IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'E', NEW DELHI

BEFORE SH. BHAVNESH SAINI, JUDICIAL MEMBER
AND
SH. O.P. KANT, ACCOUNTANT MEMBER

ITA No. 5616/Del/2012
Assessment Year: 2009-10

M/s. New Skies Satellites B.V., C/o- Pricewaterhouse Coopers (P) Ltd., Sucheta Bhawan, Gate No. 2, 1st Floor, 11A, Vishnu Digamber Marg, New Delhi	**Vs.**	ADIT, Circle -2(1), International Taxation, Room No. 412, Fourth Floor, Drum Shaped Building, New Delhi
PAN : AACCN1866C		
(Appellant)		**(Respondent)**

And
ITA No. 1061/Del/2014
Assessment Year: 2010-11

M/s. New Skies Satellites B.V., C/o- Pricewaterhouse Coopers (P) Ltd., Sucheta Bhawan, Gate No. 2, 1st Floor, 11A, Vishnu Digamber Marg, New Delhi	**Vs.**	Addl. CIT, Range-2, New Delhi
PAN : AACCN1866C		
(Appellant)		**(Respondent)**

And
ITA No. 680/Del/2015
Assessment Year: 2011-12

M/s. New Skies Satellites B.V., C/o- Pricewaterhouse Coopers (P) Ltd., Sucheta Bhawan, Gate No. 2, 1st Floor, 11A, Vishnu Digamber Marg, New Delhi	**Vs.**	DCIT, Circle -2(2)(2), International Taxation, New Delhi
PAN : AACCN1866C		
(Appellant)		**(Respondent)**

And
ITA No. 281/Del/2016
Assessment Year: 2012-13

M/s. New Skies Satellites B.V., C/o- Pricewaterhouse Coopers (P) Ltd., Sucheta Bhawan, Gate No. 2, 1st Floor, 11A, Vishnu Digamber Marg, New Delhi	**Vs.**	DCIT (International Taxation) Circle - 2(2)(2), New Delhi
PAN : AACCN1866C		
(Appellant)		**(Respondent)**

And
ITA No. 5840/Del/2016
Assessment Year: 2013-14

M/s. New Skies Satellites B.V., C/o- Pricewaterhouse Coopers (P) Ltd., Sucheta Bhawan, Gate No. 2, 1st Floor, 11A, Vishnu Digamber Marg, New Delhi	**Vs.**	DCIT (Intl. Taxation) Circle - 2(2)(2), New Delhi
PAN : AACCN1866C		
(Appellant)		**(Respondent)**

Assessee by	Sh. Salil Kapoor, Adv.; Sh. Arvind Rajan, CA; Sh. Divesh Dhawan, CA; and Sh. Abhinav Vijh, CA.
Department by	Sh. T.M. Shiv Raman, CIT(DR)

Date of hearing	31.08.2017
Date of pronouncement	17.10.2017

ORDER

PER O.P. KANT, A.M.:

These five appeals of the assessee are directed against separate orders of the Assessing Officer in terms of section 144C(13) read with section 143 (3) of the Income-tax Act, 1961 (in short 'the Act') pursuant to direction of the Ld. Dispute Resolution Panel (DRP) for assessment year 2009-10 to assessment year 2013-14 respectively. Since common

issues are involved in these appeals, same were heard together and disposed off by way of this consolidated order.

ITA No. 5616/Del/2012

2. First we take up the appeal having ITA No. 5616/Del/2012 for assessment year 2009-10. The grounds raised by the assessee are as under:

1. *That on the facts and in the circumstances of the case and in law, the Ld. Dispute Resolution Panel ('the Panel') erred in not directing the Assistant Director of Income Tax, Circle 2(1), International Taxation, New Delhi ('Ld. AO') to pass appropriate orders holding that the Appellant is not liable to be assessed to tax in India.*

2. *That on the facts and in the circumstances of the case and in law, the Panel erred in not directing the Ld. AO to follow the order passed by the Hon'ble Delhi High Court (in ITA 1167/2009 and ITA 1122 to 1129/2011) and the Hon'ble Income Tax Appellate Tribunal, New Delhi ('the Tribunal') (in ITA nos. 5385-5387/Del/2004, 2623-2624/Del/2008, 735-736/Del/2010, 4176-4177/Del/2011) in Appellant's own case holding that the Appellant is not liable to be assessed to tax in India, when there was no change of facts recorded by the Ld. AO from the preceding years.*

3. *That on facts and circumstances of the case and in law, the Ld. AO erred in holding that the payments received by the Appellant as consideration for data transmission services are in the nature of "royalty" as defined under section 9(1)(vi) of the Income Tax Act, 1961 ('the Act') and Article 12(4) of the Double Taxation Avoidance Agreement between India and Netherlands ("the DTAA").*

4. *That on the facts and in the circumstances of the case and in law, the Ld. AO erred in not holding that the payments received by the Appellant from providing data transmission services via Space Segment Capacity are not assessable as business profits in India and in the absence of a Permanent Establishment under Article 5 of the India-Netherlands DTAA, the receipts earned by the Appellant are not taxable in India.*

5. *That the Ld. AO erred in holding that income received by the Appellant from the non-resident companies is taxable in India under Article 12(4) read with Article 12(2) and 12(8) of India Netherlands DTAA*

6. *That on the facts and in the circumstances of the case and in law, the Ld. AO erred in not discharging the burden of proving that:*

   i. *The Appellant's non-resident customers had a Permanent Establishment in India in connection with which the alleged Royalty was paid; and*
   ii. *The alleged Royalty payments were borne by such Permanent Establishment of the non-resident customers.*

7. *That the Ld. AO erred in holding that the payments received by the assessee would qualify as "fee for technical services"as-defmed-under section 9(1)(vii) of the Act as well as within the meaning of Article 12(5) of the India Netherlands DTAA.*

8. *That without prejudice to the above, on facts and circumstances of the case and in law, the Ld. AO has erred in arbitrarily attributing the entire receipts from the customers falling on the beam covering India either fully or partially and not apportioning receipts which were India specific.*

3. The briefly stated facts of the case are that the assessee company was incorporated in the Netherlands and is a tax resident of that country. The assessee company is engaged in the services relating to transmission of voice, data and programmes by providing space segment capacity to customers on satellites under various contracts with the customers around the world. Before the lower authorities, the assessee submitted that the satellite is located in the space at the height of 36,000 kms above the Earth and, therefore, the satellites as well as operating facilities are maintained and controlled outside India and the customers have no control on physical possession over the satellite nor any rights to use the satellite, are granted to the customers. The customers use the uplink facilities to send the encoded signals to the satellite. The signals

are then amplified by the transponder and down-linked over the area covered by the satellite beam.

3.1 For the assessment year under consideration, the assessee filed its return of income on 29/09/2009 declaring nil income. The assessee explained that its profit from business are not taxable in India as no permanent establishment (PE) was maintained by the assessee in India. In the draft assessment order, the Assessing Officer proposed to tax the income of the assessee from satellite transmission operations as royalty/fee for technical services. The Ld. DRP also upheld the decision of the Assessing Officer stating that the SLP filed by the Department against the decision of the Hon'ble Delhi High Court in the case of Asia Satellite Telecommunications Co. Ltd. Vs. DIT (2011) 332 ITR 340 was pending for adjudication before the Hon'ble Supreme Court and therefore the matter being subjudice, no interference was required in the draft order proposed by the Assessing Officer.

3.2 Pursuant to the direction of the Ld. DRP the Assessing Officer in final order dated 05/09/2012 under section 144C read with section 143(3) of the Act, computed the income of the assessee as under:

Receipt from Indian Customers	USD 18,362,481
Receipt from Non-Indian Customers	USD 302,166
Total Royalty income of the assessee	USD 18,664,647
(Converted into INR @ 50.53)	USD 943,124,632

3.3 Aggrieved, the assessee in appeal before the Tribunal raising the grounds as reproduced above.

4. The Ld. counsel submitted that ground Nos. 1, 2 and 4 of the appeal are general in nature and are not required to adjudicate specifically. In view of the submission of the learned counsel the grounds are dismissed as infructuous.

5. The ground No. 3 relates to characterization of revenue earned by the assessee in the nature of royalties under the Act and India Netherland Double Tax Avoidance Agreement (DTAA). The learned counsel submitted that issue in dispute has been decided in favour of the assessee in its own case for assessment year 2006-07 and 2008-09 by the Hon'ble Delhi High Court, wherein it is held that revenue from provision of satellite transmission services earned by the assessee are not liable to tax under the beneficial provisions of India Netherlands DTAA even after insertion of Explanation 5 and 6 to section 9(1)(vi) of the Act by Finance Act 2012.

5.1 The Ld. CIT(DR), on the other hand, relied on the order of the lower authorities.

5.2 We have heard the rival submissions and perused the relevant material on record. We find that Hon'ble Delhi High Court in the case of assessee in ITA No. 473/2012 and 474/2012 for assessment year 2006-07 and 2008-09, which is reported in 382 ITR 114, framed the question of law as under:

(1) *whether the receipts of the assessee earned from providing data transmission services, fall within the terms royalty under the Income Tax Act, 1961, and*

(2) if the answer to the first is in the affirmative, whether the assessee would be eligible for benefit under the relevant Double Tax Avoidance Agreements.

5.3 The Hon'ble Delhi High Court answered to the question of law against the Revenue with following finding:

"60. Consequently, since we have held that the Finance Act, 2012 will not affect Article 12 of the DTAAs, it would follow that the first

determinative interpretation given to the word "royalty" in Asia Satellite, when the definitions were in fact pari materia (in the absence of any contouring explanations), will continue to hold the field for the purpose of assessment years preceding the Finance Act, 2012 and in all cases which involve a Double Tax Avoidance Agreement, unless the said DTAAs are amended jointly by both parties to incorporate income from data transmission services as partaking of the nature of royalty, or amend the definition in a manner that such income automatically becomes royalty. It is reiterated that the Court has not returned a finding on whether the amendment is in fact retrospective and applicable to cases preceding the Finance Act of 2012 where there exists no Double Tax Avoidance Agreement.

61. For the above reasons, it is held that the interpretation advanced by the Revenue cannot be accepted. The question of law framed is accordingly answered against the Revenue. The appeals fail and are dismissed, without any order as to costs."

5.4 In view of binding precedent, respectfully following the decision of the Hon'ble Delhi High Court, we hold that payment received by the assessee during the year under consideration as consideration for data transmission service cannot be held as royalty in terms of article 12(4) of the DTAA between India and Netherlands. Accordingly, the ground No. 3 of the appeal is allowed.

6. The ground No. 7 of the appeal relates to characterization of the receipt in the nature of fee for technical services (FTS) under the Act and Indian Netherlands DTAA.

6.1 The learned counsel submitted that issue in dispute has already been decided in favour of the assessee in its own case by the Tribunal for assessment year 2006-07 and 2008-09 vide order dated 16/11/ 2011 and no substantial question of law has been raised by the Revenue on the issue in dispute in the appeal filed before the Hon'ble Delhi High Court.

6.2 The Ld. CIT(DR), on the other hand, relied on the finding of the lower authorities.

6.3 We have heard the rival submission on the issue in dispute. We find that the Assessing Officer in the impugned assessment order alternatively held that the payment received was Fee for Technical Services (FTS). The Tribunal in the case of the assessee in ITA No. 4176 and 4177/Del/2011 for assessment year 2006-07 and 2008-09 respectively has decided the ground related to characterization of the payment received by the assessee as royalty or Fee for Technical Services (FTS) as under:

"5. The ld. DR, on the other hand, has strongly relied on the impugned order, contending that the decision of the Hon'ble Delhi High Court in the case of "Asia Satellite Telecommunications Co. Ltd."(supra), stands challenged by the Department before the Hon'ble Supreme Court. 6. We have heard the parties on this issue. We find the contention on behalf of the assessee to be correct. A copy of the Tribunal order in the assessee's case for assessment years 2000-01 to 2005-06 and 2007-08, passed on 11.3.2011, subsequent to the High Court order dated 17.2.2011, has been placed before us at APB 1 to 12. The relevant portion reads as follows:-

"The Hon'ble High Court of Delhi in the above referred case of "Asia Satellite Telecommunications Co. Ltd." in ITA Nos. 131 to 134/2003, has held that receipts earned from providing data transmission services through provision of space segment capacity on satellites does not constitute royalty within the meaning of section 9(1) (vi) of the Act. In doing so, the Hon'ble High Court has conclusively held that while providing transmission services to its customers, the control of the satellite or the transponder always remains with the satellite operator and the customers are merely given access to the transponder capacity. Accordingly, since the customer does not utilize the process or equipment involved in its operations, the charges paid to the satellite operators are not covered within the meaning of royalty as provided under Explanation 2 to section 9 (I) (vi) and, therefore, the same cannot be treated as royalty. In this case, the revenue also raised the question regarding applicability of

section 9(l)(vii) for the first time before the Tribunal. Although, this ground was admitted, it was not decided as the receipt was held to be assessable under sec. 9(l)(vi) of the Act by the Tribunal. No argument was advanced by the learned counsel for the revenue before the Hon'ble High Court in this manner. Therefore, the submission of the revenue regarding applicability of section 9(l)(vi) was not accepted. The result of the decision of the Hon'ble High Court is that the receipt received by the assessee is not taxable either under sec. 9(l)(vi) or sec.9(l)(vii) of the Act.

As a result, the appeal preferred by the assessee before the Hon'ble High Court was allowed and the judgment of the Tribunal was set aside. ”

6.4 Since the issue in dispute has already been decided in favour of the assessee by the Tribunal (supra) and the issue has not been raised further in the appeal file by the Revenue, respectfully following the decision of the Tribunal, we allow the ground No. 7 of the appeal of the assessee.

7. In ground Nos. 5, 6 and 8, the assessee has raised issue related to taxability of revenues from the non-resident customers under article 12(8) of Indian Netherlands DTAA as well as within section 9 (1)(vi)(c) of the Act and quantification of the revenue liable to tax in India.

7.1. The Ld. counsel of the assessee submitted that the Tribunal in assessee's own case for assessment years 2006-07 and 2008-09 has held these issues as infructuous as the primary issue of characterization of receipt as royalty, was already decided in favour of the assessee.

7.2 Ld. CIT(DR), on the other hand, relied on the order of the lower authorities, however, could not controvert that the issue in dispute was covered by the order of the Tribunal in assessment year 2006-07 and assessment year 2008-09.

7.3 We have heard the rival submission and perused the relevant material on record. We find that in ITA No. 4176/Del/2011 for assessment year 2006-07 following grounds of appeal were raised:

"5. That the learned AO erred in holding that income received by the appellant from the non-resident companies is taxable in India under Article 12(4) read with Article 12(2) and 12(8) of India Netherlands DTAA.

6. That on the facts and in the circumstances of the case and in law, the ld. AO erred in not discharging the burden of proving that:

i) The appellant's non-resident customers had a Permanent Establishment in India in connection with which the alleged Royalty was paid; and

ii) The alleged Royalty payments were borne by such Permanent Establishment of the non-resident customers."

8. That without prejudice to the above, on facts and circumstances of the case and in law, the learned AO has erred in arbitrarily attributing the entire receipts from the customers falling on the beam covering India either fully or partially and not apportioning receipts which were India specific."

7.4 The Tribunal (supra) rejected the above grounds that in view of the grounds in respect of characterization of income as royalty or fee for technical services already decided in favour of the assessee and therefore ground Nos. 5, 6, and 8 no longer survived.

7.5 As above grounds raised in ITA No. 4176/Del/2011 are identical to the grounds No. 5, 6 and 8 respectively raised in the present appeal, respectfully, following the decision of the Tribunal (supra), the grounds No. 5, 6 and 8 are dismissed as infructuous.

7.6 In the result, appeal of the assessee is partly allowed.

ITA Nos.1061/Del/2014; 680/Del/2015; 281/Del/2016 & 5840/Del/2016

8. Now, we take up the appeals having ITA No.1061/Del/2014 for assessment year 2010-11, ITA No. 680/Del/2015 for assessment year 2011-12, ITA No. 281/Del/2016 for assessment year 2012-13 and ITA No. 5840/Del/2016 for assessment year 2013-14.

9. The grounds of the appeal raised in the above appeals are reproduced as under:

Grounds raised in ITA No. 1061/Del/2014

1. *That on the facts and in the circumstances of the case and in law, the Ld. Dispute Resolution Panel ('the Panel') erred in not directing the Learned Assessing Officer ('Ld. AO') to pass appropriate orders holding that the Appellant is not liable to be assessed to tax in India.*

2. *That on the facts and circumstances of the case and in law, the Panel erred in not directing the Ld. AO to follow the order passed by the Hon'ble Delhi High Court (in ITA 1167/2009 and ITA 1122 to 1129/2011) and the Hon'ble Income Tax Appellate Tribunal, New Delhi ('the Tribunal') (in ITA nos. 5385-5387/Del/2004, 2623-2624/Del/2008, 735-736/Del/2010, 5160/2010, 4176-4177/Del/2011) in Appellant's own case holding that the Appellant is not liable to be assessed to tax in India, when there was no change of facts recorded by the Ld. AO from the preceding years.*

3. *That on the facts and in the circumstances of the case and in law, the Ld. AO erred in not holding that the payments received by the Appellant from providing data transmission services via Space Segment Capacity are not assessable as business profits in India and in the absence of a Permanent Establishment under Article 5 of the India-Netherlands Double Taxation Avoidance Agreement between India and Netherlands ("the DTAA"), the receipts earned by the Appellant are not taxable in India.*

4. *That on the facts and circumstances of the case and in law, the Ld. AO erred in holding that the payments received by the Appellant as consideration for data transmission services are in the nature of "royalties" as defined under section 9(1)(vi) of the Income Tax Act, 1961 ('the Act') and Article 12(4) of the DTAA.*

5. *Without prejudice to above, on facts and circumstances of the case, the Ld. AO erred in wrongly computing the total assessed income of the Appellant at USD 24,390,163/-.*
6. *Without prejudice to above, on facts and circumstances of the case and in law, the Ld. AO erred in not granting the entire credit of the taxes deducted at source as claimed in the return of income filed by the appellant.*

7. *The Ld. AO erred in initiating penalty proceedings under section 271(1)(c) of the Act.*

Grounds raised in ITA No. 680/Del/2015

1. *That on the facts and in the circumstances of the case and in law, the Ld. Dispute Resolution Panel ('the Panel') erred in not directing the Learned Assessing Officer ('Ld. AO') to pass appropriate orders holding that the Appellant is not liable to be assessed to tax in India.*

1.1. *That on the facts and circumstances of the case and in law, the Panel erred in not directing the Ld. AO to follow the order passed by the Hon'ble Delhi High Court (in ITA 1167/2009 and ITA1122 to 1129/2011) and the Hon'ble Income Tax Appellate Tribunal, New Delhi ('the Tribunal') (in ITA nos. 5385-5387/Del/2004, 2623-2624/Del/2008, 735-736/Del/2010, 5160/2010, 4176-4177/Del/2011) in Appellant's own case holding that the Appellant is not liable to be assessed to tax in India, when there was no change of facts recorded by the Ld. AO from the preceding years.*

1.2. *That on the facts and in the circumstances of the case and in law, the Ld. AO erred in not holding that the payments received by the Appellant from providing data transmission services via Space Segment Capacity are not assessable as business profits in India and in the absence of a Permanent Establishment under Article 5 of the India-Netherlands Double Taxation Avoidance Agreement between India and Netherlands ("the DTAA"), the receipts earned by the Appellant are not taxable in India.*

2. *That on the facts and circumstances of the case and in law, the Ld. AO erred in holding that the payments received by the Appellant as consideration for data transmission services are in the nature of*

"royalties" as defined under section 9(1)(vi) of the Income Tax Act, 1961 ('the Act') and Article 12(4) of the DTAA.

3. *That without prejudice to the above, on facts and circumstances of the case and in law, the Panel and the Ld. AO erred in reading into the expanded meaning of "royalties" contained in section 9(1)(vi) of the Act as retrospectively amended by Finance Act, 2012, for the purpose of interpreting the definition of "royalties" as provided under Article 12(4) of the India-Netherlands DTAA, when it is a settled position in law that amendment in the Act cannot have any effect for the purpose of interpretation of DTAA.*

4. *That without prejudice to the above, on the facts and in the circumstances of the case and in law, the Panel and Ld. AO erred in holding that the revenues earned from non-resident customers of the Appellant are also chargeable to tax in India as per the provisions of section 9(1)(vi)(c) of the Act and Article 12(8) of the India-Netherlands DTAA.*

4.1 That on the facts and in the circumstances of the case and in law, the Ld. AO erred in not discharging the burden of proving that:

   (i) The Appellant's non-resident customers had a Permanent Establishment in India in connection with which the alleged Royalty was paid; and
   (ii) The alleged Royalty payments were borne by such Permanent Establishment of the non-resident customers.

5. *That without prejudice to the above, on facts and circumstances of the case and in law, the Ld. AO has erred in arbitrarily attributing the entire receipts from the customers falling on the beam covering India either fully or partially and not apportioning receipts which were India specific.*

6. *That the Ld. AO erred in holding that the payments received by the appellant as consideration for data transmission services would also qualify as "fee for technical services" as defined under section 9(1)(vii) of the Act as well as within the meaning of Article 12(5) of the India-Netherlands DTAA.*

7. *Without prejudice to above, while computing the tax payable, the Ld. AO erred in law in levying surcharge and education cess (including secondary and higher education cess) on the rate of tax as provided under the Article 12 of the India- Netherlands DTAA.*

8. *That the Ld. AO has erred in levying interest under section 234B of the Act, by not appreciating the fact that the Appellant is not under any obligation to pay advance tax since the entire revenues earned by the Appellant were subject to tax deduction at source under section 195 of the Act. The Ld. AO further erred in levying Interest u/s 234D of the Act.*

9. *Without prejudice to above, on facts and circumstances of the case and in law, the Ld. AO erred in not granting the credit of taxes deducted at source as claimed in the return of income filed by the Appellant.*

10. *The Ld. AO erred in initiating penalty proceedings under section 271(1)(c) of the Act.*

Grounds raised in ITA No. 281/Del/2016

1. *That on the facts and in the circumstances of the case and in law, the Ld. Dispute Resolution Panel ('the Panel') erred in not directing the Learned Assessing Officer ('Ld. AO') to pass appropriate orders holding that the Appellant is not liable to be assessed to tax in India.*

1.1. *That on the facts and circumstances of the case and in law, the Panel erred in not directing the Ld. AO to follow the order passed by the Hon'ble Delhi High Court (in ITA 1167/2009 and ITA 1122 to 1129/2011) and the Hon'ble Income Tax Appellate Tribunal, New Delhi ('the Tribunal') for AY 2000-01 to AY 2008-09 in Appellant's own case holding that the Appellant is not liable to be assessed to tax in India, when there was no change of facts recorded by the Ld. AO from the preceding years.*

1.2. *That on the facts and in the circumstances of the case and in law, the Ld. AO erred in not holding that the payments received by the Appellant from providing data transmission services via Space Segment Capacity are not assessable as business profits in India and in the absence of a Permanent Establishment under Article 5 of the India-Netherlands Double Taxation Avoidance Agreement between India and Netherlands ("the DTAA"), the receipts earned by the Appellant are not taxable in India.*

2. *That on the facts and circumstances of the case and in law, the Ld. AO erred in holding that the payments received by the Appellant as consideration for data transmission services are in the nature of "royalties" as defined under section 9(1)(vi) of the Income Tax Act, 1961 ('the Act') and Article 12(4) of the DTAA.*

3. *That without prejudice to the above, on facts and circumstances of the case and in law, the Panel and the Ld. AO erred in reading into the expanded meaning of "royalties" contained in section 9(1)(vi) of the Act as retrospectively amended by Finance Act, 2012, for the purpose of interpreting the definition of "royalties" as provided under Article 12(4) of the India- Netherlands DTAA, when it is a settled position in law that amendment in the Act cannot have any effect for the purpose of interpretation of DTAA.*

4. *That the Ld. AO erred in holding that the payments received by the appellant as consideration for data transmission services would also qualify as "fee for technical services" as defined under section 9(1)(vii) of the Act as well as within the meaning of Article 12(5) of the India-Netherlands DTAA.*

5. *That the Ld. AO has erred in levying interest under section 234B of the Act, by not appreciating the fact that the Appellant is not under any obligation to pay advance tax since the entire revenues earned by the Appellant were subject to tax deduction at source under section 195 of the Act. The Ld. AO erred in further levying Interest u/s 234D of the Act.*

6. *Without prejudice to above, while computing the tax payable, the Ld. AO erred in law in levying surcharge and education cess (including secondary and higher education cess) on the rate of tax as provided under the Article 12 of the India- Netherlands DTAA.*

7. *Without prejudice to above, on facts and circumstances of the case, the Ld. AO erred in not granting the entire credit of taxes deducted at source as claimed in the return of income filed by the Appellant.*

8. *The Ld. AO erred in initiating penalty proceedings under section 271(1)(c) of the Act.*

Grounds raised in ITA No. 5840/Del/2016

1. *That on the facts and in the circumstances of the case and in law, the Ld. Dispute Resolution Panel ('the Panel') erred in not directing the Learned Assessing Officer ('Ld. AO') to pass appropriate orders holding that the Appellant is not liable to be assessed to tax in India.*

1.1. *That on the facts and circumstances of the case and in law, the Panel and the Ld. AO erred in not following the orders passed by the Hon'ble High Court of Delhi for the Assessment years 2000-01 to 2008-09 in the Appellant's own case since there was no change in facts recorded for the present year.*

1.2. *That on the facts and in the circumstances of the case and in law, the Ld. AO erred in not holding that the payments received by the Appellant from providing data transmission services via Space Segment Capacity are assessable as business profits in India and in the absence of a Permanent Establishment under Article 5 of the India-Netherlands Double Taxation Avoidance Agreement between India and Netherlands ("the DTAA"), the receipts earned by the Appellant are not taxable in India.*

2. *That on the facts and circumstances of the case and in law, the Ld. AO erred in holding that the payments received by the Appellant as consideration for data transmission services are in the nature of 'Royalty' as defined under section 9(1)(vi) of the Income Tax Act, 1961 ('the Act') and Article 12(4) of the DTAA.*

2.1. *That without prejudice to the above, on facts and circumstances of the case and in law, the Panel and the Ld. AO erred in reading into the expanded meaning of 'Royalty' contained in section 9(1)(vi) of the Act as retrospectively amended by Finance Act, 2012, for the purpose of interpreting the definition of 'Royalty' as provided under Article 12(4) of the India-Netherlands DTAA, when it is a settled position in law that amendment in the Act cannot have any effect in interpretation of DTAA as also held by the Hon'ble High Court of Delhi in the Appellant's own case in [2016] 382 ITR 114 (Delhi) for AY 2006-07 and AY 2008-09.*

2.2. *Without prejudice to ground 2 above, the Ld. AO and the Panel erred in not taking cognizance of the fact that 'use of a secret process' is a sine qua non for the payments to qualify as 'Royalty' under the India-Netherlands DTAA.*

3. *That the Ld. AO erred in holding that the payments received by the Appellant as consideration for data transmission services would also qualify as "fee for technical services" as defined under section 9(1)(vii) of the Act as well as within the meaning of Article 12(5) of the India-Netherlands DTAA.*

4. *Without prejudice to above, on facts and circumstances of the case and in law, the Ld. AO erred in not granting the entire credit of taxes deducted at source as claimed in the return of income filed by the Appellant.*

5. *The Ld. AO erred in initiating penalty proceedings under section 271 (1)(c) of the Act.*

10. The Ld. counsel submitted that ground Nos. 1, 1.1 and 1.2 raised in all the four appeals having ITA No. 1061/Del/2014, 680/Del/2015 281/Del/2016 and ITA No. 5840/Del/2016 are general in nature and not required to be adjudicated upon specifically. In view of the submission of the learned counsel, we dismiss these grounds in all the four appeals holding as infructuous.

11. We find that Ground Nos. 2 & 3 in ITA No. 1061/Del/2014; Ground Nos. 2 & 3 of ITA No. 680/Del/2015; Ground Nos. 2 & 3 of ITA No. 281; and Ground Nos. 2, 2.1 and 2.2 of ITA No. 5840/Del/2016 are related to the issue of characterization of revenue earned by the assessee in the nature of royalties under the Act and India Netherlands DTAA. As the issue in dispute is identical to ground No. 3 adjudicated by us in appeal having ITA No. 5616/Del/2012 for assessment year 2009-10, following our findings in para 5.4 of this order, we allow the grounds raised in respective appeals.

