आयकर अपीलीय अधिकरण, 'डी' न्यायपीठ, चेन्नई
IN THE INCOME TAX APPELLATE TRIBUNAL
' D' BENCH : CHENNAI

श्री एन.आर.एस. गणेशन, न्यायिक सदस्य एवं
श्री ए. मोहन अलंकामणी, लेखा सदस्य के समक्ष।
[BEFORE SHRI N.R.S. GANESAN, JUDICIAL MEMBER AND
SHRI A. MOHAN ALANKAMONY, ACCOUNTANT MEMBER**]**

आयकर अपील सं./I.T.A.Nos. 1070 to 1074 & 1621/Mds/2010
1562/Mds/2011, 2246/Mds/2012, 470/Mds/2014, 432/Mds/2015 & 516/Mds/2016
निर्धारण वर्ष /Assessment years : 2002-03 to 2012-13

M/s Intelsat Global Sales and Marketing Ltd C/o S.R Batliboi & Co. TPL House, Second Floor No.3, Cenotaph Road Teynampet,Chennai 600 018 **[PAN AABCI 1539 B]**	**Vs.**	The Income Tax Officer /Asst. Director of Income Tax/Addl. Director of Income Tax/Dy. Commissioner of Income Tax International taxation – I/I(1) Chennai
(अपीलार्थी/Appellant)		**(प्रत्यर्थी/Respondent)**

आयकर अपील सं./I.T.A.Nos. 872, 873 & 1080/Mds/2010
निर्धारण वर्ष /Assessment years : 2002-03, 2003-04 & 2005-06

The Income Tax Officer International taxation – I Chennai	**Vs.**	M/s Intelsat Global Sales and Marketing Ltd C/o S.R Batliboi & Co. TPL House, Second Floor No.3, Cenotaph Road Teynampet, Chennai 600 018
(अपीलार्थी/Appellant)		**(प्रत्यर्थी/Respondent)**

Assessee by	:	Shri Pawan Kumar, CA
Department by	:	Dr. Milind Madhukar Bhusari, CIT
सुनवाई की तारीख/Date of Hearing	:	26-05-2016
घोषणा की तारीख /Date of Pronouncement	:	01-07-2016

आदेश / O R D E R

PER N.R.S.GANESAN, JUDICIAL MEMBER

All the appeals of the assessee are directed against the respective orders of the Commissioner of Income-tax (Appeals)/Dispute Resolution Panel, Chennai, for assessment years 2002-03 to 2012-13. Since common issue arises for consideration in all the appeals, we heard them together and disposing of the same by this common order. The Revenue has also filed appeals for assessment years 2002-03, 2003-04 and 2005-06.

2. Let us first take assessee's appeals. Shri Pawan Kumar, ld. Representative for the assessee submitted that the assessee-company was incorporated in UK. The assessee-company provides transponder capacity installed on Satellite. According to the ld. Representative, telecasting companies/telecom operators uplink their data to the satellite owned by the assessee. The data/signal received by the Satellite would be received back by the earth stations in down linking process from where the telecasting facility is provided to customers of the telecasting companies/telecom operators. According to the ld. Representative, the assessee-company entered into an agreement for providing transmission capacity so as to enable the telecasting companies/telecom operators from India to uplink and downlink the

programmes which are to be telecasted. Referring to the copy of the agreement said to be entered into with Videsh Sanchar Nigam Ltd(VSNL), the ld. Representative submitted that the assessee has no Permanent Establishment in India. The assessee is not providing any services in India. The satellite was stationed in the orbit. The Indian telecasting companies/telecom operators upload their respective signals to the transponder provided by the assessee and they will also down link the signals for the purpose of distributing to their respective customers. Therefore, according to the ld. Representative, the assessee-company is not rendering any services in India. The assessee is also not having any Permanent Establishment in India. Referring to India-UK Double Taxation Avoidance Agreement, more particularly, Article 5, the ld. Representative submitted that the assessee has no Permanent Establishment within the meaning of Article 5 of India-UK DTAA. Merely because the Assessing Officer says that there was business connection in India that cannot lead to taxability of non-resident which is covered by the beneficial provisions of the tax treaty. Referring to the assessment order, more particularly para 7.2 for the assessment year 2002-03, the ld. Representative submitted that merely because one of the group company installed a machinery for down linking the signal from the assessee's satellite that cannot be construed as the assessee is having Permanent

Establishment in India. According to the ld. Representative, even though a machinery was installed by one of the Group Companies to test the quality of signal received in India, the same was removed during the year 2004. Therefore, on and after 2004, the assessee-company or any of its Group Companies do not have any machinery installed in India. When the Assessing Officer found that there was a machinery to test the quality of signal received in India by one of the Group Companies, he failed to examine the taxability of the assessee-company with reference to the income attributable to the alleged operations in India.

3. Referring to the judgment of the Apex Court in CIT vs Toshoku Ltd, 125 ITR 525 and Ishikawajma-Harima Heavy Industries Ltd vs DIT, 288 ITR 408, the ld. Representative submitted that at the best, the Revenue can tax a portion of the income that may be attributable to the operations carried out in India.

4. Referring to Article 5(6) of India-UK DTAA, the ld. Representative submitted that a company which is a resident in UK controls a company which is resident of India or which carries on business in India shall not by itself constitute either a Permanent Establishment or otherwise. Therefore, merely because an associated enterprises existed in India, that cannot be a reason to conclude that

the assessee has a Permanent Establishment in India. According to the ld. Representative, since the assessee has no Permanent Establishment is in India, no portion of the assessee's income can be attributable to Group company's equipment which was said to be installed at Chandigarh and Chennai upto the year 2004. The satellite operation was carried out from outside India only. The assessee has not rendered any service in the territorial jurisdiction of India. According to the ld. Representative, the concept of Permanent Establishment would override the assertions made by the assessee regarding the business connection in India.

5. The equipments said to be installed at Chandigarh and Chennai are different from an Earth Station. According to the ld. Representative, Communication System Monitoring Equipment was owned by the assessee's associated enterprise, viz. Intelsat Global Service Corporation, USA whereas the Earth Stations are owned, operated and maintained by VSNL. The assessee has not owned any Earth Station in India. The basic function of Communication System Monitoring Equipment or the Earth Station as the case may be, it should be owned by the assessee. According to the ld. Representative, the basic function of Communication System Monitoring Equipment is to monitor the signals. Whereas the function

of the Earth Station is to receive the down linked signal from the transponder provided by the assessee. In this case, no Earth Station was provided by the assessee in any part of India. In fact, the Earth Station was owned by VSNL, therefore, according to the ld. Representative, the assessee has not rendered any services in India.

6. The ld. Representative further submitted that the assessee was providing satellite service through space capacity to its customers. Referring to the agreement said to be entered into between the assessee and VSNL, the ld. Representative submitted that the trial and operations were solely undertaken by the assessee and it was not parted away at any point of time. The assessee merely receives data/signal which was uploaded by VSNL and the same was processed through transponder which is situated in the Satellite at orbit and thereafter it was retransmitted to earth. It is for the VSNL to receive the signal/data transponded by the assessee from satellite by installing Earth Station. In this case, according to the ld. Representative, the assessee has not installed any machinery or Earth Station to downlink the signal from satellite.

7. Referring to the judgment of the Delhi High Court in Asia Satellite Telecommunications Co. Ltd vs DIT, 332 ITR 340, the ld. Representative submitted that the payment made by the assessee

cannot be even construed as 'royalty'. The ld. Representative has also placed his reliance on the judgment of the Delhi High Court in the case of DIT vs New Skies Satellite BV in I.T.A.Nos.473 to 474/2012, the copy of which is available at page 1 of the paper book. According to the ld. Representative, the definition of the term 'royalty' under India-UK DTAA and Indo Thai DTAA, are pari materia, therefore, the judgment of the Delhi High Court in the case of New Skies Satellite BV(supra) is squarely applicable to the facts of the case.

8. The ld. Representative further submitted that the payment made by the assessee cannot be construed to be a payment as 'fee for technical services'. According to the ld. Representative, the services rendered by the assessee-company is a standard service, therefore, it does not qualify as fee for technical services. The ld. Representative placed is reliance on the judgment of the Madras High Court in the case of Skycell Communications Ltd vs The Dy. CIT, 251 ITR 53. Moreover, the technology was not made available to anyone by the assessee, therefore, the services rendered by the assessee even if it is considered to be a technical service, is not liable for taxation. According to the ld. Representative, the assessee has to necessarily make available the technology to VSNL for the purpose of treating the payment as 'fee for technical services'. Other than providing

transponder for down linking data/signal by VSNL, the assessee was not rendering any service. In fact, the system in-built in the transponder process the signal/data received from VSNL and the same was retransmitted not only to India but also across the globe. Anyone in the earth, according to the ld. Representative, could receive the signal from satellite. On a query from the Bench when the agreement entered into between the assessee and VSNL specifically indicates VSNL as a distributor for receiving the signal from assessee's satellite how anyone can receive the signal in India, the ld. Representative could not answer the question. According to the ld. Representative, the signal is very much available for 45% of the orbit.

9. Referring to the business connection in India, the ld. Representative submitted that the Assessing Officer has never said that the assessee has business connection in India. It is not the case of the Assessing Officer that the assessee has Permanent Establishment in India. In fact, the CIT(A) in the impugned order for the assessment years 2002-03 and 2003-04 held that discussion with regard to business connection in India is only academic in nature. According to the ld. Representative, business connection involves a relation between the business carried on by a Non-Resident which earned profits and gains and some activity which contributes directly

or indirectly for earning of such profit and gains. In this case, according to the ld. Representative, there is no business carried on by NRI in India which yielded the profit. According to the ld. Representative, the entire services were rendered by Non-resident through Satellite stationed in the orbit. The signal/data received by the satellite was processed through the transponder and thereafter it was retransmitted across the globe. Therefore, according to the ld. Representative, the assessee has not rendered any service or carried on any business in India.

10. According to the ld. Representative, even for any reasons this Tribunal came to the conclusion that there was a business connection in India and a portion of the income was earned in India, then the income which is reasonably attributable to the functions performed by the assessee in India alone is liable for taxation. In fact, no such examination was made by both the authorities below. According to the ld. Representative, mere business connection is not sufficient to tax the income of the assessee in India. Apart from business connection, some activities needs to be carried on by the assessee in India then only a portion of the income which is attributable to the activity carried on by the assessee in India is liable for taxation. The ld. Representative placed his reliance on the

judgment of the Apex Court in the case of Ishikawajma-Harima Heavy Industries Ltd (supra).

11. Referring to the services rendered by the assessee, the ld. Representative submitted that the company provides satellite capacity via space segment and related services to distributors in accordance with the terms of the agreement. According to the ld. Representative, the agreement said to be entered into between the assessee and VSNL is available on record. Referring to clause (4) of the Agreement, the ld. Representative submitted that the assessee authorizes the distributor on a non-exclusive basis, for so long as the agreement remains in effect, to procure from the company satellite capacity via the space segment and related services pursuant to a service contract for services in accordance with the ordering procedures. According to the ld. Representative, VSNL is solely responsible for down linking the signal/data by establishing the necessary Earth Station. The ld. Representative further submitted that for the purpose of maintaining Earth Station, VSL has to obtain necessary permission/approval from Government of India. Referring to the agreement between VSNL and the assessee, the ld. Representative submitted that the contract between VSNL and assessee is on principal to principal basis and the assessee is not privy to contractual terms between VSNL and its

customers. According to the ld. Representative, it is for the VSNL to market their services via space segments and related services. Considering the nature of the contract and the services rendered by the assessee-company, according to the ld. Representative, there is no principal to agent relationship and the relationship was only principal to principal. According to the ld. Representative, the responsibility of the assessee is to maintain the satellite capacity in the orbit whereas the responsibility of VSNL is to maintain the Earth Station for the purpose of receiving signal from the satellite. In this case, according to the ld. Representative, the payment made by the assessee cannot be construed as 'royalty' or 'fee for technical services'. Therefore, the CIT(A) is not justified in disallowing the claim of the assessee.

12. On the contrary, Dr. Milind Madhukar Bhusari, ld. DR submitted that admittedly, the assessee-company engaged in providing satellite capacity through space segment and related services to Indian customers. The assessee-company is providing service either directly or through VSNL. The telecasting companies/telecom operators uplink their data/signal to satellite maintained by the assessee in the orbit. On receipt of the signal/data, the system in-built in the satellite would process the same and downlink the same to VSNL. VSNL, in fact, receives signal in India and redistribute the same

to various customers. The assessee in fact entered into an agreement with VSNL and other telecom service providers for providing transponder capacity so as to enable them to uplink and downlink the programs to be telecasted. For the purpose of maintaining the quality of the signal received in India, the assessee has maintained an equipment at Chandigarh and Chennai. The assessee now claims before this Tribunal that the equipments installed at Chandigarh and Chennai do not belong to it and in fact it was installed and maintained by an associated concern. The fact remains that the equipment installed at Chandigarh and Chennai is to test the signal/data received in India which was retransmitted by assessee. Therefore, according to the ld. DR, to test the quality of signal which was down linked by the assessee an equipment was installed and the assessee is admittedly as claimed before this Tribunal maintaining the same through its associated concern. Therefore, according to the ld. DR, the assessee is having a permanent establishment in India. According to the ld. DR, the equipment installed and maintained in India for the purpose of testing the quality of signal received in India has to be necessarily treated as an Earth Station. Merely because VSNL has separate Earth Station to down link the programs retransmitted by the assessee-company that does not mean that the equipment installed by the assessee-company though through its associated concern as claimed,

cannot lose its character as Earth Station. According to the ld. DR, the equipment installed at Chandigarh and Chennai has to be necessarily treated as Earth Station, therefore, the assessee has business connection in India hence, profit and gain arising out of the services rendered has to be necessarily treated as business income in India hence, even as per the India-UK DTAA, the same has to be taxed only in India.

13. Referring to the claim of the assessee that the equipment installed at Chandigarh and Chennai was dismantled from assessment year 2004, the ld. DR submitted that dismantling of the equipment installed at Chandigarh and Chennai is not brought to the notice of the authorities below.

14. Referring to the order of the CIT(A), the ld. DR submitted that the transmission service provided by the assessee through satellite is to enable the transmission of signal through operators. Therefore, the assessee-company rendered service in India and hence, the Assessing Officer has rightly brought the same for taxation.

15. We have considered the rival submissions on either side and also perused the material available on record. Admittedly, the assessee engaged in providing satellite capacity through

space segment and related services to Indian customers. The assessee now claims that it has no Permanent Establishment in India and it is not doing any service in India. The claim of the assessee is that the signal/data down linked by VSNL and other companies in India namely, telecasting companies/telecom operators are received from the transponder maintained by the assessee's own satellite in the orbit. The signal/data upinked to the transponder was processed and it was transmitted/down linked to the Earth Station. According to the assessee, Earth Station is not maintained by the assessee. In fact, the specific claim of the assessee is that Earth Stations are maintained by the respective companies/operators in India. The question arises for consideration is when the assessee receives signal/data transmitted by the companies in India and process the same through transponder/satellite owned by the assessee which are situated in the orbit whether the assessee is rendering any service in India? If the assessee is maintaining satellite in the orbit and Indian companies are uploading the signal/data which was received by the satellite and transmitted to India then the assessee may not be rendering any service in India. In this case, the admitted fact is that the assessee is maintaining equipment at Chandigarh and Chennai for the purpose of testing the quality of signal. The very object of the agreement between the assessee and VSNL is to uplink and down link the signal

and the assessee has to maintain proper quality of the signal which was transmitted to India or to the Earth Station. The assessee now claims that the equipment installed in India at Chandigarh and Chennai does not belong to it and it is owned by its associated enterprise. The fact remains that the equipment maintained at Chandigarh and Chennai is for the purpose of testing the signal which was uploaded by VSNL and other Indian companies while it was down linked in India. Therefore, the assessee is maintaining an equipment in India through its associated enterprise for the purpose of testing quality of signal retransmitted in India. Therefore, this Tribunal is of the considered opinion that so long as the assessee is maintaining and equipment in India, it has to be construed that the assessee is rendering services in India. Now the assessee claims that the equipment installed at Chandigarh and Chennai was dismantled from the year 2004. However, dismantling of machinery/equipment installed at Chandigarh and Chennai is not brought on record by the authorities below. The Assessing Officer proceeded as if the assessee is maintaining the equipment at Chandigarh and Chennai for all the assessment years continuously. It needs to be examined when the assessee is not maintaining any equipment at Chandigarh/Chennai or any other place, how the quality of signal is being tested by the assessee-company. VSNL or any other companies entered into any agreement with the

assessee-company for the purpose of up linking and down linking data/signal would ensure the assessee to maintain the good quality while it was being retransmitted. Therefore, the assessee has to maintain the quality of signal which was retransmitted. If the quality of the signal/data is very poor then the recipient company may not accept the service as it was claimed before this Tribunal. Therefore, there is an obligation on the part of the assessee-company to maintain good quality of signal/data to be retransmitted so that VSNL or other companies which may redistribute the signal to their respective customers. Therefore, this Tribunal is of the considered opinion that it is obligation on the part of the assessee to maintain the quality of signal/data which was retransmitted.

16. If the assessee-company dismantled the equipment/ machinery installed at Chandigarh and Chennai in the year 2004, it is not known how the assessee is testing the quality of signal retransmitted to India. The so called Earth Station maintained by VSNL and other companies in India may be down linking the signal/data from the satellite. The question arises for consideration is whether the Earth Station said to be maintained by VSNL and other companies could receive signal/data without any intervention by the assessee-company in India. This fact was not examined by both the

authorities below. Further, how the signals were received in India without intervention of the assessee-company needs to be examined. This Tribunal is of the considered opinion that the technical experts from VSNL or very any other companies which entered into agreement with assessee-company needs to be examined about the mode of receipt of signal/data which was retransmitted by the assessee-company in India. Since the Assessing Officer has not examined the technical experts, this Tribunal is of the considered opinion that to appreciate the real services rendered by the assessee, the matter needs to be reexamined by the Assessing Officer. Accordingly, the orders of the lower authorities are set aside and the entire issue is remitted back to the file of the Assessing Officer. The Assessing Officer shall reexamine the matter afresh after examining the technical experts from VSNL who is responsible for maintaining the Earth Station in India or any other companies which has entered into similar agreement with the assessee and bring on record the actual services rendered by the assessee consequent to the agreement said to be entered into telecasting companies/telecom operators and thereafter decide the issue in accordance with law after giving a reasonable opportunity to the assessee.

17. In the result, all the appeals of the assessee are allowed for statistical purposes.

18. Now, coming to the Revenue's appeals, the first common issue raised by the Revenue is with regard to interest levied u/s 234B of the Act.

19. The claim of the assessee is that interest u/s 234B is not liable at all. Since the main issue in the assessee's appeal is remitted back to the file of the Assessing Officer, this Tribunal is of the considered opinion that the levy of interest u/s 234B is also needs to be reconsidered by the Assessing Officer. Accordingly, the orders of the lower authorities are set aside and the issue of levy of interest u/s 234B is remitted back to the file of the Assessing Officer for deciding afresh.

20. The Revenue has raised one more ground with regard of deduction of tax for assessment years 2002-03 and 2003-04. According to the ld. DR, the Assessing Officer ought to have deduced tax @ 15%. However, the CIT(A) found that tax has to be deducted at 10%. Referring to the order of the Assessing Officer, the ld. DR submitted that the payments received by the assessee from VSNL relates to the services covered under Article 13(2)(a) of the DTAA

between India and UK. Therefore, Article 7 of the DTAA may not be applicable since it relates to 'royalties'. According to the ld. DR, since there was a business connection, the profit earned by the assessee has to be necessarily construed as income, therefore, the Assessing Officer has to deduct tax @ 15%.

21. We heard the ld. Representative for the assessee also. Since the main issue relates to services rendered by the assessee to VSNL is remitted back to the file of the Assessing Officer, this Tribunal is of the considered opinion that the Assessing Officer shall reconsider the rate of tax to be deducted at the time of payment. Accordingly, the orders of the lower authorities are set aside and the entire issue is remitted back to the file of the Assessing Officer. The Assessing Officer shall reconsider the issue afresh and decide the same in accordance with law.

22. In the result, all the appeals of the Revenue are allowed for statistical purposes.

23. To summarize, all the appeals of the assessee and Revenue are allowed for statistical purposes.

24. Order pronounced in the open court on 1st July, 2016, at Chennai.

Sd/-	Sd/-
(ए. मोहन अलंकामणी)	**(एन.आर.एस. गणेशन))**
(A. MOHAN ALANKAMONY)	**(N.R.S. GANESAN)**
लेखा सदस्य/ACCOUNTANT MEMBER	**न्यायिक सदस्य/JUDICIAL MEMBER**

चेन्नई/Chennai
दिनांक/Dated: 1st July, 2016
RD

आदेश की प्रतिलिपि अग्रेषित/Copy to:

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकर आयुक्त (अपील)/CIT(A)
4. आयकर आयुक्त/CIT
5. विभागीय प्रतिनिधि/DR
6. गार्ड फाईल/GF