IN THE INCOME TAX APPELLATE TRIBUNAL,
DELHI BENCH 'C' NEW DELHI

BEFORE : SHRI I.C. SUDHIR, JUDICIAL MEMBER &
SHRI L.P. SAHU, ACCOUNTANT MEMBER

ITA Nos. 128, 2620, 2621/Del./2011 & 1236/Del./2014
Asstt. Years : 2004-05, 2005-06, 2006-07 & 2007-08

Geo Connect Ltd., Room No. 110, Indraprakash, 21, Bahakhamba Road, New Delhi. (PAN – AAECS 2401C)	vs.	DCIT, Circle 12(1), New Delhi.
Date of hearing	:	23.02.2017

ITA No. 699/Del./2014
Asstt. Year : 2004-05

Geo Connect Ltd., Room No. 110, Indraprakash, 21, Bahakhamba Road, New Delhi. (Appellant)	vs.	DCIT, Circle 12(1), New Delhi. (Respondent)
Date of hearing	:	01.03.2017
Appellant by	:	Sh. Gaurav Jain, Advocate & Ms. Bhavita Kumar, Advocate
Respondent by	:	Sh. Amrit Lal, Sr. DR
Date of pronouncement	:	30.03.2017

ORDER

Per Bench:

The first four appeals by the assessee are directed against separate orders of learned CIT(A) dated 26.10.2010, 08.03.2011, 18.03.2011 and 20.12.2013 for

the assessment years 2004-05, 2005-06, 2006-07 & 2007-08 respectively. The assessee has raised following grounds in its respective appeals :

A.Y. 2004-05:

"1. That on the law, facts and in the circumstances of the case, the Learned Commissioner of Income-tax (A) has erred in confirming the disallowance made by Learned Assessing Officer in respect of amortization of expenses U/s 35D of Income Tax Act 1961, in the second year, amounting to Rs.67,800 being 1/5^ of expenditure having been incurred in the assessment for assessment year 2003-04. The deduction U/s 35D was duly allowed to the assessee company by the Ld. Assessing Officer during the assessment year 2003-04.

2. That on the law, facts and in the circumstances of the case, the Learned Commissioner of Income-tax (A) has erred in confirming the disallowance made by Learned Assessing Officer in respect of Telecommunication expenses paid to M/s GNO Solutions Inc. USA and International Private Leased Circuit (IPLC) charges paid to M/s World Com Data International Services USA amounting to Rs.45,41,474/-, and Rs.36,47,900/- respectively on the ground that no tax was deducted at source under section 195 of the I. T. Act, 1961 before making such payments as per provisions of section 40(a)(i).

2.1 On the facts and in the circumstances of the case, the CIT (A) erred in upholding the action of the Assessing Officer in treating the payment of telecommunication charges and IPLC charges as chargeable to tax in India under section 9(1) (vii) read with Article 12(2) and 12(4) of DTAA between USA and India.

3. That on the law, facts and in the circumstances of the case, the Learned Commissioner of Income-tax (A) has erred in confirming the disallowance made by Learned Assessing Officer in respect of Training and Development Expenses amounting to Rs. 17,71,2147- claimed as allowable expense U/s 37(1) being foreign higher education expenses incurred in respect of its employee Mr. Karun Ansal's studies abroad, particularly when he had committed to render services to the organization after competing his studies abroad.

4. That all the above grounds and sub-grounds have to be read conjunctively and also independent of each other.

5. That the above ground(s) of appeal are to be considered separately and without prejudice to one another.

6. That the appellant assessee craves, leaves to add, alter, amend, substitute, withdraw or forego any of the ground(s) of appeal before or at the time of hearing.

7. That the order of Learned CIT (A) is bad in law and wrong on facts of the case and is in violation of the principles of natural justice without providing reasonable opportunity to the appellant assessee to meet the merits of its case."

A.Y. 2005-06:

"1. That on the law, facts and in the circumstances of the case, the Learned Commissioner of Income-tax (A) has erred in confirming the disallowance made by Learned Assessing Officer in respect of amortization of expenses U/s 35D of Income Tax Act 1961, in the third year, amounting to Rs.67,800 being l/5th of expenditure having been incurred in the assessment for assessment year 2003-04. The deduction U/s 35D was duly allowed to the assessee company by the Ld. Assessing Officer during the assessment year 2003-04.

2. That on the law, facts and in the circumstances of the case, the Learned Commissioner of Income-tax (A) has erred in confirming the disallowance made by Learned Assessing Officer in respect of Training and Development Expenses amounting to Rs. 18,15,474/- claimed as allowable expense U/s 37(1) being foreign higher education expenses incurred in respect of its employee Mr. Karun Ansal's studies abroad, particularly when he had committed to render services to the organization after competing his studies abroad.

3. That on the law, facts and in the circumstances of the case, the Learned Commissioner of Income-tax (A) has erred in not accepting the revised computation of income tiled on 29.09.2007 on the dak counter, in view of decision of Hon'blc Supreme Court in the case of Goetze India Ltd 284 ITR

323, without going into the merits of the claim made by the assessee company through revised computation of income filed during the course of assessment proceedings.

3.1 That on the law, facts and in the circumstances of the case, the Learned Commissioner of Income-tax (A) has further erred in rejecting the claim without considering the detail /documents filed along with revised computation of income and which were duly submitted before Ld. CIT (A).

4. That all the above grounds have to be read conjunctively and also independent of each other.

5. That the above ground(s) of appeal are to be considered separately and without prejudice to one another.

6. That the appellant assessee craves, leaves to add, alter, amend, substitute, withdraw or forego any of the ground(s) of appeal before or at the time of hearing.

7. That the order of Learned CIT (A) is bad in law and wrong on facts of the case and is in violation of the principles of natural justice without providing reasonable opportunity to the appellant assessee to meet the merits of its case."

A.Y. 2006-07:

"1. That on the law, facts and in the circumstances of the case, the Learned Commissioner of Income-tax (A) has erred in confirming the disallowance made by Learned Assessing Officer in respect of Training and Development Expenses amounting to Rs.7,22.790/- claimed as allowable expense u/s 37(1) being foreign higher education expenses incurred in respect of its employee Mr. Karun Ansal's studies abroad, particularly when he had committed to render services to the organization after competing his studies abroad.

2. That the appellant assessee craves, leaves to add, alter, amend, substitute, withdraw or forego any of the ground(s) of appeal before or at the time of hearing.

3. That the order of Learned CIT (A) is bad in law and wrong on facts of the case and is in violation of the principles of natural justice without

providing reasonable opportunity to the appellant assessee to meet the merits of its case."

A.Y. 2007-08:

"1. That on the law, facts and in the circumstances of the case, the Learned Commissioner of Income-tax (A), has erred in confirming the disallowance made by Learned Assessing Officer in respect of Training and Development Expenses amounting to Rs.97,965/- claimed as allowable expense U/s 37(1) being foreign higher education expenses incurred in respect of its employee Mr. Karun Ansal's studies abroad, particularly when he had committed to render services to the organization after completing his studies abroad.

2. That on the law, facts and in the circumstances of the case, the Learned Commissioner of Income-tax (A) has erred in holding that FBT proceedings are separate proceedings and issue cannot be decided under Income Tax proceedings. The Training & Development expenses of Rs.97,965/- were considered for the purpose of payment of FBT, and thus cannot be disallowed under income tax assessment proceedings.

2. That the appellant assessee craves, leaves to add, alter, amend, substitute, withdraw or forego any of the ground(s) of appeal before or at the time of hearing.

3. That the order of Learned CIT (A) is bad in law and wrong on facts of the case and is in violation of the principles of natural justice without providing reasonable opportunity to the appellant assessee to meet the merits of its case."

2. By way of next appeal No. 699/Del./2013, the assessee challenges the confirmation of penalty u/s. 271(1)(c) of the Act by the ld. CIT(A)-XVIII, New Delhi vide order dated 11.11.2013, for A.Y. 2004-05.

3. Since these appeals are in respect of the same assessee and the issues involved are interconnected, all these appeals are being disposed of by this consolidated order for the sake of convenience and brevity. We take up the facts from the appeal for the assessment year 2004-05.

4. The brief facts of the case are that the assessee filed return of income declaring loss of Rs.8,22,03,460/- on 15.10.2004. The return was selected for scrutiny and statutory notices were issued to the assessee. The assessee company was engaged in IT enabled services, i.e., providing call centre services. During the course of scrutiny proceedings, the assessee filed revised computation of income on 14.07.2006 and claimed deduction u/s. 35D of Rs.67,600/- in respect of filing fee paid to ROC for increase in authorized share capital of the company. The ld. Assessing Officer did not allow the claim of the assessee u/s. 35D and relying the judgment of Hon'ble Supreme Court in the cases of Punjab State Industrial Development Corporation. Ltd. vs. CIT, 225 ITR 792 (SC) and Brooke Bond India Ltd. vs. CIT, 225 ITR 798 (SC), observed that these expenditures are capital in nature and not allowable as claimed by the assessee by way of revised computation of income.

5. Aggrieved by this disallowance, the assessee appealed before the first appellate authority and the ld. CIT(A) after considering the submissions and relying on the judgments as cited by the AO, upheld the order of the AO. The assessee is, therefore, in appeal before the Tribunal.

6. The ld. AR of the assessee submitted that the Assessing Officer has allowed such amortization of expenses u/s. 35D in the assessment year 2003-04. Therefore, rule of consistency should be maintained. He placed reliance on the decision of Hon'ble Supreme Court in the case of Shasoon Chemicals and Drugs Ltd. vs. CIT, 298 CTR 97. The assessee has expanded his business by utilizing the share capital raised. He submitted that once this position is accepted and the clock had started running in favour of the assessee, it had to complete entire period of deduction granted u/s. 35D. The ld. AR further submitted that this expenditure is fully covered u/s. 35D for amortization of expenses.

7. On the other hand, the ld. DR relied on the order of the Assessing Officer. He submitted that the assessee did not claim in the return filed. He only claimed the deduction by way of revised computation of income. He relied on the decision of Hon'ble Supreme Court in the case of Goetz India Ltd., 284 ITR 323 (SC). The assessee did not bring any cogent material on record to show that the

expansion of unit has been done as provided u/s. 35D. The ld. DR further submitted that the case law relied by the assessee is not applicable because in the said case, the assessing Officer himself had visited the factory premises for physical verification for the expansion of the facilities to the Industrial Undertaking and on being satisfied, the ld. AO allowed the claim of the assessee after scrutinizing all the materials available to him and recorded the positive finding of fact that there was an expansion to the existing units of the Industrial Undertaking and allowed the claim of shares issued expenses u/s. 35D of the Act.

8. After hearing both the parties and perusing the material available on record and the case laws cited by both the parties, we find that the assessee did not produce any cogent materials before the Bench for any expansion of the undertaking of the assessee. The AO is empowered for giving deduction claimed by the assessee in the return of income, as decided in Goetz India Ltd. (supra). The case law relied by the assessee is distinguishable on facts because the assessee in that case expanded his industrial undertaking and the AO was fully satisfied after physical verification of the factory premises. In that case, the assessee had claimed deduction u/s. 35D in the return of income. In the above case, the shares were issued publicly for raising funds to meet the capital expenditure and other expenditure relating to expansion of its existing units of

production for the research and development activities. The Assessing Officer had treated it as capital expenditure by following the judgment as cited by the AO in his order. In this regard we rely on the order dated 18.07.2012 of the coordinate Bench in the case of Dronagiri Infrastructure Pvt. Ltd. vs. DCIT (ITA No. 3369/Mum/2011 for the assessment year 2006-07 wherein it has been observed as under :

> *"6 We have considered the rival submissions as well as relevant material on record. There is no dispute on the fact that the expenditure in question was incurred in relation to the increase in authorised capital and not in relation to incorporation of the assessee company by registration with ROC. The assessee has mainly relied upon the decision of honourable Rajasthan High Court in case of multi-metal Ltd (supra) and advanced the argument that the language of section 35D(2)(c) is wide in nature and would include the deductibility of fee paid by the assessee to ROC for enhancement of authorised capital. We note that the Assessing Officer has distinguished the decision of the honourable Rajasthan High Court and relied upon the decision of honourable Supreme Court as well as honourable Delhi High Court. The relevant part of the assessment order at page no.4 is reproduced as under:*
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> > *"The submissions of the assessee is considered, but cannot be accepted due to the reasons that the expenditure allowed to be amortised of certain preliminary expenses are mentioned in the provisions of Section 35D of I.T. Act, 1961. Assessee's expenditure is incurred on none of the items mentioned in provisions of Section 35D (2) and hence does not qualify for any allowance on this account. The assessee is a private limited company and not a company in which the public is substantially interested and the expenses are not incurred for public issue. The facts of the case of the assessee is squarely covered by the decision of the Hon'ble Supreme Court in the cases of Punjab State Industrial Development Corporation Ltd Vs. CIT 225 ITR 792 and Brook Bond India Ltd vs. CIT 225 ITR 798 (SC) wherein it was held that expenses incurred on increasing the share capital and fees paid to Registrar of companies*

for increase in authorised capital is capital expenditure and cannot be allowed as revenue expenditure. In the case of CIT Vs. Hindustan Insecticides Ltd 250 ITR 338, the Hon1e Delhi High Court has held that fees paid for increase in share capital is not fees for registration of the/ company and hence is not amortizable under Section 35D(2)(e)(iii) of the I..T. Act. Regarding the contention of the assessee that this item is covered by provisions of section 35D (2)(d) of the I.T. Act, it is seen that the said clause provides that any other item as may be prescribed can be considered for amortization. However, nothing has been prescribed, so as to include the expenses as claimed by the assessee. Therefore the claim of the assessee is rejected. The assessee has relied on the case of CIT Vs. Multi Metals Ltd 188 ITR 151. The facts of that case are totally different. In that case, the expenses were incurred for raising public issue of shares and therefore was held to be covered by Section 35D (2)(c)(iv). The assessee is not a public company and has not incurred any expenses on public issue and therefore the ratio of this decision is not applicable. The other cases relied by the assessee are also distinguishable on facts, Hence the claim of the assessee on account of amortization of expenses are disallowed in view of the above discussion."

6.1 The Assessing Officer disallowed the claim by following the decision of honourable Supreme Court in case of Punjab state industrial development Corporation and broke Brooke Bond India Ltd (supra). Further the honourable Delhi High Court in case of Hindustan Insecticides Ltd (supra) has decided an identical issue after considering and following the aforesaid decisions of honourable Supreme Court and held in para 3 and 4 as under:

"We have heard learned counsel for the Revenue. There is no appearance on behalf of the assessee in spite of notice. So far as the question referred at the instance of the assessee is concerned, the matter is squarely concluded by two decisions of the Supreme Court in Punjab State Industrial Development Corporation Limited v. CIT [1997] 225 ITR 792 and Brooke Bond India Limited v. CIT [1997] 225 ITR 798. It was held in both the cases that expenditure incurred by a company in connection with issue of shares with a view to increase its share capital is directly related to the expansion of the capital base of the company and is capital expenditure even though it may incidentally help in the business of the company and in the

profit making. That being the position, the question is answered in the affirmative, in favour of the Revenue and against the assessee. Coming to the question referred at the instance of the Revenue it would be necessary to quote the provision as it stood at the relevant point of time:

"35D. (1) . . .
(2) The expenditure referred to in sub-section (1) shall be the expenditure specified in any one or more of the following clauses, namely :-
(a) & (b)....
(b) where the assessee is a company, also expenditure
(i) and (ii).....
(iii) by way of fees for registering the company under the provisions of the Companies Act, 1956 (1 of 1956) ;"

It has to be noted that the Tribunal referred to Schedule X to the Companies Act, 1956 (in short, "the Companies Act"). The said schedule refers to the table of fees to be paid to the Registrar in respect of a company having a share capital. Item 1 of the Schedule indicates Rs. 200 as prescribed fees payable for registration of a company whose nominal share capital does not exceed Rs. 20,000. Item 2 of the Schedule indicates an additional fee for registration of a company whose nominal share capital exceeds Rs. 20,000. The Tribunal was of the view that item 3 was the relevant item. The said item reads as follows :

"(3) For filing a notice of any increase in the nominal share capital of a company the difference between the fees payable on the date of filing the notice for the registration of a company with a nominal share capital equal to the increased share capital and the fees payable, on such date, for the registration of a company with a share capital equal to the nominal share capital of the company filing the notice immediately before the increase."

With reference to the said item, the Tribunal held that the additional fee is a registration fee on the difference in the nominal share capital and the increased share capital of the company and is covered by the said item. For coming to said conclusion the Tribunal observed that it has to be kept in view that the whole amount, which becomes the authorised share capital, would have attracted payment of fee at a

particular figure at the point of time of original registration of the company. Merely because the share capital is increased subsequently as permissible under section 81 of the Companies Act, the fee paid on the increased capital does not cease to be registration fee. Learned counsel for the Revenue with reference to the various provisions of the Companies Act submitted that item 3 of Schedule X has no application to the facts of the case. There is a conceptual difference between registration of the company and action taken for increase of the share capital. Part II of the Companies Act deals with incorporation of a company and matters incidental thereto. Section 12 deals with mode of forming an incorporated Company. Sections 33 and 34 deals with registration of memorandum and articles and effect of registration respectively. Section 97 deals with the requirement of notice of increase of the share capital or of members. Section 611 deals with the fees payable under Schedule X. Sub-section (1) of section 34 to which we have made reference earlier stipulates that on the registration of the memorandum of a company, the Registrar shall certify under his hand that the company is incorporated and, in the case of a limited company, that the company is limited. Therefore, on the registration of the memorandum of a company the company becomes incorporated. A reading of Schedule X would go to show that items 1 and 2 deal with registration of a company depending on the nominal share capital, in respect of a company having a share capital. Item 3, on the other hand, deals with fees payable for filing a notice for increase in the nominal share capital of the company. The first two items and the third item operate in conceptually and contextually different fields. This is also clear from a reading of item 4 which provides that for registration of any existing company, except such companies as are by the Companies Act exempted from payment of fees in respect of registration under the Companies Act, the same fee as is charged for registering a new company is payable. Section 35D(2)(c)(iii) deals with expenditure incurred by way of fees for registration of a company under the Act. As the analysis of the position above would go to show, fees paid under item 3 of Schedule X cannot be stated to be fees paid for registering a company. That being the position section 35D(2)(c)(iii) has no application to the facts of the case. The question referred at the instance of the Revenue is, therefore, answered in the negative, in favour of the Revenue and against the assessee."

7 It is clear from the decisions cited above that the issue is settled and covered against the assessee and in favour of the revenue. Accordingly, respectfully following the decisions of honourable Supreme Court as well as honourable Delhi High Court, we do not find any merit in the appeal of the assessee on this issue and hence we uphold the orders of the authorities below on this issue."

9. As far as the contention of the assessee regarding rule of consistency is concerned, we find that each year is an independent unit and principle of res judicata is not applicable in the Income-tax proceedings, more particularly when the issue under consideration has been decided by Hon'ble Supreme Court against the assessee in the decisions relied by the AO (supra). Therefore, laying our hands on the said decisions of Hon'ble Apex Court and respectfully following the above decision of coordinate Bench, we conclude that the fee paid to ROC for increasing the share capital is to be treated as capital expenditure. Accordingly, ground No. 1 for the assessment year 2004-05 is dismissed.

10. Since this issue is also involved in appeal for A.Y. 2005-06 in which amortization of expenses amounting to Rs.67,900/- were disallowed, and the facts and circumstances are similar, our above decision and findings would equally apply to ground No. 1 of appeal for A.Y.2005-06 also. The same is accordingly dismissed.

11. Ground No. 2 & 2.1 relate to disallowance u/s. 40(a)(i) of the IT Act regarding payment on account of International Private Leased Circuit (IPLC) charges and connectivity charges to non-resident parties without tax deduction at source. Following payments were made to non-resident parties without TDS :

S. No.	Name of the party	Nature of payment	Amount (Rs.)
1.	M/s. GNG Solutions Inc. USA	Tele communication Expenses	4541474/-
2.	World Com Data International Services USA.	IPLC (International Private Lease Circuit) Charges.	3647900/-

The Assessing Officer noted that the above parties have rendered their services in India, but the assessee submitted that the Transponder/Modem was situated outside India and which the control & brainwave of rendering services at Miyami USA and no part of services have been rendered in India. The Assessing Officer after analyzing the agreement and Article 12 of the DTAA between USA & India and as per section 9(1)(vi), treated the payment as royalty. He concluded that the assessee is a resident and his business is situated in India and the source of income is its call centre which is also situated in India. He also applied Explanation (2) of the aforesaid section wherein royalty has been defined. The AO noted that the right to use of Band Width technical services in the nature of maintenance falls within the definition of Royalty. In appeal before the ld. CIT(A), the order of the AO stood upheld. Hence, this appeal by assessee before the Tribunal.

12. The learned AR submitted that the telecommunication expenses paid for ASP service parties to non-resident party, M/s. GNG Solutions Inc. USA amounting to Rs.45,41,475/- and IPLC charges pad to non-resident party M/s. World Com. Data International Services, USA amounting to Rs.36,47,900/-, aggregating to Rs.81,89,374/- has been debited as telecommunication expenses to the profit and loss account. These expenses are barely essential for running international call centre as having laid out or expanded wholly and exclusively and necessarily for the purpose of running of the business of the assessee company and it is allowable u/s. 37(1) of the Act. In the identical situation, the ITAT, Delhi Bench in the case of assessee itself for the assessment year 2003-04 has decided the issue in favour of the assessee vide order dated 17.01.2017 which is placed at pages 458 onwards of the paper book. Therefore, the issue is squarely covered by the said order of the ITAT.

13. On the other hand, the ld. DR relied on the order of the lower authorities.

14. We have considered the rival submissions and perused the materials on record and we find that the facts, nature of business and other circumstances attending to the preceding assessment year 2003-04, are identical to the facts prevailing during the year under consideration and in the similar situation, the

coordinate bench in the case of assessee itself has decided the issue in favour of the assessee vide order dated 17.01.2017 (supra). The relevant findings recorded by the Tribunal in different paras are as under :

"9.12 We have heard the rival submissions of the parties and perused the relevant material including the order of the lower authorities and case laws relied upon by the both the parties.

9.12.1 The assessee company did not deduct tax at source on the payments made to non-resident parties namely ñKick Communicationò and ñIGTL solutionsò holding that no income was chargeable in their hands. The issue in question before us is whether the payments made to those parties was liable as income accrued or deemed to accrue in their hands within the provisions of the Act or income in their hands as per the articles of the DTAA between the USA and the India. If the answer to the question is positive, the assessee was liable to deduct tax at source on those payments and consequent disallowance under section 40(a)(i) of the Act.

9.12.2 The services rendered by both the parties have been described in detail by the lower authorities in their orders. Briefly, it can be summarized that the executive of the call Centre of the assessee located at Ghaziabad used to make call to the persons in USA for marketing of the products of the clients of the assessee. The voice call data was converted into electronic data and transmitted from the call Centre in India to the person in USA to whom the call was made. The call from the call Centre at Ghaziabad to the last point of Indian territory at Mumbai was transmitted by the VSNL. We may call it as domestic leg of the call transmission. Further, the call data was transmitted from last point in Indian Territory at Mumbai to entry point in the USA at Miami through undersea cable by M/s kick communication. The data from entry point at Miami in USA to the person connected to the call was transmitted by M/s IGTL solutions. We may call these both the part of the call transmission as international leg of the call transmission. From the analysis of the agreements with the both the non-resident parties by the Ld. Commissioner of Income-tax (Appeals), we find that M/s Kick Communication was not only responsible for providing smooth transmission of call data, it was also responsible for managing the faults arising in transmission of calls and providing all information to the assessee in respect of transmission of call data. Similarly, M/s. IGTL Solutions was responsible for smooth transmission and management of call data from entry point in the USA to the person to whom the call was made. The lower authorities have not raised any issue of rendering service by the non-resident parties through any permanent establishments in India. The Assessing Officer held that there was certainly a business connection between the assessee and the non-resident parties and the payments were made for using facilities of non-resident parties by the assessee from India. He further held that The payments made for services rendered by above two non-resident parties was in the nature of royalty as the assessee was having right to use of bandwidth and technical services in the nature of maintenance in terms of Explanation-2 to section 9(1)(vi) of the Act. The Assessing Officer held that the payment made was also in the nature of the royalty under the DTAA as the term royalty has been defined in clause 3(b) of the DTAA as payment of any kind received

as consideration for use of, or the right to use any industrial commercial or scientific equipment. The learned Commissioner of Income-tax (Appeals) upheld the finding of the Assessing Officer in view of the decision of the Tribunal in the case of Asia Satellite Telecommunication Ltd. Vs. Deputy Commissioner of Income Tax, reported in 85 ITD 478(Del). The learned Commissioner of Income-tax (Appeals) alternatively also held that the amount of remittances to both non-resident parties were chargeable as fee for technical services in their hands under section 9(1)(vii) read with article 12(2) and article 12(4) of the DTAA between USA and India.

9.12.3 Therefore, first we discuss whether income accrued or arisen in hands of the recipient non-resident parties in terms of section 9(1)(i) of the Act. In this respect, we are reproducing the relevant part of section 9(1)(i), as under:

"Income deemed to accrue or arise in India.

9. *(1) The following incomes shall be deemed to accrue or arise in India :—*

(i) all income accruing or arising, whether directly or indirectly, through or from any business connection in India, or through or from any property in India, or through or from any asset or source of income in India, or through the transfer of a capital asset situate in India."

9.12.4 Thus, for Revenue to succeed on this issue, it has to prove that income has accrued or arisen, whether directly or indirectly in India:

(a) through or from any business connection in India
(b) through or from any property India
(c) through or from any assets or source of income in India
(d) through a from transfer of capital asset situated in India.

9.12.5 Further the ñbusiness connectionò has been defined in Explanation-2 below the subsection 9(1)(i) as under:

*"Explanation 2.*ð For the removal of doubts, it is hereby declared that "business connection" shall include any business activity carried out through a person who, acting on behalf of the non-resident,ð

(*a*) has and habitually exercises in India, an authority to conclude contracts on behalf of the non-resident, unless his activities are limited to the purchase of goods or merchandise for the non-resident; or

(*b*) has no such authority, but habitually maintains in India a stock of goods or merchandise from which he regularly delivers goods or merchandise on behalf of the non-resident; or

(*c*) habitually secures orders in India, mainly or wholly for the non-resident or for that non-resident and other non-residents controlling, controlled by, or subject to the same common control, as that non-resident:

Provided that such business connection shall not include any business activity carried out through a broker, general commission agent or any other agent having an independent status, if such broker, general commission agent or any other agent having an independent status is acting in the ordinary course of his business :

Provided further that where such broker, general commission agent or any other agent works mainly or wholly on behalf of a non-resident (hereafter in this proviso referred to as the principal non-resident) or on behalf of such non-resident and other non-residents which

are controlled by the principal non-resident or have a controlling interest in the principal non-resident or are subject to the same common control as the principal non-resident, he shall not be deemed to be a broker, general commission agent or an agent of an independent status.ò

9.12.6 The CBDT Circular No. 23, dated 23/07/1969 (which was subsequently withdrawn by the CBDT Circular No. 7/2009, dated 22/10/ 2009) provided certain illustrative instances of a non-resident having business connection in India as under:

*"**2.** The expression 'business connection' admits of no precise definition. The import and connotation of this expression has been explained by the Supreme Court in their judgment in CIT vs. R.D. Aggarwal & Co. (1965) 56 ITR 20 (SC) : TC 39R.1098. The question whether a non-resident has a 'business connection' in India from or through which income, profits or gains can be said to accrue or arise to him within the meaning of s. 9 of the IT Act, 1961, has to be determined on the facts of each case. However, some illustrative instances of a non-resident having business connection in India, are given below :*

(a) Maintaining a branch office in India for the purchase or sale of goods or transacting other business.

(b) Appointing an agent in India, for the systematic and regular purchase of raw materials or other commodities, or for sale of the non-resident's goods or for other business purposes.

(c) Erecting a factory in India where the raw produce purchased locally is worked into a firm suitable for export abroad.

(d) Forming a local subsidiary company to sell the products of the non-resident parent company.

(e) Having financial association between a resident and non- resident company.

***3.** The following clarifications would be found useful in deciding questions regarding the applicability of the provisions of s. 9 in certain specific situations :*

1. Non-resident exporter selling goods from abroad to Indian importer.—(i) No liability will arise on accrual basis to the non-resident on the profits made by him where the transactions of sale between the two parties are on a principal to principal basis. In all cases, the real relationship between the parties has to be looked into on the basis of an agreement existing between them but where :

(a) the purchases made by the resident are outright on his own account,

(b) the transactions between the resident and the non-resident are made at arm's length and at prices which would be normally chargeable to other customers,

(c) the non-resident exercises no control over the business of the resident and sales are made by the latter on his own account, or

(d) the payment to the non-resident is made on delivery of documents and is not dependent in any way of the sales to be effected by the resident.

it can be inferred that the transactions are on the basis of principal to principal.

(ii) A question may arise in the above type of cases whether there is any liability of the non-resident under s. 5(1) of the IT Act, 1961, on the basis of receipt of sale proceeds including the profits in India. If the non-resident makes over the shipping documents to a bank in his own country which discounts the documents and sends them for collection to the bankers in India, who present the sight or usance draft to the resident importer and deliver the documents to him against payment or acceptance by the latter, the non-resident will not be liable to tax on the profit arising out of the sales on receipt basis. Even if the shipping documents are not discounted in the foreign country, but are handed over in India against payment or acceptance, no portion of the profits will be chargeable to tax under the IT Act, if this is the only operation carried on in India on behalf of the non-resident."

9.12.7 On perusal of the Explanation-2 as well as the illustrative examples of business connection given in CBDT Circular No. 23, we are of the opinion that non-resident parties in the case of the assessee are not having any business connection as no such facts of business activity carried out through a person acting on behalf of the non-resident or through a broker or agent have been brought forward before us by the Revenue.

9.12.8 Further, we find that Hon'ble Delhi High Court in the case of Asia Satellite Telecommunication Company Limited Vs. DIT (supra) has decided the issue of applicability of section 9(1)(i) as under:

"3.2 After considering the respective submissions, we are of the view that the findings of the learned Tribunal on the non-applicability of Section 9(1)(i) of the Act are proper, justified and legally sustainable. We have already taken note of the Explanation (a) to this sub-clause, which lays down that in the case 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. It, thus, clearly follows that carrying out the operations in India, wholly or at least partly, is sine qua non of the application of Clause (i) of sub-section (1) of Section 9 of the Act. Can it be said that the appellant, under the given circumstances, is doing some business in India, i.e., is there any business act of the appellant which could be attributed to the Indian territory? Under the agreement with TV channels, role attributed to the appellant can be paraphrased in the following steps:

(i) Programmes are uplinked by the TV channels (admittedly not from India).

(ii) After receipt of the programmes at the satellite (at the locations not situated in India airspace), these are amplified through complicated process.

(iii) The programmes so amplified are relayed in the footprint area including India where the cable operators catch the waves and pass them over to the Indian population.

33. Accepted position is that the first two steps are not carried out in India and the entire thrust of the Revenue is limited to the third step and the argument is that the relaying of the programmes of in India amounted to the operations carried out in India. Whether this argument is sustainable? Answer is emphatic no! Merely because the footprint area includes India and the programmers by ultimate consumers/viewers are watching the programmes in India, even when they are uplinked and relayed outside India, would not mean that the appellant is carrying out its business operations in India. The Tribunal has rightly emphasized the expressions —operations‖ and —carried out in India‖ occurring in Explanation (a) to hold that these expression signify that it was necessary to establish that any part of the appellant's operations were carried out in India. No machinery or computer, etc. is installed by the appellant in India through which the programmes are reaching India. The process of amplifying and relaying the programmes is performed in the satellite which is not situated in the Indian airspace. Even the Tracking, Telemetering and Control (TTC) operations are also performed outside Indian in Hong Kong. No man, material or machinery or any combination thereof is used by the appellant in the Indian territory. There is no contract or agreement between the appellant either with cable operators or viewers for reception of signals in India.

34. We, thus, hold that Section 9(1)(i) is not attracted in the present case."

9.12.9 In the instant case also, the undersea cable for providing dedicated bandwidth to the assessee was installed beyond the territory of India and no operations were carried out by the non-resident party M/s Kick Communication in India. It was responsible for restoring connectivity and Managing faults in connectivity etc in respect of data transmitted through undersea cable only. Similarly, the operations carried out by M/s. IGTL Solutions are also in USA and not in India. Since operations by both the non-resident parties are carried out beyond the territory of India, we thus hold that section 9(1)(i) is of the Act is not attracted in case of above two non-resident parties.ò

10.10 We find that the service in substance is for providing connectivity facility to the assessee to generate and cater to outbound Public Switch Telephone Network (PSTN) calls within the USA. Thus, the clause (iii), (iv) or (iva) are not applicable for consideration paid to M/s IGTL Solutions by the assessee.

10.10.1 In view of above, we are of the opinion that consideration paid to the non-resident parties does not fall under the term royalty in terms of section 9(1)(vi) of the Act.

10.10.2 Further, we now examine whether the consideration paid by the assessee falls in the definition of the órоyaltyôin the hands of the recipient as per the DTAA between USA and India. The term órоyaltyôhas been defined under the DTAA between India and USA in article 12 (3) of the treaty 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 cinematograph films or work on film, tape or other means of reproduction for use in connection with radio or television broadcasting, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience, 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."

10.11 The learned Assessing Officer has held consideration received for use of right to use any industrial, commercial or scientific equipment as royalty. The Ld. Commissioner of Income-tax (Appeals) has held consideration for use or right to use of process or information as royalty. As we have already held that in the facts of the case only services of transmission of call and connectivity from the end of the Indian Territory to the person to whom the call is made in USA, have only been provided by the two non-resident parties and there was no use of any process or right to use the process or information was involved in the facts of the case. Similarly, the consideration was not for use or right to use any industrial, commercial or scientific equipment as the control of equipments was with the non-resident parties, and therefore in our opinion the consideration paid also does not fall in the term royalty as defined in the DTAA between India and USA.

10.12 We find that the learned Commissioner of Income-tax (Appeals) relied on the decision of the Tribunal in the case of Asia Satellite Telecommunication Company Limited (supra). The Tribunal observed that the TV channels were utilizing the process made available by the Asia satellite telecommunication company limited in its satellite for the purpose of their business and that the customer were using the process embedded in the satellite for the purpose of their business, and accordingly held that whether any process was used or any service in connection with processes provided, same held within the meaning of royalty as defined in Explanation. -2.

10.13 Above decision of the Tribunal was reversed by the Hon'ble Delhi High Court in the case of Asia Satellite Telecommunications Co, Ltd. Vs. DIT, 332 ITR 340. The Hon'ble High Court held that consideration paid for bandwidth used for up-linking and down-linking of the television signals cannot be termed as royalty either under the section 9(1)(vi) of the Act or under the terms defined in DTAA. The Hon'ble High Court has discussed in detail the use or right to use the process, information or equipments. The relevant paragraphs of the decision of the Hon'ble High Court are reproduced as under:

"55. Keeping in view the aforesaid principles, we now embark upon the interpretative process in defining the ambit and scope of term 'royalty' appearing in Expln. 2 to sub-cl. (vi) of s. 9(1) of the Act. Sub-cl. (i) deals with the transfer of all or any rights (including the granting of a licence) in respect of a patent, etc. Thus, what this sub-cl.

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

56. As noticed above, the Tribunal has held that the appellant is deriving income from lease of transponder capacity of its satellites. The appellant is deriving income from lease of transponder capacity of its satellites. The appellant is amplifying and relaying the signals in the footprint area after having been linked up by the TV channels. The essence of the agreement of the TV channels with the appellant is to relay their programmes in India. The responsibility of the appellant is to make available programmes of the TV channels in India through transponders on its satellite. The function of the satellite in the transmission chain is to receive the modulator carrier that earth stations emitted as uplinking, amplifying them and retransmitting them and downlink for reception at the destination earth stations. The meaning of the word process being a series of action or steps taken in order to achieve a particular end, considering the role of the appellant in the light of meaning of the term 'process', it is evident that the particular end, viz., viewership by the public at large was achieved only through the series of steps taken by receiving the uplinked signals, amplifying them and relaying them after changing the frequency in the footprint area including India. This is held that the TV channels in entire cycle of relaying the programmes in India were using the process provided by the assessee and, therefore, it is liable to be taxed as royalty income.

57. We have to test the rationality of the aforesaid reasoning and consider the attack thereupon by the appellants in their arguments recorded above. Before that, we may take note of few judgments relevant to the context. In the case of CIT vs. Datacons (P) Ltd. (1985) 47 CTR (Kar) 162 : (1985) 155 ITR 66 (Kar), the company was engaged in processing the data supplied by its customers by using IBM unit record

machine computer. The assessee received vouchers and statements of accounts from its customers and converted them into balance sheets, stock accounts, sales analyses etc. They were printed as per the requirement of the customers. The Karnataka High Court held that in all these activities, the assessee had to play an active role by co-ordinating the activities and collecting the information. Such activities amounted to processing of goods. In the case of NV Philips vs. CIT (supra), the assessee received the amount for providing specialized knowledge of manufacturing particular commodity which included working methods, manufacturing process including indications, instructions, specifications, standards and formulae, method of analysis and quality control. It was held that the payment for the user of such specialized knowledge, though not protected by a patent, was assessable as royalty. In the case of DCM Ltd. vs. ITO, the issue related to transfer of comprehensive technical information know-how and supply of equipment. It was held that the collaboration agreement dealing with the dispatch of one or more of its engineers, technologists to visit the factory site of the assessee, train the factory personnel and to commission the specified processes, would not create a PE. Therefore, it was held that the payments were not in the nature of royalty'. In Modern Threads (I) Ltd. vs. Dy. CIT, it was held that the payments were made in instalments to Italian company for supply of technical knowhow and also for supply of basic process engineering documentation for designing, construction and operation of plant subject to their liability on account of rectifying form, it was held that the amount paid for supply of technical know-how and basic engineering documentation for setting of the plant in India for manufacturing of PTA was the business profit in the hands of Italian company in the absence of PE in India.

58. In the light of our discussion explaining Expln. 2 to s. 9(1) of the Act, let us proceed to apply these principles on the facts of the case. The starting point has to be the nature of services provided by the appellant to its customers as per the agreement arrived at between them. Keeping in view the aforesaid operation of the satellites, we revert back to the agreement entered into between the appellant and its customers. It is clear from various clauses of the agreement (and noticed above), the appellant is the operator of the satellites. It also remains in the control of the satellite. It had not leased out the equipments to the customers. On this basis, it is argued by the appellant that the equipment is used by the appellant and it is only providing and rendering services to its customers and not allowing the customers to use the process. In the case of ISRO (supra), AAR has narrated in detail the process of the operation of a satellite and the role played by the transponder therein.

59. Following features of the agreement entered into by the appellant with its clients need to be highlighted at this stage :

(a) The appellant is a foreign company incorporated in Hong Kong and carries business of providing satellite business and broadcasting facilities.

(b) The clients with whom the appellant has entered into agreement are not the residents of India.

(c) The appellant has launched its satellites in the orbit footprint on which it is extended over four continents including Asia and, thus, covers India.

(d) The agreement signed with the customers which are TV channels, the appellant provides facility of transponder capacity available on its satellite to enable these TV channels to relay their signals. These customers have their own relaying facilities, which are situated outside India. From this facility, the signals are beamed in space where they are received by a transponder located in the appellant's satellite. The transponder receives the signal and on account of the distance these signals have to travel, they are required to be amplified. After amplification frequency of signals are downlinked to facilitate the transmission of signals. This is how the signals are received over various parts of the earth spanning numerous countries including India.
(e) The outcome, thus, would entirely depend upon the question as to whether any process is used by the TV channels and also whether a secret process is required to bring within the ambit of Expln. 2.

60. Once we keep in mind the aforesaid important aspects, it is not difficult to find the answer to the question posed. In fact, we can say that it is so provided by the AAR in ISRO (supra). A close scrutiny of the said ruling of the AAR would clearly reveal that where the operator has entered into an agreement for lease of transponder capacity and has not given any control over parts of satellite/transponder, the provisions of sub-cl. (vi) would not apply. In the present case also, the appellant had merely given access to a broadband available in a transponder which can be utilized for the purpose of transmitting the signals of the customer. In that case, after taking note in depth, the operation and the functioning of transponder, the AAR emphasized on the fact that data sent by the telecast operator does not undergo any change for improvement through the media of transponder. Following discussion from the said judgment needs to be reproduced :

"13. As IGL does not carry on any business in India through PE, as discussed towards the end, the main contention of Revenue is that the 'charges' paid by the applicant—ISRO under the terms of the agreement is in the nature of consideration paid for the 'use of' or 'right to use' the scientific equipment within the meaning of cl. (b) of art. 13(3) of the treaty.

14. The crucial question that needs to be addressed, therefore, is whether the payment made to IGL under the aforementioned contract constitutes consideration for the use of or right to use equipment of IGL. To answer this question, we have to discern the substance and essence of the contract as revealed from the terms of the contract document, the technical report and other facts furnished by the applicant. The first article in the contract makes it clear that the payment is for the lease of' navigation transponder segment capacity. From the designated transponder (L1 and L5) of Inmarsat satellite, this capacity at a particular frequency is made available to the applicant through INLUS (Navigation Land Uplink Station) which is set up and operated by the applicant. The capacity is meant to be used for the purpose of providing an augmentation to global satellite navigation system. The capacity will be utilized through data commands issued from the ground station INLUS. Undeniably, the applicant will not be able

to operate the transponder in the space but it will be transmitting/uplinking the augmented data to the navigation transponder. Access to the transponder's space capacity is established through the applicant's operations at the ground station INLUS pursuant to which the transponder transmits signals/data received from INLUS from the geo-stationary orbits. The Inmarsat satellite carries many transponders out of which the transponder for navigation purposes will provide the satellite based augmentation system signals in space at two frequencies i.e. 1575.42 MHz (L1) and 1176.45 MHz (L5) which are accessed for the GAGAN project undertaken by the applicant. It is also seen that the navigation transponder which uplinks and downlinks the data is a passive transponder unlike the communication transponder.

15. It will be relevant to know the connotation of the term transponder'. In McGraw Hill's Dictionary of Scientific and Technical Terms, the meaning given is a transmitter-receiver capable of accepting the challenge of an interrogator and automatically transmitting an appropriate reply. In Chamber's Dictionary of Science and Technology, transponder (communication), is defined as an equipment forming part of a communications satellite, which receives signals from a ground station at one frequency and re-transmits them to another ground station or to domestic satellite receivers at another frequency.

16. It is clear that the applicant in the course of carrying out its objectives and operations will not be using any equipment of IGL satellite or the transponder. What the applicant needs to do is to adjust or tune its system to access the navigation transponder space segment capacity. By earmarking a space segment capacity of the transponder for use by the applicant, the applicant does not get possession (actual or constructive) or control of the equipment of IGL. The applicant and the end-users are enabled to have the benefit of use of facility provided by Inmarsat 4th generation satellite and the navigational transponder it has. That is the objective of GAGAN project. The applicant does not use or operate any equipment of IGL. The lease of space segment capacity related to L1 and L5 transponder only means that a segment of the navigational transponder though which the data passes is allocated to the applicant so that it could be utilized for the specific purpose of making available the augmented data sent by the applicant through its ground station to the users extensively. The substance of the contract is the facility given to the applicant for the utilization of space segment capacity of the transponder for transmitting the augmented data as to the position of an object on land, air or water so that the end user can have access to it through SABS receiver. The use of capacity, as clarified by the applicant involves the use of bandwidth, that is to say, a particular bandwidth in the transponder meant exclusively for navigational purposes is linked to the earth station INLUS. The expression 'use of space segment capacity' of transponder has no reference to any operations performed by means of the transponder. The use or operation of transponder as such is not at all contemplated under the contract. What really happens is that the augmented data sent by INLUS reaches the transponder and it is transmitted back to the earth and the same is accessed by SBAS user receivers in the coverage area. In response to a query, the applicant specifically clarified that the transponder does not perform any

operation with reference to the data uplinked and downlinked and "there is no on-board data storage."

61. It is worthwhile to note that the contention of the Department that there was use of transponder by the applicant was specifically rejected in the following terms:

"17. It is contended by the Revenue that in substance, there is use of equipment i.e. transponder by the applicant. The exclusive capacity of specific transponder is kept entirely at the disposal of the applicant. The use of transponder is ensured when it responds to the directions sent through the ground station. Such directions, it is stated, are akin to the operation of TV by remote control apparatus. We find it difficult to accept this contention. The fact that the transponder automatically responds to the data commands sent from the ground station network and retransmits the same data over a wider footprint area covered by Inmarsat satellite does not mean that the control and operation of transponder is with the applicant. Undoubtedly, the applicant does not operate the transponder; it gets access to the navigation transponder through the applicant's own network/apparatus. The data sent by the applicant does not undergo any change or improvements through the media of transponder. In essence, it amounts to the provision of a communication/navigational link through a facility owned by IGL and exclusively operated/controlled by it. The operation and regulation of transponder is always with IGL. It is also pertinent to notice that a navigation transponder unlike a communication transponder is not an active transponder in the sense it does not amplify. It is a passive transponder, as pointed out by the applicant. This is also a pointer that the applicant does not use the equipment (transponder) as such."

62. It is also clear from the above that the aspect of amplification of data by the transponder is taken only as additional factor, but the judgment is not entirely rested on that. This ruling further categorically demonstrates that in a case like this, services are provided which is integral part of the satellite, remains under the control of the satellite/transponder owner (like the appellant in this case) and it does not vest with the telecast operator/TV channels.

63. Position is substantially the same in the present case as well. The Tribunal has distinguished this judgment and has opined that it is not applicable because of the reason that in ISRO (supra), there was any (sic-no) amplification of the signal whereas in the present case, signals are amplified. That, to our mind, would not make any difference insofar as ultimate conclusion is concerned, in as much as the ruling of the AAR is not founded on the aforesaid consideration. It becomes manifest when we take note of the question posed by the AAR before answering the same. The AAR expressed this as under:

"The crucial question that needs to be addressed, therefore, is whether the payment made to IGL under the aforementioned contract constitutes consideration for the use of or right to use equipment of IGL. To answer this question, we have to discern the substance and essence of the contract as

revealed from the terms of the contract document, the technical report and other facts furnished by the applicant."

64. On the aforesaid poser, the AAR discussed the issue and held that the transponder and the process therein are actually utilized for the satellite user for rendering the services to the customer and further that it cannot be said that the transponder or process employed therein are used by the customer.

65. It needs to be emphasized that a satellite is not a mere carrier, nor is the transponder something which is distinct and separable from the satellite as such. It was explained that the transponder is in fact an inseverable part of the satellite and cannot function without the continuous support of various systems and components of the satellite, including in particular: (a) Electrical power generation by solar arrays and storage battery of the satellite, which is common to and supports multiple transponders on board the satellite.

(b) Common input antenna for receiving signals from the customers' ground stations, which are shared by multiple transponders.
(c) Common output antenna for retransmitting signals back to the footprint area on earth, which are shared by multiple transponders.
(d) Satellite positioning system, including position adjusting thrusters and the fuel storage and supply system therefor in the satellite. It is this positioning system which ensures that the location and the angle of the satellite is such that it receives input signals properly and retransmits the same to the exact desired footprint area.
(e) Temperature control system in the satellite, i.e., heaters to ensure that the electronic components do not cease to operate in conditions of extreme cold, when the satellite is in the shadow.
(f) Telemetry, tracking and control system for the purpose of ensuring that all the abovementioned systems are monitored and their operations duly controlled and appropriate adjustments made, as and when required.

66. It was also not disputed that each transponder requires continuous and sustained support of each of the abovementioned systems of the satellite without which it simply cannot function. 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. On the contrary, the transponder is incapable of functioning on its own. In fact, the Tribunal has itself demonstrated so in the order as is clear from the following:

"A bare perusal of this meaning reveals that equipment is an instrument or tool which is capable of doing some job independently or with the help of other tools. A part of an equipment incapable of performing any activity in itself cannot be termed as an equipment. We take an example of scissors which has two blades. This scissors is an equipment but when one blade is separated from the other blade, it ceases to be an equipment. In other words, the blade in isolation cannot be termed as an equipment. Reverting to the facts of the present case, we find that the transponder is not an equipment in itself. In other words, it is not capable

of performing any activity when divorced from the satellite. It was fairly conceded by the learned Authorised Representative that the transponder in itself without other parts of satellite is not capable of performing any function. Rightly so because satellite is not plotted at a fixed place. It rotates in the same direction and speed as the earth. If it had been fixed at a particular place or the speed or direction had been different from that of earth, it could not have produced the desired results. Transponder is part of satellite, which is fixed in the satellite and is neither moving in itself nor assisting the satellite to and the transponder, namely, a part of it, playing howsoever important role, cannot be termed as equipment."

67. Even after stating so, the Tribunal did not take the aforesaid view to its logical conclusion, viz., the process carried on in the transponder in receiving signals and retransmitting the same, is an inseparable part of the process of the satellite and that process is utilized only by the appellant who is in control thereof. Whether it is done with or without amplification of the signal would not make any difference, in such a scenario.

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

69. We may also refer to the following distinction brought out by the Karnataka High Court between leasing out of equipment and the use of equipment by its customer. This was done in the case of Lakshmi Audio Visual Inc. vs. Asstt. Commr. of Commercial Taxes (supra) in the following terms :

"9. Thus if the transaction is one of leasing/hiring/letting simpliciter under which the possession of the goods, i.e., effective and general control of the goods is to be given to the customer and the customer has the freedom and choice of selecting the manner, time and nature of use and enjoyment, though within the framework of the agreement, then it would be a transfer of the right to use the goods and fall under the extended definition of "sale". On the other hand, if the customer entrusts to the assessee the work of achieving a certain desired result and that involves the use of goods belonging to the assessee and rendering of several other services and the goods used by the assessee to achieve the desired result continue to be in the effective and general control of the assessee, then, the transaction will not be a transfer of the right to use goods falling within the extended definition of "sale". Let me now clarify the position further, with an

illustration which is a variation of the illustration used by the Andhra Pradesh High Court in the case of Rashtriya Ispat Nigam Ltd. vs. CTO.

Illustration :

(i) A customer engages a carrier (transport operator) to transport one consignment (a full lorry load) from place A to B, for an agreed consideration which is called freight charges or lorry hire. The carrier sends its lorry to the customer's depot, picks up the consignment and proceeds to the destination for delivery of the consignment. The lorry is used exclusively for the customer's consignment from the time of loading, to the time of unloading at destination. Can it be said that right to use of the lorry has been transferred by the carrier to the customer ? The answer is obviously in the negative, as there is no transfer of the "use of the lorry" for the following reasons : (i) The lorry is never in the control, let alone effective control of the customer; (ii) the carrier decides how, when and where the lorry moves to the destination, and continues to be in effective control of the lorry; (iii) the carrier can at any point (of time or place) transfer the consignment in the lorry to another lorry; or the carrier may unload the consignment en route in any of his godowns, to be picked up later by some other lorry assigned by the carrier for further transportation and delivery at destination.

(ii) On the other hand, let us consider the case of a customer (say a factory) entering into a contract with the transport operator, under which the transport operator has to provide a lorry to the customer, between the hours 8 a.m. to 8 p.m. at the customer's factory for its use, at a fixed hire per day or hire per km. subject to an assured minimum, for a period of one month or one week or even one day; and under the contract, the transport operator is responsible for making repairs apart from providing a driver to drive the lorry and filling the vehicle with diesel for running the lorry. The transaction involves an identified vehicle belonging to the transport operator being delivered to the customer and the customer is given the exclusive and effective control of the vehicle to be used in any manner as it deems fit; and during the period when the lorry is with the customer, the transport operator has no control over it. The transport operator renders no other service to the customer. Therefore, the transaction involves transfer of right to use the lorry and thus be a deemed sale."

70. Argument was addressed on the meaning which is assigned to the term royalty occurring in sub-cl. (iii) of Expln. 2. The learned counsel for the appellant had argued that the doctrine of noscitur a sociis would apply and the process should be treated as item of intellectual property. On this it was argued that the process employed in the transponder of a satellite, i.e., changing of frequency and amplifying the signal, is not at all an item of intellectual property. Though there appears to be some force in this argument, it is not necessary to answer it conclusively. The fact remains that there is no use of process by the TV channels. Moreover, no such purported use has taken place in India. It is stated at the cost of repetition that the telecast companies/customers are situated outside India and so is the appellant. Even the agreements are executed abroad under which the services are provided by the appellant to its customers. The transponder is in the orbit. Merely because it has its

footprint on various continents would not mean that the process has taken place in India. This aspect now stands concluded by the Supreme Court in the case of Ishikawaima-Harima Heavy Industries Ltd. (supra). In that case, the appellant, a non-resident company incorporated in Japan, along with five other enterprises formed a consortium. The consortium was awarded by petronet a turnkey project for setting up a liquefied natural gas (LNG) receiving, storage and regasification facility in Gujarat. The contract specified the role and responsibility of each member of the consortium and the consideration to be paid separately for the respective work of each member. The appellant was to develop, design, engineer, procure equipment, materials and supplies to erect and construct storage tanks including marine facility (jetty and island breakwater) for transmission and supply of LNG to purchasers, to test and commission the facilities, etc. The contract involved : (i) offshore supply, (ii) offshore services, (iii) onshore supply, (iv) onshore services, and (v) construction and erection. The price for offshore supply and offshore services was payable in US dollars, that for onshore supply and onshore services and construction and erection partly in US dollars and partly in Indian rupees. The payment for offshore supply of equipment and materials supplied from outside India was received by the appellant by credit to a bank account in Tokyo and the property in the goods passed to Petronet on the high seas outside India. Though the appellant unloaded the goods, cleared them from customs and transported them to the site, it was for and on behalf of Petronet and the expenditure including the customs duty was reimbursed to it. The price of offshore services for design and engineering including detailed engineering in relation to the supplies, services and construction and erection and the cost of any other services to be rendered from outside India, was also paid in US dollars in Tokyo. On these facts the appellant applied to the AAR (income-tax) for a ruling on the following points :

> *(a) Whether the amounts received/receivable by the appellant from Petronet for offshore supply of equipment, materials, etc., were liable to tax in India under the provisions of the IT Act, 1961, and the Double Taxation Avoidance Convention between India and Japan;*
> *(b) Whether the amounts received/receivable from Petronet for offshore services were chargeable to tax in India under the Act and the Convention; and*
> *(c) Would the appellant be able to claim deduction for expenses incurred in computing the income from offshore services.*

The authority ruled :

> *(i) That though property in the goods passed to Petronet while the goods were on the high seas, and insofar as the activities of the appellant for taking delivery of the goods from the ship, payment of customs duty and transportation of the goods to the site were concerned, these facts did not militate against the property in the goods passing to the appellant. In connection with the offshore supply, certain operations were inextricably interlinked in India, such as, signing of the contract in India which imposed liability on the appellant to procure equipment and machinery in India and receiving, unloading, storing and transporting, paying demurrage and other incidental charges on account of delay in clearance. The price of the goods covered not only their price but also of all these operations which were carried out in India and from which income accrued to the appellant.*

Therefore, income accrued to the appellant from the offshore supply through business connection in India and some operations of the business were carried out in India. Profits were deemed to accrue/arise in India would be only such part of the profits as was reasonably attributable to the operation carried out in India.

(ii) That having regard to art. 7(1) of the Convention for Avoidance of Double Taxation and Fiscal Evasion with respect to taxes on income between India and Japan read with para 6 of the protocol supply of equipment or machinery (sale of which was completed around, the order having been placed directly by the overseas office of the enterprise) would be within the meaning of the phrase directly or indirectly attributable to that PE and, therefore, so much of the amount received or receivable by the appellant as was directly or indirectly attributable to the PE as postulated in para 6 of the protocol would be taxable in India. The price of the offshore services would be deemed to accrue or arise under s. 9(1)(vii) of the IT Act, 1961. And in as much as fees for technical services were specifically provided in art. 12 of the Convention, they would not fall under art. 7. Therefore, the price of the offshore services was taxable in India under the Act as well as the Convention.

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

71. In that case, the appellant approached the Supreme Court challenging the aforesaid judgment of the AAR. The Supreme Court reversed the decision of the AAR and in the process, inter alia, held as under :

"(i) That s. 9 of the IT Act, 1961, raises a legal fiction; but, having regard to the contextual interpretation and in view of the fact that the Court is dealing with a taxation statute, the legal fiction must be construed having regard to the object it seeks to achieve. The legal fiction created under s. 9 must also be read having regard to the other provisions thereof.

(ii) That the second sentence of art. 7(1) which allowed the State of the PE to tax business profits, but only so much of them as was attributable to the PE excluded the applicability of the principle that where there was a PE, the State of the PE should be allowed to tax all income derived by the enterprise from sources in the State irrespective of whether or not such income was economically connected with the PE. The State of the PE was allowed to tax only those profits which were economically attributable to the PE, i.e., those which resulted from the PE's activities, which were economically from the business carried on by the PE. In this case, the PE's non-involvement in the transaction of offshore supply, excluded it from being a part of the cause of the income itself and thus there was no business connection.

(iii) That for attracting the tax there had to be some activities through the PE. If income arose without any activity of the PE, even under the Convention the

taxation liability in respect of overseas services would not arise in India. Sec. 9 spelled out the extent to which the income of a non-resident would be liable to tax in India. Sec. 9 had a direct territorial nexus. Relief under a double taxation avoidance treaty, having regard to the provisions contained in s. 90(2), would arise only in the event taxable income of the assessee arose in one Contracting State on the basis of accrual of income in another Contracting State on the basis of resident. So far as accrual of income in India was concerned, taxability must be read in terms of s. 4(2) r/w s. 9, whereupon the question of seeking assessment of such income in India on the basis of the double taxation treaty would arise. Para 6 of the protocol to the Convention was not applicable, because, for the profits to be attributable directly or indirectly, the PE must be involved in the activity giving rise to the profits.

(iv) That where different severable parts of a composite contract were performed in different places, as in this case, the principle of apportionment could be applied to determine which fiscal jurisdiction could tax that particular part of the transaction. This principle helped to determine where the territorial jurisdiction of a particular State lay and to determine its capacity to tax on event. Applying it to composite transactions which had some operations in one territory and some in the other, was essential to determine the taxability of various operations. The concepts of profits of business connection was relevant for the purpose of application of s. 9, the concept of PE was relevant for assessing the income of a non-resident under the Convention.

(v) That in this case the entire transaction was completed on the high seas and, therefore, the profits on sale did not arise in India. Once excluded from the scope of taxation under the IT Act application of the double taxation avoidance treaty would not arise.

(vi) That, in relation to offshore services, s. 9(1)(vii)(c) required two conditions to be met: to be taxable in India the services which were the source for the income sought to be taxed had to be rendered in India as well as utilized in India.

(vii) That whatever was payable by a resident to a non-resident by way of technical fees would not always come within the purview of s. 9(1)(vii). It must have sufficient territorial nexus with India so as to furnish a basis for imposition of tax.

(viii) That even in relation to such income, viz., income from offshore services, the provisions of art. 7 of the Convention would be applicable, as services rendered outside India would have nothing to do with the PE in India. Thus, if any services had been rendered by the head office of the appellant outside India, only because they were connected with the PE, even in relation to the principle of apportionment would apply.

72. The Tribunal has made an attempt to trace the fund flow and observed that since the end consumers, i.e., persons watching TV in India are paying the amounts to the cable operators who in turn are paying the same to the TV channels, the flow of fund

is traced to India. That is a farfetched ground to rope in the appellant in the taxation net. The Tribunal has glossed over an important fact that the money which is received from the cable operators by the telecast operators is treated as income by these telecast operators which has accrued in India and they have offered and paid tax. Thus, the income which is generated in India has been duly subjected to tax in India. It is the payment which is made by the telecast operators who are situated abroad to the appellant which is also a nonresident, i.e., sought to be brought within the tax net."

10.14 In the case of instant assessee, the control of equipment was with the non-resident parties and they have not leased the equipments, i.e. the undersea cable etc. to the assessee. The equipments were owned and used by the non-resident parties only and therefore it cannot be said that the consideration paid was for use of equipment by the assessee. Similarly the non-resident parties have not provided use of any process to the assessee, which are of patentable nature having exclusive ownership rights. The assessee was not concerned with any of the process involved in transmission or connectivity of call data. The only concern of the assessee was transmission of call data beyond the boundaries of India to the person in USA to whom call was made.

10.15 Identical issue came up before the Delhi bench of Tribunal in the case of Bharti Airtel Ltd. vs. Income Tax Officer (supra), wherein also the issue whether payment towards call interconnectivity charges for call transmission on foreign network was amounted to royalty or not. The findings of the Tribunal are reproduced as under:

"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 ITA Nos. 3593 TO 3596/Del/2012 [Bharti Airtel Ltd. vs. ITO(TDS)] & ITA Nos. 4076 TO 4079/Del/2012 [ITO(TDS) vs. Bharti Airtel Ltd.] 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. 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 ITA Nos. 3593 TO 3596/Del/2012 [Bharti Airtel Ltd. vs. ITO(TDS)] & ITA Nos. 4076 TO 4079/Del/2012 [ITO(TDS) vs. Bharti Airtel Ltd.] 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 ITA Nos. 3593 TO 3596/Del/2012 [Bharti Airtel Ltd. vs. ITO(TDS)] & ITA Nos. 4076 TO 4079/Del/2012 [ITO(TDS) vs. Bharti Airtel Ltd.] 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."

10.16 Further the assessee in support of the proposition that amendment under section 9(1)(vi) of the Act by finance Act 2012 has no bearing on the provisions of DTAA has relied on the decision of the Hon'ble Delhi High Court in the case of DIT Vs. New Sky Satellite BV, in ITA 473/2012. In the instant case also the assessment year involved is 2002-2003, and thus the Explanation-5 and 6 and Memorandum of Explanation cannot be brought into action as there has not been any corresponding change in the definition of the term royalty in the DTAA between India and the USA. Accordingly, we are of the opinion that under the DTAA, the restricted meaning of the royalty shall continue to operate despite the amendment in law.

10.17 As far as the assessee is concerened, in case of difference between provisions of the Act and an agreement under section 90 i.e. (DTAA), the provisions of the agreement shall prevail over the provisions of the Act.

10.18 In view of our discussion above, we hold that the payments made by the assessee are not in the nature of royalty either under the domestic law or relevant DTAA.

13. The learned Commissioner of Income-tax (Appeals) has alternatively held that the payments to the above two non-resident parties was chargeable in their hands as "Fee for Technical Services" (FTS). In ground No. 1.1, the assessee has challenged this alternative finding of the learned Commissioner of Income-tax (Appeals).

18. We find that in the instant case also identical service of transmission of call data from end of the Indian Territory to the person in USA to whom call is made, is involved, and accordingly in view of above discussion and following the judgements cited above, the payment in question cannot be considered as Fee for Technical services (FTS)in terms of section 9(1)(vii) read with Explanation - 2 of the Act .

19. Further in para- 40 of the decision in the case of Bharti Airtel Limited Vs. ITO, the Tribunal has held that where make available clause is found in the treaty and there is no imparting as contemplated in the treaties, the payment cannot be treated as Fee for Technical Services (FTS) under the DTAA. The relevant paragraph of the decision is reproduced as under:

> *"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 ITA Nos. 3593 TO 3596/Del/2012 [Bharti Airtel Ltd. vs. ITO(TDS)] & ITA Nos. 4076 TO 4079/Del/2012 [ITO(TDS) vs. Bharti Airtel Ltd.] 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."

21. Since in the call connectivity and transmission from end of the Indian Territory at Mumbai to the termination of call in USA, no technical knowledge has been made available to the assessee, respectfully following the decision of the Tribunal in the case of Bharti Airtel Ltd Vs. ITO (supra), we hold that payment for the services of call transmission through dedicated bandwidth provided by the non-resident parties to the assessee , cannot be termed as Fee for Technical services under the treaty also, in the hands of the recipients.ò

Respectfully following the decision of coordinate Bench, we find that this issue is squarely covered by the said decision. Therefore, we allow this ground of assessee's appeal.

15. In respect of ground No. 3, the brief facts of the case are that the AO noticed during the assessment proceedings that the assessee has incurred an expenditure of Rs.17,71,214/- towards traveling and educational tuition fee incurred outside India on the education of Karun Ansal S/o Deepak Ansal, the main promoter of M/s. Ansal Housing and Construction Ltd. The assessee company is a subsidiary of this company and Shri Deepak Ansal has substantial interest in the assessee company. The assessee was asked as to why these expenditures should not be disallowed as being personal expenditure, as defined u/s. 40A(2)(b) of the Act. After considering the detailed reply of assessee, the AO also observed that the agreement was made only for BBA course and the assessee did not file any service agreement for further extension for MBA course.

The assessee has just taken burden of sponsorship of the son of its main promoter after completion of his 10+2 examination. The assessee has not filed any details to show how Karun Ansal was considered as an exceptional case for sponsoring his education while he has served only for a period of few days in the company after passing his 10+2 examination before completing for his sponsorship and that too as a management trainee on stipend of Rs.5000/- Further the sponsorship was not for any specialization course and the company sponsored for BBA course which is a normal educational course. He, therefore, disallowed the expenses of Rs.17,71,214/- treating the same as personal expenses u/s. 40A(2)(b) of the Act and not the business expenditure, relying on the decision of Hon'ble Karnataka High Court in the case of MAC Explotech P. Ltd. vs. CIT, 286 ITR 378. Aggrieved, the assessee approached the ld. CIT(A) in appeal where the order of the AO was upheld observing as under :

> "I have considered the submissions of the appellant, the findings of the AO and the facts on record. Perusal of facts on record shows that Sh. Karun Ansal s/o the main promoter of the appellant was sponsored for BBA course. The BBA course of education is a general course of business administration and not a specialized course connected with the business of the appellant, Moreover, such type of education is available in India also.
>
> In the case of Max Explotic Pvt. Ltd. Vs CIT (2006) 286 ITR 378 (Karn.) the son of the Director was sent to USA and in the process the assessee company incurred an expenditure which was claimed as business expenditure of the assessee company. The Tribunal noticed that the training that was availed of by the son had nothing to do with the technical side of production or manufacturing of explosives and such type of education was available in this country as well. The Tribunal sustained the disallowance on this account. On a reference, the Hon'ble High Court held thus:-
>
> > "Held, that it was not as thought any specialized training was given to the son and it was not as thought it was absolutely necessary for the purpose of running

> the business of the assessee company. Any_expense on the facts of the case would result in providing the benefit for the purpose of personal gain and not for the purpose for which the section was meant. Therefore, the expenditure on the higher education of the son of the director was not a permissible deduction."
>
> In the instant case also it is seen that Sh. Karun Ansal did not attend any specialized course and the simple degree of BBA cannot be said to be directly linked to the business of running a call centre in which the appellant was engaged. There is also no evidence or any material on record to establish that the appellant had sponsored any other student employee for education abroad. Therefore, the decision of the Board of Directors of the appellant company to sponsor M/s Karun Ansal for foreign education was for other than business consideration. I am in agreement with the view of the AO that the expense of Rs. 1771214/- claimed by the appellant on education of Sh. Karun Ansal was not an allowable expenditure. This ground of appeal is dismissed."

16. The ld. AR of the assessee, reiterating the submissions made before the authorities below submitted that Karun Ansal was appointed as Management Trainee in M/s. SAS Net E.com Pvt. Ltd. w.e.f. 20.06.2000. He was selected for BBA course in USA and he requested for sponsorship of his education abroad by letter dated 18.08.2000 which was approved by the assessee company. Accordingly an agreement and service agreement were made between the assessee company and Karun Ansal, which are available on paper book pages 205 to 207 and 209 to 212 respectively. After completion of BBA course, the sponsorship was suo moto extended to include the studies of MBA from the same Institute by the assessee company by way of resolution dated 30.04.2003. Later on, the name of the company was changed to name of Geo Connect Ltd. Karun Ansal was required to serve the company for a limited period of seven years. Since this expenditure was made on foreign expenditure on employee's

education so that the education and expertise acquired by him could be utilized for the purpose of the company. The assessee company gave appointment to Karun Ansal as a Vice-president (operation) of the company w.e.f. 17.04.2007 and he obtained permission from Company Law Board u/s. 314(2B) of the Companies Act. He had obtained specialization in basic financial markets, equity valuation, mergers and acquisition, strategic management, sales management, e-commerce, post merger issues, budget analysis, developing and implementation of financial audit plan, accounting, auditing, internal controlling accounts, policy and procedure review etc. The Assessing Officer had allowed the foreign expenditure for three consecutive assessment years 2001-02 to 2003-04 in the assessment proceedings u/s. 143(3). Therefore, principle of consistency should have been maintained. The expenditure is directly related to the assessee's business. His foreign education and foreign travel expenses sponsored by the Co. was duly ratified by the Board of Directors and he was bound to serve the organization after completion of his education and he joined the company. Even during his tenure outside India he had been instrumental in helping the company to carry out its business operations in the field of international call centre in USA. The ld. AR has relied on the following decisions :

1. Decision of Delhi High Court in the case of Kostub Investment Ltd. v. CIT: 365 ITR 436
2. Decision of Allahabad High Court in the case of CIT v, U.P. Asbestos Ltd.: 52 taxmann.com 452/ 260 CTR 194

3. Decision of Karnataka High Court in the case of Mallige Medical Centre P. Ltd. v. ,ICTT: 375 ITR 522
4. Decision of Karnataka High Court in the case of CIT v. Ras Information Technologies (P.) Ltd.: 200 Taxman 305
5. Decision of Madhya Pradesh High Court in the case of CIT v. Naidunia news and Networking (P.) Ltd.: 210 Taxman 73
6. Decision of Madhya Pradesh High Court in the case of CIT v. Kohinoor Paper Products.: 226 ITR 220
7. Decision of Bombay High Court in the case of Sakal Papers Pvt. Ltd. v. CIT: 114 ITR 256
8. Decision of Delhi bench of Tribunal in the case of Jhalani holding P. Ltd. v. ITO: 42 TTJ 116
9. Decision of Mumbai bench of Tribunal in the case of JB Advani & Co. Ltd. v. JCTT: 92 TTJ 175

17. On the other hand, the ld. DR relying upon the orders of the authorities below, submitted that the expenditure incurred by assessee on foreign education of Karun Ansal, the son of assessee's main promoter, are in the nature of personal expenditure and the assessee has wrongly claimed the same as business expenditure deductible u/s. 37 of the Act. It was submitted that the assessee failed to establish that the educational course done by Karun Ansal abroad for BBA, and further MBA was for the benefit of the business of the assessee, particularly when there was no agreement with the assessee for MBA course. No business expediency or necessity was established by assessee to bear such a huge expenditure on foreign education of promoter's son. The assessee also could not establish that there was any such scheme for sending the persons for education abroad. He, therefore, contended that the personal expenses

incurred could not be claimed as business expenditure deductible u/s. 37 of the Act. Reliance is placed on the following decisions :

(i). Ocean City Trading (India) P. Ltd. vs. CIT, 328 ITR 290 (Bom)
(ii). CIT vs. R.K.K.R. Steels P. Ltd., 258 ITR 306 (Mad)
(iii). MAC Explotec P. Ltd. vs. CIT, 286 ITR 378 (Kar)

The learned DR further submitted that allowance of such expenditure, which was for the BBA course of Karun Ansal in preceding three years, would not create a bar to adjudicate upon a question of law on its own merit, particularly when there is no agreement for MBA course in the instant case. Reliance is placed on the decision of Hon'ble Punjab & Haryana High Court in the case of CIT vs. Punjab Braveries Ltd., 20 taxmann.com 630)P&H).

18. We have considered the rival submissions, perused the material available on record and gone through the case laws cited by both the parties and we find no justification to interfere with the orders of the authorities below on this count. It is pertinent to note that the assessee is entitled to claim an expenditure u/s. 37(1) of the Act if it is laid wholly and exclusively for the purpose of business. It is not in dispute that the Karun Ansal is the son of Sh. Deepak Ansal who is the main promoter of the holding company of assessee and had substantial interest in the assessee company. The assessee failed to meet out the objections of the AO as to how the potentials of Sh. Karun Ansal was examined

and considered as an exceptional case for sponsoring his education abroad while he had served only for a few days in the company after passing his 10+2 examination. The appointment letter dated 19.06.2000 lays down a condition that regular appointment in the company shall be given to Karun Ansal after five months of completion of 42 days' training, based upon his performance. However, after completion of training on 31st July, 2000, Shri Karun Ansal appears to have not served with the company, but went abroad for his higher education, meaning thereby, Shri Karun Ansal was not even the regular employee of the assessee company when he joined his BBA Course in USA and paid fee for first semester himself. Yet his higher education was sponsored by the company, which appears to get benefit of expenditure incurred on his education as business expenditure. Besides, there is nothing on record to establish as to how the educational course (BBA/MBA) done by Karun Ansal abroad was beneficial to the business of call centre then run by the assessee-company. We, therefore, find no justification to discard the finding reached by the ld. CIT(A) that Sh. Karun Ansal did not attend any specialized course and the simple degree of BBA cannot be said to be directly linked to the business of running a call centre in which the appellant was engaged and therefore, the decision of the Board of Directors of the appellant company to sponsor Karun Ansal for foreign education was for other than business consideration. It is also evident from the

record, that there was no agreement between the assessee company and Karun Ansal nor is there any such request from Karun Ansal for further MBA course. Suo moto extension of sponsorship of Karun Ansal by the assessee company without any agreement between the assessee company and Karun Ansal for such extension for MBA course speaks a lot against the assessee. No business expediency or necessity was established by assessee to bear such a huge expenditure on foreign education of son of assessee's promoter, who was not even a regular employee of the assessee company at the time of joining the course abroad. Moreover when the service agreement was made the business of assessee was of call centre only and such business was sold by the assessee company on 16th day of September, 2004 as per sale deed available on paper book pages 306 to 308. The List of call centre assets sold is available at paper book pages 309 to 327. Therefore, when the very business of call centre, for promotion of which Shri Karun Ansal was allegedly sponsored for higher studies abroad, stood sold in Sept. 2004, no benefit of such studies of Karun Ansal could be assumed for such a business of assessee company and there remains no justification to bear expenditure for his further studies abroad for MBA course. The assessee company has produced its financial results at page 404 of the paper book, on perusal of which we find that there is no amount received from the export of services and no operating expenses are shown to have been incurred.

The assessee has also not produced Schedule 9 & 10 which is the part and parcel of the profit and loss account. The contention of the assessee has also been that Karun Ansal subsequently joined the assessee company on 17.04.2007 as Vice-President (operation)and therefore the said expenditure should have been allowed in view of the decision of ITAT, Delhi Bench in the case of Jhalani Holding P. Ltd. vs. ITO, 42 TTJ 116 wherein it has been held that when the relative of a director rejoined the company after completion of his education, the expenditure incurred thereon, would be allowed as business expenditure. This decision does not render any help to the assessee in view of distinguishable facts in the present case. In the instant case, the assessee could not establish that the educational course done by Karun Ansal was beneficial to the business of call centre which was sold before he joined the assessee company back. We, however, find complete answer of this plea of assessee in the decision of Hon'ble Madras High Court in the case of CIT vs. RKKR Steels Pvt. Ltd. (supra) relied by the ld. DR, wherein it has been held as under :

It was canvassed for the assessee before the Tribunal that the fact that Rajiv Rai was the son of the director of the company should not be held against him and the expenditure incurred on his training was in fact, an expenditure which was to the benefit of the company as he subsequently became a director.

If this logic were to be accepted, in every family owned business, all the expenditure incurred in bringing up the children who may later on be given a role in the business as partners or directors could be claimed as business expenditure incurred in training the prospective employees and directors of the business. The expenditure permissible for deduction is expenditure that is wholly and

exclusively laid out for the purposes of the business. The expenditure which a father incurs out of his natural love and affection for his children in meeting the cost of their education cannot become a business expenditure merely because he is also the owner or a director of a business in which the son or daughter subsequently takes part.

It is not the case of the assessee that the assessee had a scheme of sending people abroad for training with the stipulation that after receiving the benefit of training they should work for the company and that moneys expended on such training were in fact, moneys which were expended for the purpose of obtaining the benefit of their expert service after they acquire proficiency in the field in which they had been sent for training,. It is evident that a director father had, instead of incurring expenses from his personal account, which he should have, had merely chosen to debit the expenditure of his son's education to the business of which he was the director. Such expenditure does not become business expenditure, merely because the father was in a position to debit the expenditure to the accounts of the business. The Tribunal was clearly in error in accepting and allowing the claim which had been rightly disallowed by the Assessing Officer and by the Commissioner in appeal.

This court considered a similar claim of a father debiting the expenditure of the education of his sons to the business, in the case of M. Subramaniam Bros. v. CIT [2001] 250 ITR 769. In that case, the father had sent his son abroad for higher education. The son as a minor had been admitted to the benefits of partnership and only after returning he took part in running the business of the firm. It was held by the court that the expenditure incurred on the education of the son before he joined the business was not an expenditure in respect of which deduction could be granted.

19. Similar view has been taken by Karnataka High Court in MAC Explotec P. Ltd (supra) by Hon'ble Bombay High Court in Ocean City Trading (India) P. Ltd. (supra).

20. In the case of Hon'ble Delhi High Court in Kostub Investment Ltd. (supra) relied by the assessee, the business of that assessee was in investments and securities. In that case son of director was commerce graduate and was sponsored for MBA course from abroad. As such the expenditure claimed in that case had an intimate and direct connection with its business, i.e., dealing in securities and investments. In the instant case, the assessee could not establish any link between the course of MBA with its business of call centre. The other decisions relied on by the assessee also are found distinguishable on facts of the present case.

21. On the rule of consistency, in view of the above factual and legal discussion and considering the fact that principle of res judicata is not fully applicable to the income tax proceedings, we find support from the decision of Punjab & Haryana High Court in CIT vs. Punjab Braveries Ltd. (supra), wherein it has been held that the principles of consistency is not absolute.

22. In view of what has been discussed above, we find no justification to interfere with the orders of the authorities below on this count. Accordingly, ground No. 3 of assessee's appeal is dismissed.

23. Since this issue is common in remaining appeals for A.Yrs. 2005-06, 2006-07 and 2007-08 except the difference in the amount of Training and Development Expenses claimed by assessee, our decision given on this account in appeal for A.Y. 2004-05 would equally apply to the appeals for A.Yrs. 2005-06, 2006-07 and 2007-08 also.

24. In appeal for A.Y. 2007-08 one more issue regarding FBT calculation has been raised by assessee. On this, direct the AO to recalculate the Fringe Benefit Tax after excluding the Training and Development Expenses of Rs.97,965/- for the reason that these expenses have not been treated as business expenditure deductible u/s. 37(1) of the Act.

25. Adverting to the penalty appeal for A.Y. 2004-05, the record speaks that the AO imposed penalty of Rs.40,00,000/- u/s. 271(1)(c) of the Act for furnishing inaccurate particulars of its income on the basis of following additions sustained by the ld. CIT(A) :

(i).	Non deduction of TDS on telecommunication expenses paid to non-resident parties. (Correct figure is 81,89,374)	Rs.91,89,375/-
(ii).	Training and Development Expenses	Rs.17,71,214/-

Out of above two additions, the addition of Rs.91,89,375/-(correct figure 81,89,374) stands deleted by us as per our above discussion and therefore, the penalty based on this addition deserves to be deleted.

26. Regarding the penalty imposed on the basis of second addition of Rs.17,71,214/- , it is notable that the assessee made a claim of training and development expenses in the return of income and disclosed all particulars thereof before the Assessing Officer. The AO has not made out any case that any material fact had been withheld or concealed by the assessee company. It is a different matter that the claim of the assessee was not found sustainable in law, for which no penalty can be imposed against the assessee in view of the decision of Hon'ble Apex Court in the case of CIT vs. Reliance Petro-products, 322 ITR 158 (SC), wherein, it has been held as under :

> *" Section 271(1)(c) applies where the assessee 'has concealed the particulars of his income or furnished inaccurate particulars of such income'. As regard the furnishing of inaccurate particulars, no information given in the return was found to be incorrect or inaccurate. The words 'inaccurate particulars' means that the details supplied in the return are not accurate, not exact or correct, not according to truth or erroneous. In the absence of a finding by the Assessing Officer that any detail supplied by the assessee in its return were found to be incorrect or erroneous or false, there would be no question of inviting penalty U/s 2711)(c).*
>
> *The argument of the revenue that 'submitting on incorrect claim for expenditure would amount to giving inaccurate particulars of such income' is not correct. By no stretch of imagination can the making of an incorrect claim in law tantamount to furnishing inaccurate particulars. A mere*

making of the claim, which is not sustainable in law, by itself, will not amount to furnishing inaccurate particulars regarding the income of the assessee. If the contention of the revenue is accepted than in case of every return where the claim made is not accepted by the Assessing Officer for any reason, the Assessing Officer will invite penalty u/s 271(l)(c). That is clearly not the intendment of the Legislature."

27. In view of the ratio laid down by Hon'ble Apex Court in the above case and respectfully following the same, we find no justification to sustain the penalty imposed by the authorities below u/s. 271(1)(c) of the Act. Accordingly, the penalty appeal of the assessee deserves to be allowed.

28. In the result, the appeal for A.Y. 2004-05 is partly allowed, the appeals for A.Yrs. 2005-06, 2006-07 are dismissed and appeal for A.Y. 2007-08 is partly allowed. The penalty appeal of the assessee for A.Y. 2004-05 is allowed.

Order pronounced in the open court on 30.03.2017.

Sd/- Sd/-

(I.C. SUDHIR) (L.P. SAHU)
Judicial Member Accountant Member

Dated : 30.03.2017
*aks/-
Copy of order forwarded to:

(1) The appellant
(2) The respondent
(3) Commissioner
(4) CIT(A)
(5) Departmental Representative
(6) Guard File

By order

Assistant. Registrar
Income Tax Appellate Tribunal
Delhi Benches, New Delhi