12. Further, Ground No. 6 of ITA No. 1061/Del/2014, Ground No. 6 of ITA No. 680/Del/2015, Ground No. 4 of ITA No. 281/Del/2016 and Ground No. 3 of ITA No. 5840/Del/2016 are related to the issue of characterization of receipts in the nature of Fee for Technical Services (FTS) under the Act and Indian Netherlands DTAA. The issue in dispute

is identical to the issue raised in ground No. 7 of ITA No. 5616/Del/2012, which we have adjudicated in favour of the assessee. Accordingly, following the same finding, we allow the above grounds raised in respective appeals.

13. Further ground No. 4, 4.1 and 5 of ITA No. 1061/Del/2014 and ground No.4, 4.1 and 5 of ITA No. 680/Del/2015 are related to taxability of revenues from non-resident customers under article 12(8) of India Netherlands DTAA as well as within section 9(1)(vi)(c) of the Act and quantification of revenue liable to tax in India. The identical Ground no. 5, 6 & 8 have been adjudicated by us in ITA No. 5616/Del/2012, accordingly, following our findings, above grounds are dismissed as infructuous.

14. The Ground No. 7 of ITA No. 1061/Del/2014, Ground No. 8 of ITA No. 680/Del/2015 and Ground No. 5 of ITA No. 281/Del/2016 relates to levy of interest under section 234B of the Act.

14.1 The learned counsel of the assessee submitted before us that the Tribunal for assessment years 2006-07 and 2008-09 in the assessee's own case observed that the issue has become infructuous, since the primary issue on characterization of receipts as being in the nature of royalty has been decided in favour of the assessee.

14.2 The Ld. CIT(DR), on the other hand, relied on the finding of the lower authorities.

14.3 We have heard the rival submission and perused the relevant material on record. Since the issue of characterization of receipt as royalty or fee for technical services has been decided in favour of the assessee, the issue of charging interest under section 234B of the Act is merely rendered academic and accordingly, we dismiss the same as infructuous.

15. The ground No. 10 of ITA No. 106/Del/2014, ground No. 10 of ITA No. 680/Del/2015, ground No. 8 of ITA No. 281/Del/2016 and ground No. 5 of ITA No. 5840/Del/2016 relates to initiation of penalty under section 271(1)(c) of the Act.

15.1 We find that in the impugned orders, the Assessing Officer has only initiated the penalty under section 271(1)© of the Act and not levied the said penalty and therefore it is premature for the assessee to agitate the issue of levy of penalty under section 271(1)(c) of the Act in present appeals. Accordingly, we dismiss above grounds of respective appeals as infructuous.

16. Ground No. 9 of ITA No. 1061, ground No. 9 of ITA No. 680/Del/2015 , ground No. 7 of ITA No. 281 /Del/2016 and ground No. 4 of ITA No. 5840/Del/2016 relate to not granting of credit of tax deducted at source, which is claimed in the returns of income of respective years filed by the assessee.

16.1 We have heard the rival parties on the issue in dispute and we are of the opinion that issue of allowing credit of tax deducted at source needs verification of the evidences of tax deducted and reconciliation with the database of the Income Tax Department, therefore, we feel it appropriate to restore this issue to the file of the Assessing Officer for verification and decide in accordance with law. The assessee shall be afforded sufficient opportunity of being heard. Accordingly, above grounds are allowed for statistical purposes

17. In ground No. 7 of ITA No. 680/Del/2015 and ground No. 6 of ITA No. 281/Del/2016, the assessee has raised the issue of levying of surcharge and education cess on the rate of tax as provided under article 12 of the Indian Netherland DTAA.

17.1 Before us, the learned counsel submitted that the issue has become infructuous since the primary issue characterization of the

receipt in the nature of the royalty/FTS has been decided in favour of the assessee.

17.2 In view of submission of the assessee, the relevant grounds of the respective appeals are dismissed as infructuous.

18. In ground No. 8 of ITA No. 1061/Del/2014, the assessee has raised issue of wrong computation of the total assessed income.

18.1 We have heard the rival submission. We are of the opinion that the issue needs factual verification at the end of the Assessing Officer. Accordingly, we restore the issue to the file of the Assessing Officer with the direction to decide in accordance with law, after allowing opportunity of being heard to the assessee. The ground is allowed for statistical purposes.

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

The decision is pronounced in the open court on 17th Oct., 2017.

Sd/-	Sd/-
(BHAVNESH SAINI)	**(O.P. KANT)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: 17th October, 2017.
RK/-(D.T.D)
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi