IN THE INCOME TAX APPELLATE TRIBUNAL "L" BENCH, MUMBAI

BEFORE SHRI SHAMIM YAHYA, AM AND SHRI RAVISH SOOD, JM

I.T.A. Nos.599 to 614/Mum/2016
(Assessment Year: 2013-14, 2014-15 & 2015-16)

Viacom 18 Media Pvt. Ltd. Zion Bizworld, Subhash Road-A, Near Garware Office, Vile Parle (E), Mumbai-400 057	Vs.	Asst. Director of Income – tax (International Taxation)-4(30(1), Scindia House, Mumbai-400 001
PAN/GIR No. AAACM 9164 E		
(**Appellant**)	:	(**Respondent**)

Appellant by	:	Shri Abhishek Tilak
Respondent by	:	Shri M. V. Rajguru

Date of Hearing	:	12.04.2018
Date of Pronouncement	:	09.07.2018

O R D E R

Per Bench:

These are appeals by the assessee against the respective orders of the ld. Commissioner of Income Tax (Appeals) for the concerned assessment years. Since the issues are common and the appeals were heard together these have been disposed of by this common order.

2. The common grounds of appeal read as under:

> 1. On the facts, and in the circumstances of the case, and in law, the learned Commissioner of Income-tax (Appeals) - 58, Mumbai ['CIT(A)'] has erred in dismissing the Appellant's appeal and confirming the order of the Asst. Director of Income-tax (International Taxation) - 2(2), Mumbai, holding that the payments of transponder fees by the Appellant to Intelsat Corporation, USA, ('Intelsat'), are taxable as 'royalty' under the Income-tax Act, 1961 ('the Act'), and under the India-USA Tax Treaty ('the Treaty'), and consequently, subject to tax withholding under Section 195 of the Act.

2. On the facts, and in the circumstances of the case, and in law, the learned CIT(A) ought to have held that the transponder fees payable by the Appellant to Intelsat are not taxable in India and consequently, not subject to tax withholding under Section 195 of the Act.

3. The assessee has also raised the common additional ground which reads as under:

3. On the facts and in the circumstances of the case, and in law, since the Hon'ble Delhi High Court {ITA No. 530 & 545 of 2012 and ITA No. 977 of 2011} has held that the transponder fees are not taxable in the hands of the recipient (Intelsat Corporation), there cannot be any liability on the Appellant (as a payer) to deduct tax at source under Section 195 of the Income Tax Act, 1961 ('the Act').

4. On the facts and in the circumstances of the case, and in law, the transponder fees payable by the Appellant to Intelsat Corporation ought not to be taxable in India and consequently, not subject to withholding of tax under Section 195 of the Act, in light of the following decision of the Hon'ble Mumbai Tribunal on identical facts and issues:

- Taj TV Ltd. [(2016) 161 ITD 339 and (2017) 162 ITD 674]
- United Home Entertainment Pvt. Ltd. (ITA No.2841 to 2856/Mum/2012 and ITANo.5I71to5181/Mum/2013).

5. Without prejudice to the above and in the alternative, this issue be referred to a larger / special bench to resolve the views rendered by the Hon'ble Income Tax Appellate Tribunal Mumbai Bench in the case of the Appellant and the other assessees which are conflicting and contrary to one another if the Hon'ble Bench decides to follow decision rendered in assessee's own case.

4. For acceptance of the additional ground, it has been submitted that they are essentially for the due dispensation of substantial of justice. In this regard, the assessee has placed reliance on the following case laws:

- Jute Corporation of India Limited v CIT [1991] 187 ITR 688 (SC)
- National Thermal Power Co. Ltd v CIT [19981 229 ITR 383 (SC)
- CIT v Nelliappan (S.) |1967] 66 ITR 722 (SC)
- Ahemdabad Electricity Co. Ltd. v CIT [1993] 199 ITR 351 (Bom.)
- Ashok Vardhan Birla v CWT |1994| 208 ITR 958 (Bom.)
- Inaroo Ltd. v CIT (1993] 204 ITR 312 (Bom.)
- CIT v Goviodram Bros. Pvt. Ltd. [1983] 141 ITR 626 (Bom.)

5. Since the facts are identical, we are referring to the facts and figures from ITA No. 667/Mum/2016. Accordingly, we adjudicate this issue arising out of the above grounds as under:

Apropos main ground of appeal no.1: Liability of TDS on transponder fee paid to Intelsat Corporation, USA

6. Brief facts of the case are as under:

The assessee is a company registered in India and is primarily engaged in broadcasting television channels from India. It is also engaged in marketing of advertising airtime on these channels, distribution of the channels, marketing and distribution of films and production of program content/television software. The assessee has been provided with a 24 hour satellite signal reception and retransmission service (transponder service) by Intelsat Corporation, a USA Corporation ('Intelsat' previously known as 'PanAmSat Corporation') as per the "Full Time Transponder Service Agreement for Television Service Delivery" dated : 19th August, 2011 entered into between the assessee and Intelsat. In consideration for the transponder capacity allowed to the assessee, it has to pay transponder service fee to Intelsat on a monthly basis @ USS 100,000. As per para 3.5 of this agreement, the taxes, if any, payable on the transponder service fee, are to be borne by the assessee. The assessee has made various transponder fee payments to Intelsat. It has approached the assessing officer for a certificate under section 195(2) of the Act allowing it not to deduct any taxes from the remittances made to Intelsat. The assessing officer has passed an order under section 195(2) of the Income

Tax Act holding the assessee liable to deduct tax on this amount treating the same as royalty and hence subject to TDS. He also directed grossing up of the amount as well as payment of surcharge on the remitted amount. The action of the Assessing Officer was upheld by the ld. Commissioner of Income Tax (Appeals) following the earlier orders of ITAT.

