder in fact cannot function without the continuous support of various systems and components of the satellite. Consequently, it is entirely wrong to assume that a transponder is a self-contained operating unit, the control and constructive possession of which is or can be handed over by the satellite operator to its customers. The terms "lease of transponder capacity", "lessor", "lessee" and "rental" used in the agreement would not be the deter-minative factors. There was no use of "process" by the television channels. Moreover, no such purported use had taken place in India. The telecast companies/customers were situated outside India and so was the assessee. The agreements under which the services were provided by the assessee to its customers were executed abroad. The transponder was in orbit. Merely because it had its footprint on various continents that would not that the process had taken place in India.

ISRO SATELLITE CENTRE [ISAC], In re [2008] 307 ITR 59 (AAR), ISHIKAWAJIMA-HARIMA HEAVY INDUSTRIES LTD. v. DIT [2007] 288 ITR 408 (SC) and LAKSHMI AUDIO VISUAL INC. v. ASST. CCT [2001] 124 STC 426 (Karn) applied.

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iii) That the money received from the cable operators by the operators was treated as income by these telecast operators which had in India and they had offered and paid tax. Thus, the income generated in India had been duly subjected to tax in India. The payment made by the tele cast operators situated abroad to the assessee which was also a non-resident did not represent income by way of royalty as defined in Explanation section 9(1)(vi) of the Act. Article 12 of the model double taxation avoidance agreement framed by the Organisation of Economic Co-operation and Development contains a definition of "royalty" which is in all respects virtually the same as the definition of "royalty" contained in (iii) of Explanation 2 to section 9(1)(vi) of the Act. The commentary by the OECD can be relied upon.

(iv) That the Tribunal rightly admitted the additional ground question of applicability of section 9(1)(vii) on the ground that it was legal and did not require consideration of any fresh facts, as all necessary for adjudication whether the amount received was chargeable to tax section 9(1)(vii) were available on record. However, no arguments been advanced by the Department on this ground, it had to be presumed that the case was not sought to be covered under this provision."

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61. In the case of DCIT vs. PanAmSat International Systems Inc. (2006) 103 TTJ 861 (Del) the Tribunal has held as under:-

> "There is a ''process'' involved in the activity carried on by the assessee. There is a comma after the words "secret formula or process" in art. 12.3(a) of Indo-US DTAA which indicates that both the words "formula" and "process" are qualified by the word "secret". The requirement thus under the treaty is that both the formula and the process, for which the payment is made, should be a secret formula or a secret process in order that the consideration may be characterised as royalty. Normally punctuation by itself cannot control the interpretation of a statutory provision. However, the punctuation-the use of the comma-coupled with the setting and words surrounding the words under consideration, indicates that under the treaty even the process should be a secret process so that the payment therefore, if any, may be assessed in India as royalty. The words which surround the words "secret formula or process", in art. 12.3(a) of the treaty refer to various species of intellectual properties such as patent, trade mark, design or model, plan, etc. Thus the words "secret formula or process" must also refer to a specie of intellectual property applying the rule of ejusdem

generis or noscitur a sociis.-Asia Satellite Telecommunication Co. Ltd. vs. Dy. CITT(2003) 78 TTJ (Del) 489 : (2003) 85 ITD 478 (Del) distinguished. (Para 19)

So far as the transponder technology is concerned there appears to be no "secret technology", known only to a few. There is evidence to show that the technology is even available in the form of published literature/book from which a person interested in it can obtain knowledge relating thereto. There is no evidence led from the side of the Department to show that the transponder technology is secret, known only to a few, and is either protected by law or is capable of being protected by law. Since there is nothing secret about the process involved in the operation of a transponder, the payment for the use of the process- assuming it to be so-does not amount to royalty" (Para 20) The argument that the consideration has been received by the assessee for letting the broadcasters use the patent relating to the transponder/satellite goes farther than the assessment order and therefore cannot be accepted. Even on merits the argument is not acceptable since the patent relating to the transponder/satellite is not with the assessee but is

with the manufacturer of the same. There is no clause in the purchase agreement to show that the patent relating to the transponder/satellite was also transferred to the assessee by the manufacturer. If the patent did not ensure to the assessee, how the assessee could have, even in the wildest of imaginations, let the broadcasters use the same for consideration. The argument sought to be made is factually not borne out. There is not on iota of evidence to show that the assessee had any patent to the satellite or transponder which it allowed the broadcasters to use for a consideration." (Para 21)

62. In the case of Cable & Wireless Networks India (P) Ltd. in re (2009) 315 ITR 0072, the AAR held as under:-

> *"Cable & Wireless Networks India (P) Ltd.; In Re (2009) 315 ITR 0072: Held that "Payment made by applicant to the UK company for providing international leg of the services in transmitting voice/data to places outside India using its international infrastructure and equipments is neither royalty nor fees for technical services; payment is in the nature of business profits and in the absence of PE of UK company in India, same is not taxable in India."*

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Further, at paras 8.1 to 8.3, the Hon'ble AAR held as under:

"No material has been placed 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. The Revenue has thus failed to show how the payments made by the applicant will be royalty income in the hands of C&W UK."-Dell International Services India (P) Ltd., In re(2008) 218 CTR (AAR) 209 : (2008) 10 DTR (AAR) 249 : (2008) 305 ITR 37 (AAR) followed."

62.1 Applying the proposition laid down in the case laws to the facts of the case, we have to hold that the payment in question is not 'Royalty' as contemplated under the DTAAs.

62.2 Now the question is whether there would be any change in this position subsequent to the retrospective amendments brought out by the Finance Act, 2002 w.e.f.

1.6.1976 by adding Explanation 5 & 6 to Section 9(1)(vi of the Act. The answer is no as changes in domestic law cannot be read into the Treaties as long as there is no change in the working of the Treaties.

63. The Hon'ble High court of Delhi in the case of DIT vs. Nokia Networks (2013) 358 ITR 259 has held as under:-

> *"S. 9 has been amended vide Finance Act, :;2012 and Explanations have been inserted with retrospective effect from 1-6-1976. The revenue argued that the amendments are only clarificatory in nature and submitted that the question of "copyrighted article" or actual copyright does not arise in the context of software both in the DTAA 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 ITAT has dealt with this aspect in its judgment in Gracemac Co. Vs. ADIT 134 TTJ (Delhi) 257 pointing out that even software bought off the shelf, does not constitute a "copyrighted article". <u>It was categorically held in CIT Vs. Siemens Aktiongesellschaft, 310 ITR 320 (Bom) that the amendments cannot be read into the treaty and on 'the wording of the treaty, it was already held that a copyrighted article does not fall within the purview of Royalty</u>."*

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Gracemac Co. vs. ADIT 134 TTJ (Delhi) 257, CIT vs. Siemens Aktiongesellschaft, 310 ITR 320 (Bom.), DIT vs. Ericsson, 343 ITR 370, relied on."

64. Recently, the Hon'ble Delhi High Court in the case of DIT vs. New Skies Satellite BV & Ors. In ITA No. 473/2012 & Ors. Vide judgment dated 8.2.2016 has held as under:-

> *"39. It is now essential to decide the second question i.e. whether the assessees in the present case will obtain any relief from the provisions of the DTAAs. Under Article 12 of the Double Tax Avoidance Agreements, the general rule states that whereas the State of Residence shall have the primary right to tax royalties, the Source State shall concurrently have the right to tax the income, to the extent of 15% of the total income. Before the amendment brought about by the Finance Act of 2012, the definition of royalty under the Act and the DTAAs were treated as pari materia. The definitions are reproduced below:*
>
>> *Article 12(3), Indo Thai Double Tax 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*

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> *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."*

Article 12(4), Indo Netherlands Double Tax Avoidance Agreement ITA 473/2012, 474/2012, 500/2012 & 244/2014 Page 31 "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."

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"

40. In Asia Satellite Telecommunication 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 pari materia. 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 DTAAs 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

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one such attempt, which falls just short of a breach, but is nevertheless, in the opinion of this Court, indefensible."

64.1 After considering the Vienna Convention on the Law of Treaties, 1969 (VCLT) and the judgments of the Hon'ble Supreme Court of Canada and other precedents, the Hon'ble High Court further has held as under :-

"60. Consequently, since we have held that the Finance Act, 2012 will not affect Article 12 of the DTAAs, it would follow that the first determinative interpretation given to the word "royalty" in Asia Satellite59 , when the definitions were in fact pari materia (in the absence of any contouring explanations), will continue to hold the field for the purpose of assessment years preceding the Finance Act, 2012 and in all cases which involve a Double Tax Avoidance Agreement, unless the said DTAAs 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 59 supra note 1 ITA 473/2012, 474/2012, 500/2012 & 244/2014 Page 50 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 Tax Avoidance Agreement."

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65. Thus, respectfully following the jurisdictional High Court decision as well as the judgments of the other Courts, we agree with the submission of the Ld. Counsel for the assessee that the amendments to the Finance Acts cannot be read into the DTAA's.

66. Ld. DR relied upon the decision of the Bangalore Bench of the ITAT in the case of Vodafone South vs. DCIT (Supra) wherein it was held that there is liability for deduction of tax at source on "IUC" payments as these payments were held to be payments, for use of process and hence payment for royalty. We have perused this decision of the ITAT. The proposition laid down therein are contrary to the propositions laid down by the Hon'ble Jurisdictional High Court in the case of DIT vs. New Skies Satellite BV & Ors. (Supra) as well as Asia Satellite Telecommunications Co. Ltd. vs. Director of Income Tax (Supra) and in the case of of the assessee itself as well as in the case of DIT vs. Nokia Networks (Supra) and other judgments referred in our decision. Even the Hon'ble Supreme Court has held that such payments are only for service rendered. Moreover, the agreements entered into by M/s Vodafone South India with the FTOs, are not before us. As per the terms of the agreement before us, the assessee had to pay the Inter Connectivity Usage charges to the FTOs, for services provided by them and not for the 'use of' or 'the right to use' of the process in their telecom network. In the case in hand, the Assessee never used or had acquired the right to use the

process of the FTOs. This decision of the ITAT, Bangalore Bench as already stated, is contrary to the proposition laid down in judgment of the Jurisdictional High Court in the case of the assessee itself where it is held that the payment was for service and this necessarily excludes the possibility of the payment being held as that which is made for Royalty, as both are contradictory position. This decision has been affirmed by the Hon'ble Supreme Court. Thus, we follow the binding decision of the Jurisdictional High Court in the matter and uphold the finding of the Ld. CIT(A).

67. Similarly, the reliance placed by the Ld. DR on the judgment of the Hon'ble Madras High court in the case of Verizon Communications Singapore Pte. Ltd. vs. ITO (International Taxation) reported in (2014) 361 ITR 0575 is also misplaced for the following reasons:-

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(a) M/s Verizon Communications received International Private Leased Circuit charges from customers for providing point to point dedicated private line to communicate between offices that are geographically dispersed throughout the world, the said case the bandwidth capacity was dedicated for the use of the Indian customer irrespective of actual usage. In the case of the present assessee, no such point to point dedicated private line was made available by the FTOs.

(b) In the case of Verizon Communications the customer has dedicated active internet connection at a particular speed, so that the contracted bandwidth is provided and the equipment at the customer end is also delivered by VCPL. In the case of the assessee no equipment is given by the FTO to the assessee. The assessee merely delivers a call using its own network, to the interconnection location of the FTOs which picks up the call and further transmit and terminates at the desired destination by using its own network.

c) In the case of Verizon Communication the customer has a significant economic interest in the VCPL's equipment to the extent of the bandwidth hired by the customer. The bandwidth capacity is given to the customer on a dedicated basis for a entire contract period. The Assessee has no such interest.

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68. Ld. DR further relied upon the decision of ITAT, Mumbai in the case of Viacom 18 Media (P) Ltd. vs. ADIT (International Taxation), (2014) 44 taxmann.com 1 (Mumbai Tribunal). This decision is also contrary to the proposition of law laid down by the Hon'ble Jurisdictional High Court in the assessee's own case. The ITAT has held that M/s Viacom 18 Media Pvt. Ltd. was engaged in the broadcasting of its various programmes on TV channels including marketing and advertising airtime. The Mumbai Bench

also held that the judgment of the Hon'ble Jurisdictional High court in the case of Asia Satellite Communications Co. Ltd. vs. DIT (Supra) is not applicable to the facts of Viacom 18 (Supra) case. It is not so in the case on hand. In any event the interpretation given by the Mumbai ITAT is divergent from the law laid down by the Jurisdictional High court in the case of Asia Satellite Communication Co. Ltd. (Supra) and hence we canot follow the same.

69. Thus, we uphold the order of the Ld. First Appellate Authority that the payment made for FTO for interconnection charges does not fall within the ambit of the definition of 'Royalty' under section 9(1)(vi) of the Act or under the definition of 'Royalty' under the Treaties.

70. Now we take up the other issues.

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ISSUE NO. 3

WHETHER THE ASSESSEE IS LIABLE TO BE TREATED AS ASSESSEE IN DEFAULT U/S. 201 OF THE I.T. ACT.

71. Under Section 195, any person, who is responsible for making a payment to a person who is a non-resident, of any sum, which is chargeable to Tax under the Act, is required to deduct the tax thereon at the rates in force. The Hon'ble Supreme Court of India in the case of GE Technology Central (P) Ltd. vs. CIT (2010) 327 ITR 456 (SC) held that the payer becomes an

assessee in default, only when he fails in his statutory obligations under section 195(1) of the Act. If the payment does not contain an element of income, the payer cannot be made liable to deduct tax u/s. 195 of the Act and he cannot be declared to be an "assessee in default".

72. We have held that the payment in question for "IUC" to FTOs is neither FTS nor royalty either under the Act or under the Treaties. We have in subsequent paragraphs given reasons as to why the income in question arising from the payment cannot be deemed to accrue or arise in India. Thus the assessee cannot be declared as "assessee in default" as it has not failed in its statutory obligations to deduct tax at source u/s. 195 of the Act. Assessee cannot be held the Assessee in default under section 201 of the I.T. Act. Hence, this issue is decided in favour of the Assessee.

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ISSUE NO. 4

WHETHER THE PAYMENT MADE BY THE ASSESSEE TO THE "FTO" CAN BE DEEMED TO ACCRUE OR ARISE IN INDIA.

73. The undisputed fact is that none of the operations of the FTOs are in India. The call is delivered outside India and is carried and terminated outside India. Under these circumstances, the question is whether the FTO is liable to pay tax on the income derived by it, on the ground that, the income is received or is deemed to have been received in India or on the ground

that, the income accrues or arises in India or is deemed to accrue or arise in India, during the relevant year. On facts, it is clear that Section 5(2)(a) is not applicable, as the payments were neither received nor deemed to have been received by the 'FTOs' in India. The first part of Section 5(1)(2)(b) is also not applicable. Hence, we have to test the receipts, as per the deeming provisions contained in the I.T. Act i.e. whether the receipt in question can be deemed to accrue or arise in India, u/s. 9, read with section 5(2)(b) of the Act.

74. The payment in question does not accrue or arise to the 'FTOs', through or from any property of the 'FTOs' in India or from any asset or source of income of the 'FTOs' in India or through the transfer of any capital asset of the 'FTOs' in India. The entire business operations are carried out outside India by the FTOs. Under these circumstances, the proposition of law laid down in the judgment of the Hon'ble Jurisdictional High Court in the case of Asia Satellite Communication Company Ltd. (Supra) applies in this case. Hence, no income is deemed to accrue or arise to the FTO's in India.

75. Even if it is assumed that the payments accrued or arise to the FTOs either directly or indirectly through or from any business connection in India since the business operations of the FTOs are carried out entirely outside India, no part of such income can

be said to be reasonably attributable to the business connection of the FTOs if in India.'

76. The Mumbai Bench of the ITAT in the case of JCTI vs. Siemens Aktiengesellschaft (2010) 133 TTJ 0563 has held as under:-

> *"Expln. l(a) to s. 9(1) provides that for the purposes of this clause, in the case of a business of which all the operations are not carried out in India, the income of the business deemed under this clause to accrue or arise. In India shall be only such part of the income as is. reasonably attributable to the operations carried out in India. From this Explanation, it is further amply clear that even if there is a business connection of the non-resident in India, then also only that part of the income shall be deemed to accrue or arise in India which is relatable to the operations carried out in India. So even if it is presumed for a moment, that there was any business connection of the assessee in India, still in the absence of any operations carried on by the assessee in India in this regard, there cannot be any question of bringing the case within the ambit of s. 9(1). It is pertinent to mention that the assessee categorically stated before the AO that the local activity with reference to installation was carried out by S Ltd. in*

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their independent capacity. It has further been claimed that income from such services has been duly offered for taxation by the Indian company, which has not been disputed by the Departmental Representative. Therefore, no part of the income as relatable to the sale of equipment by the assessee can be said to have deemed to accrue or arise to the assessee in India within the meaning of s. 9."

77. The Hon'ble High Court in the case of CIT vs. Goodyear Tyre & Rubber Co. (1989) 184 ITR 369 (Del.) held that even though the non-resident had a business connection in India, if no operations were carried out in India, the income cannot be subject to tax in India. Hence, the payment cannot be brought within the ambit of Section 9(1) r.w.s. 5(2) of the Act.

78. Even under the DTAA, the payments being in the nature of business income of the FTOs, Article '7' of the relevant DTAA's governs the same. There is no dispute that the FTOs do not have any Permanent Establishment in India. Under such circumstances, under Article 7 of the Treaty the income cannot be brought to tax in India. Hence, the payment of "IUC" to the FTOS cannot be deemed to accrue or arise in India under any of the clause of Section 9(1) read with Section 5(2) of the Act. Therefore this issue is decided in favour of the assessee.

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ISSUE NO. 5

WHETHER BENEFICIAL RATE PROVIDED UNDER DTAA OVERRIDE THE PROVISIONS OF SECTION 206AA AND WHETHER SECTION 206AA OF THE ACT IS APPLICABLE RETROSPECTIVELY.

79. This issue of retrospective applicability is covered in favour of the Assessee and against the Revenue by the decision of the ITAT, Pune Bench in the case of DDIT (IT-II), Pune vs. Serum Institute of India Ltd. (2015) 56 taxmann.com 1. Hence, respectfully following the order of the Coordinate Bench, we hold that Section 206AA cannot be applied retrospectively.

80. Recently the Bangalore 'B' Bench of the Tribunal in the case of M/s Wipro Ltd. vs. ITO (Int. Taxation) in ITA NO. 1544 to 1547/Bang./2013 (AY 2011-12) has held as under:-

> *"Where the tax has been deducted on the strength of the beneficial provisions of section OT Ms, the provisions of section 206AA of the Act cannot be invoked by the Assessing Officer to insist on the tax deduction @ 20%, having regard to the overriding nature of the provisions of section 90(2) of the Act. Section 206AA of the Act does not override the provisions of section 90(2) of the Act and in the payments made to non-residents, the assessee correctly applied the rate of tax prescribed under the*

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OT Ms and not as per section 206AA of the Act because the provisions of the DTAAs was more beneficial.

(ii) The explanation below sub-section-1 of Section 200A of the IT Act, which clarifies that in respect of deduction of tax at source where such rate is not in accordance with provisions of this Act can be considered as an incorrect claim apparent from the statement. However, in the case in hand, it is not a simple case of deduction of tax at source by applying the rate only as per the provisions of Act, when the benefit of DTAA is available to the recipient of the amount in question. Therefore, the question of applying the rate of 20% as provided u/s 206AA of the IT Act is an issue which requires a long drawn reasoning and finding. Hence, we are of the considered opinion, that applying the rate of 20% without considering the provisions of DTAA and consequent adjustment while framing the intimation u/s 200A is beyond the scope of the said provision. Thus, the AO has travelled beyond the jurisdiction of making the adjustment as per the provisions of Section 200A of the IT Act, 1961."

81. Respectfully, following the Coordinate Bench decision we hold that the beneficial rate provided in the DTAA override the

provisions of Section 206AA of the Act. Thus this issue is resolved in favour of the Assessee.

ISSUE NO. 6

Whether the ld. CIT(A) acted in violation of the provisions of Rule 46A in admitting the additional evidence filed by the assessee

82. After hearing rival submissions, we find that the Assessee was not allowed sufficient time by the AO to file the requisite details. It is not in dispute that the details and documents produced are voluminous. The Assessee submitted before the Ld. CIT(A) that the time given by the AO to furnish all the information and details pertaining to many past years, and that the assessee required time to collect the same from third parties who were located overseas and that such an exercise was time consuming. The Assessee has requested the AO specifically on 5.1.2012 to allow more time to compile the details. The AO without giving any further opportunity, within 7 days of such a request passed the impugned order. Under the circumstances, we find no infirmity in the order of the ld. CIT(A) admitting additional evidence under Rule 46A as these go into the root of the matter. The First Appellate Authority also recorded that these additional evidence are crucial for deciding the primary issues that were raised in the Appeal.

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83. The Ld. DR in support of his contention that the Ld. CIT(A) should not have admitted additional evidence relied upon on the following decisions.

- Order of the ITAT, 'D' Bench, Delhi in the case of ITO vs. Life Line Biotech Ltd. reported (2014) 52 taxmann.com 27 (Delhi – Trib.)

- Order of the ITAT, 'H' Bench, Delhi in the case of JCIT vs. Venus Financial Services Ltd. reported in (2012) 21 taxmann.com 436 (Delhi)

84. The Assessee also relied upon the decision of the Jurisdictional High Court in the case of CIT vs. Virgin Securities & Credits (P) Ltd. 332 ITR 396.

85. We have perused these decisions. These are distinguished on facts. When the Ld. DR has not disputed the finding of the Ld. CIT(A) that sufficient time was not granted to the assessee to file the requisite details. He has also not disputed the finding that these documents are crucial for adjudicating this aspect. These were not the facts in these cases cited by the Ld. DR.

86. In the decision of the Hon'ble Delhi High Court in the case of CIT vs. Virgin Securities & Credits (P) Ltd. (Supra) reported in 332 ITR 396 at Para 8 held as follows:-

"8 The aforesaid contention appears to be devoid of any merit. It is a matter of record that before admitting the additional evidence; the Commission of Income-tax (Appeals) had obtained a remand report from the Assessing Officer. While submitting his report, the Assessing Officer had not object, to the admission of the additional evidence, but had merely reiterated contentions in the assessment orders. It is only after considering remand report, the Commissioner of Income-tax (Appeals) had admitted the additional evidence. It cannot be disputed that this additional evidence was crucial to the disposal of the appeal and had a direct bearing 0n the quantum of claim made by the assessee. The plea of the asses was taken before the Assessing Officer remains the same. The Assessing Officer had taken adverse note because of non-production of certain documents to support the plea and it was in these circumstances, the additional evidence was submitted before the Commissioner of Income- (Appeals). It cannot be said nor is it the case of the Revenue that additional evidence is not permissible at all before the first appellate authority. On contrary, rule, 46A of the Rules permits the Commissioner of Income-(Appeals) to admit additional evidence if he finds that the same is crucial for disposal

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of the appeal. In the facts of this case, therefore, we are of the opinion that on this aspect, no substantial question of law arises."

87. The Jurisdictional High Court in the case of CIT vs. Text Hundred India (P) Ltd. at Para 13 held as follows:

"13. The aforesaid case law clearly lays down a neat principle of law that the discretion lies with the Tribunal to admit additional evidence in the interest of justice once the Tribunal affirms the opinion that doing so would be necessary for proper adjudication of the matter. This can be done even when application is filed by one of the parties to the appeal and it need not to be a suo motu action of the Tribunal. The aforesaid rule is made enabling the Tribunal to admit the additional evidence in its discretion if the Tribunal holds the view that such additional evidence would be necessary to do substantial justice in the matter. It is well-settled that the

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procedure is handmaid of justice and justice should not be allowed to be choked only because of some inadvertent error or omission on the part of one of the parties to lead evidence at the appropriate stage. Once it is found that the party intending to lead evidence before the Tribunal for the first time was prevented by sufficient cause to lead such an evidence and that this evidence would have material bearing on the issue which needs to be decided by the Tribunal and ends of justice demand admission of such evidence. The Tribunal can pass an order to that effect."

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88. Applying the proposition laid down in the decisions to the facts of the case, we uphold the order of the Ld. CIT(A).

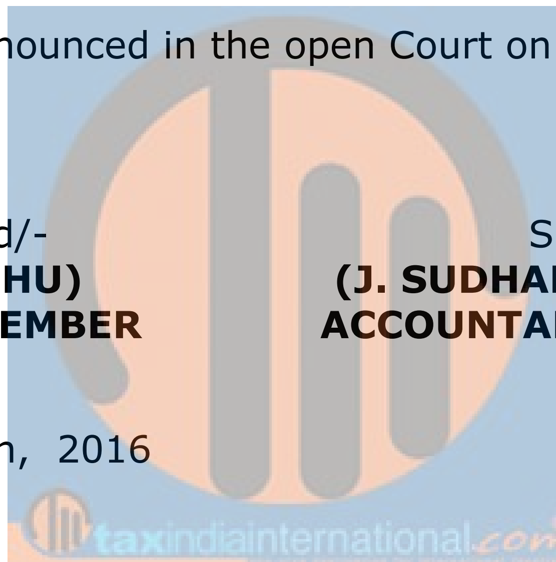
ISSUE NO. 7

89. **On the issue whether the payment is revenue sharing or not.** Though detailed arguments have been

advanced by both the parties on this issue, we do not adjudicate the same as in our opinion this requires further details and documents which are not on record. Hence we leave this question open.

90. In the result, all the Appeals of the Assessee are allowed and all the Revenue's Appeals are dismissed.

Decision pronounced in the open Court on 17th March, 2016.



Sd/-	Sd/-
(H.S. SIDHU)	**(J. SUDHAKAR REDDY)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated : 17th March, 2016

<u>Copy forwarded to: -</u>

1. Appellant :
2. Respondent :
3. CIT
4. CIT(A)
5. DR, ITAT

Assistant Registrar