Additional ground:

7. By way of additional ground, the assessee has raised an issue that since the Hon'ble Delhi High Court has held that the transponder fee are not taxable in the hands of the recipient Intelsat Corporation, USA, there cannot be any liability on the assessee to deduct tax at source u/s. 195 of the Act. Further, the assessee has made submissions in this regard that as per the law laid down by the Hon'ble Apex Court in the case of *G. E. Technology Centre Pvt. Ltd. vs. CIT* (327 ITR 456)(SC), there is no liability to deduct TDS when the income is held to be not chargeable to tax in the hands of the recipient. For the acceptance of the aforesaid additional ground, it has been submitted that it is an important legal issue and for the substantial justice, the same should be accepted. On the touch stone of various case laws referred by the ld. Counsel of the assessee in this regard including that decision of the Hon'ble Supreme Court in the case of *National Thermal Power Co. Ltd*. (supra), we admit the additional ground.

8. We have heard both the counsel and perused the records. We note that the Hon'ble Apex Court in the case of *G. E. Technology Centre Pvt. Ltd.* (supra), has held that where an amount is payable to a non-resident, the payer's obligations to deduct tax at source arises only when such remittances is a sum chargeable under the Act, i.e., chargeable u/s.

4, 5, 9 of the Act in the hands of the recipient. It has further been expounded that section 195(2) of the Act is not merely a provision to provide information to the ITO(TDS), so that the department can keep track of the remittances being made to non residents outside India, rather it gets attracted to the case where payment made in a composite manner which has an element of income chargeable to tax in India and the payer seeks determination of the "appropriate proportion of such sum so chargeable". From the above case law it emerges that when in the hands of the nonresident recipient, the sum paid is not chargeable under the Act, there is no liability on the payer to deduct tax at source. Now we note that the Hon'ble Delhi High Court in the case of *DIT(International Taxation) vs. Intelsat Corporation* (in ITA No. 977/2011 dated 19.08.2011) considering the issue of chargeability of tax of similar payments received by Intelsat Corporation, USA has held as under:

> The respondent assessee is a tax resident company of the United States of America with its registered office located in Washington D.C. The assessee owns and operates global network of telecommunication satellites in outer space. It is engaged in the business of transmitting telecommunication signals to and fro from the earth station(s). Its customers are various TV Channels, NICNET and Internet Service providers. For this purpose, the assessee enters into contracts with various parties around the world. The assessee leased its transponder capacity and bandwidth to various customers in India and outside India, who used the transponders for their business in India. According to the assessee, for the aforesaid activities no income accrued or attributed to India and therefore, the assessee was not liable to be taxed in India. For this reason, in respect of assessment year in question, i.e., Assessment Year 2007-08 it filed ?Nil? income return. The A.O., however, going by the past history of the assessments in the case of assessee in the years 1996-97 to 2004-05 held that certain percentage of the income of the assessee was exigible to tax in India as it was attributed to the receipts from the customers in India. The

matter was referred to the Disputes Resolution Panel (DRP). Objections preferred by the assessee were dismissed by the DRP and the DRP directed the A.O. to compute the income as per the draft order prepared by it. In arriving at the conclusion that revenue receipts on account of providing transmission services to its identified customers was in the nature of royalty to be taxed @ 10% of the total revenues, as per Article 12(7)(b) of the DTAA between India and the USA and the provisions of Section 9(1)(vi) of the Income-Tax Act, reliance was placed on the judgment dated 16.10.2009 of the Special Bench of the ITAT, Delhi in the case of New Skies Satellite NV v. ADIT, International Taxation, Circle-2(1), New Delhi. Pursuant to the directions given by the DRP the Assessing Officer passed assessment orders and taxed the income pertaining to satellite transmission service/telecasting companies as royalty income. This order of the Assessing Officer was challenged before the ITAT. The ITAT has allowed the appeal of the assessee. Perusal of the order of the Tribunal would reveal that it is relied upon the judgment of this Court in the case of Asia Satellite Communication Company Ltd. v. DIT and Vice Versa in I.T.A. Nos.131 and 134/2003 decided on 31.01.2001. Operative portion of the order of the Tribunal stating the manner in which the judgment of this Court in Asia Satellite?s case (supra) was relied upon, reads as under:-

3.2 Thereafter he drew our attention towards paragraph Nos.72 to 81 of the judgment. In paragraph No.72, it is mentioned that the Tribunal has made an attempt to trace the fund flow and observed that since the end customers being persons watching televisions in India are paying the amounts to cable operators who in turn are paying the same to TV Channels, the flow of fund is traced to India. This is a far-fetched ground to rope in payment received by 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 the telecast operators, which has accrued in India, and they have offered and paid tax. Thus, the income, which is generated in India, has been subjected to tax. It is the payment, which is made by the telecast operators who are situated abroad to the appellant, which is also a non-resident, i.e., sought to be brought within the tax net. It is concluded that it is difficult to accept such far-fetched reasoning with no causal connection. It may be mentioned here that the assessee has received revenues from Indian residents also, as can be seen from the table mentioned in the assessment order and reproduced by us while summarizing the order.

3.3 Thereafter he drew our attention towards paragraph No.79 of the

judgment, in which it has been held that the Court is unable to subscribe to the view taken by the Tribunal in the impugned judgment on the interpretation of section 9(1)(vi) of the Act. Thus question No.3 was answered in favour of the assessee which is ? whether, on the facts and in the circumstances of the case, the Tribunal was justified in holding that the amount paid to the appellant by its customers represented income by way of royalty as defined in Explanation 2 to Section 9(1)(vi) of the Act? In arriving at this decision, the Hon?ble Court inter alia referred to OECD convention, commentary thereon, commentary written by Klaus Vogel, decision in the case of Union of India and Another Vs. Azadi Bachao Aandolan and Another, (2003) ITR 706, CIT Vs. Ahamdabad Manufacturing and Calico Printing Company 139 ITR 806 (Gujarat), and CIT vs. Vishakhapatnam Port Trust, (1983) 144 ITR 146 (AP).

3.4 The revenue had also raised the question regarding applicability of section 9(1)(vii) for the first time before the Tribunal. Although this ground was admitted, it was not decided as the income was held to be assessable u/s 9(1)(VI). No argument was advanced by the learned counsel for the revenue before the Hon?ble Court in this matter. Therefore, the submission in the ground regarding applicability of section 9(1)(vii) was not accepted. The result of the decision is that the revenues received by the assessee is not taxable either u/s 9(1)(vi) or section 9(1)(vii) of the Act.?

Learned Counsel for the Revenue could not dispute the position that issues raised in this appeal are directly covered by the judgment of this Court in the case of Asia Satellite Telecommunications Ltd. Vs. Commissioner of Income Tax (ITA 131/2003 decided on 31.01.2011). In that judgment, a categorical view is taken that the income received from the activities undertaken by the respondent/assessee would not be exigible to tax in India.

Following that judgment, this appeal is dismissed.

9. Similar order was passed by the Hon'ble Delhi High Court in the case of *DIT(International Taxation) vs. Intelsat Corporation* (in ITA No.530 & 545/2012 dated 28.09.2012), wherein the Hon'ble High Court has held as under:

The Revenue claims to be aggrieved by the orders dated 2.2.2012 and 16.01.2012, whereby its appeals before the Tribunal were dismissed. The

> substantial question of law sought to be urged is whether the Tribunal fell into error in holding that the assessee did not incur any tax liability under provisions of the Income Tax Act?
>
> An elaborate discussion on the merits is not warranted since the impugned order and notices are based upon a previous order of the Tribunal dated 4th March, 2011 (ITA 5443/Del/2010), for AY 2007-08 that was subsequently followed by the Tribunal in its own decision for AY 2006-07 (ITA No.4662/Del/2011). This Court by its judgment and order dated 19th August, 2011 in ITA No.977/2011, affirmed the findings of the Tribunal by a reasoned order. In view of these developments, no substantial question of law can be said to arise; there is no infirmity in the finding of the Tribunal with regard to the taxability of the assessee for the assessment years in question i.e. 2006-07 and 2008-2009. The appeals are accordingly dismissed.

10. From the above case laws it is evident that similar payments received by the Intelsat Corporation USA have been held to be not chargeable to income tax in the hands of the same recipient. When this point is considered in light of the Hon'ble Apex Court decision in the case of *G. E. Technology Centre Pvt. Ltd.* (supra) it emerges that no liability fasten on the assessee to deduct tax at source on payments made to Intelsat Corporation USA. Hence, the additional grounds of the assessee deserve to be allowed. Accordingly, we hold that since the Hon'ble High Court has held that the payment was not income chargeable to tax in the hands of the same recipient, there was as a corollary no liability on the part of the assessee (the payer) to deduct tax at source on the similar payment made to the same payee. Hence, the assessee succeeds on the additional ground.

11. Since we have decided the issue in favour of the assessee on the additional ground, the adjudication on other grounds raised in this appeal has now become academic and, hence, otiose. Since the above decision is rendered by following the ratio from the

Hon'ble Apex Court, we are not engaging in the academic exercise of dealing with the other issues.

12. In the result, all the assessee's appeals are allowed as above.

Order pronounced in the open court on 09.07.2018

Sd/-	Sd/-
(Ravish Sood)	(Shamim Yahya)
Judicial Member	Accountant Member

Mumbai; Dated : 09.07.2018
Roshani, Sr. PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT - concerned
5. DR, ITAT, Mumbai
6. Guard File

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai