



IN THE INCOME TAX APPELLATE TRIBUNAL “L”, BENCH MUMBAI

BEFORE SHRI SHAMIM YAHYA, AM
&
SHRI RAM LAL NEGI, JM

ITA Nos.6604/Mum/2004 & 4348/Mum/2005
(Assessment Years: 2001-02 & 2002-03)

M/s. Satellite Television Asian Region Ltd., 8 th Floor, One Harbour Front 18, Tak Fung Street Hungghom, Kowloon Hongkong <u>Mumbai Address:</u> M/s. Satellite Television Asian Region Ltd., C/o. DSK Legal 4 th Floor, Express Towers Nariman Point Mumbai – 400 021	Vs.	Deputy Director of Income-Tax (International Taxation)-2(1) Scindia House Ballard Pier Mumbai – 400 001
(Appellant)	..	(Respondent)

&
ITA No.5441/Mum/2005
(Assessment Year : 2002-03)

Deputy Director of Income-Tax (International Taxation)-2(1) Mumbai – 400 001	Vs.	M/s. Satellite Television Asian Region Ltd., Mumbai – 400 021
(Appellant)	..	(Respondent)

Assessee by	Shri Porus Kaka and Shri Divesh Chawla
Revenue by	Shri Samuel Darse
Date of Hearing	16/08/2018
Date of Pronouncement	05 /10/2018

आदेश / ORDER

PER SHAMIM YAHYA (A.M):

These are appeals by the assessee against respective orders of CIT(A) for A.Y.'s 2001-02 and 2002-03.

2. Revenues has also filed cross appeal for the A.Y.2002-03.
3. Grounds of appeal filed by assessee in 2001-02 are as under:

“Ground No 1

The learned Commissioner of Income-tax (Appeals) - XXXI [‘CIT(A)'] has erred in disallowing the payment made by the Appellant to various non-resident television content aggregators ('channel companies') in computing the income of the Appellant by applying the provisions of Section 40(a)(i) of the Income-tax Act, 1961 ('Act') to the aforesaid payment.

The Appellant respectfully submits that the disallowance be deleted.

Ground No 2

The learned CIT(A) has erred in holding that the provisions of Section 40(a)(i) of the Act apply to the Appellant despite the entire sums received by the Appellant having been processed under Section 195 of the Act in accordance with the order of the Income-tax Department itself issued under Section 197 of the Act.

The Appellant therefore prays the disallowance be deleted.

Ground No 3

The learned CIT(A) has erred in concluding that the Appellant is not a telecasting company and failing to apply the provisions of Circular 742 issued by the Central Board of Direct Taxes.

The Appellant respectfully submits that the above finding is erroneous and should be set aside.

Ground No 4

The learned CIT(A) has erred in holding that the channel companies have a business connection in India as per the provisions of Section 9(l)(i) of the Act.

The Appellant respectfully submits that the above finding is erroneous and should be set aside.

Ground No 5

The learned CIT(A) has erred in holding that the channel companies carried out operations in India as per Explanation (a) to Section 9(1)(i) of the Act.

The Appellant respectfully submits that the above finding is erroneous and should be set aside.

Ground No 6

The learned CIT(A) has erred in holding that the Appellant has not refuted, inter-alia, the following findings of the learned Assessing Officer, which are erroneous and contrary to facts:

- predominant footprint of the satellite is only in India;*
- the decoders are provided to the cable operators either by the Appellant or by the channel companies or their agents in India;*
- Star India Private Limited ('SIPL') is a direct subsidiary of the Appellant;*
- majority of the business operations of the channel companies are in India.*

The Appellant respectfully submits that the above findings are erroneous and contrary to facts and should be set aside.

Without prejudice to the above, it is also submitted that the above findings are not relevant in determining whether the channel companies carried out operations in India as per the provisions of Section 9(1)(i) of the Act and generally, in deciding the taxability of the channel companies.

Ground No 7

Without prejudice to Grounds 1 to 6, as per explanation (a) to Section 9(1)(i) of the Act, income deemed to accrue or arise to the channel companies cannot exceed such part of the income as is reasonably attributable to the operations carried out in India. Given that the channel companies do not carry out any operations in India, no income can be subject to tax in India in the hands of the channel companies.

The Appellant respectfully submits that the finding of the CIT(A) that the channel companies are taxable in India is erroneous and should be set aside.

Ground No 8

The learned CIT(A) has erred in upholding the disallowance under Section 40(a)(i) of the Act in the absence of establishment of the chargeability to tax of the channel companies in India by the Income-tax Department.

The Appellant respectfully submits that the disallowance be deleted.

Ground No 9

The learned CIT(A) has erred in holding the Appellant to be an agent of the channel companies.

The Appellant respectfully submits that the above finding is erroneous and should be set aside.

Ground No 10

The learned CIT(A) has erred in holding SIPL to be an agent of the channel companies.

The Appellant respectfully submits that the above finding is erroneous and should be set aside.

Ground No 11

The learned CIT(A) has erred in holding that the channel companies are taxable in India.

The Appellant respectfully submits that the above finding is erroneous and should be set aside,

Ground No 12

The learned CIT(A) has erred in holding that the provisions of Section 40(a)(i) of the Act apply to the payment made by the Appellant to the channel companies despite treating the Appellant as an agent of the channel companies.

The Appellant respectfully submits that the above basis of assessment is erroneous and should be set aside.

Ground No 13

The learned CIT(A) has erred in not applying the provisions of Section 40(a)(i) of the Act to only that portion of the payment made to the channel companies that represents income that has been considered to be chargeable to tax in India.

The Appellant prays that the disallowance be restricted accordingly.

Ground No 14

Without prejudice to Grounds 1 to 13 above, the margin retained by the Appellant, as an agent, from the activity of selling airtime is not taxable in India.

Ground No 15

The learned CIT(A) has erred in contending that International Global Networks BV (formerly known as Satellite Television Asian Region Advertising Sales BV) [SAS BV] is a 'conduit' for the Appellant and that the advertisement revenues earned by SAS BV are taxable in the hands of the Appellant.

The Appellant respectfully submits that the above finding is erroneous and should be set aside.

Ground No 16

Without prejudice to Ground 13 above, the learned CIT(A) has erred in taxing the advertisement income earned by SAS BV in the hands of the Appellant on an accrual basis.

The Appellant respectfully submits that the above finding is erroneous and should be set aside.

Ground No 17

The learned CIT(A) has erred in not allowing deduction in respect of the commission paid to SIPL on the basis of invoices raised by the Appellant rather than on the basis of the collections made by SIPL.

The Appellant requests that the above grounds be decided based on the merits of the case.

The Appellant craves leave to submit such further grounds at or before the hearing of the appeal, so as to enable the Hon'ble Income tax Appellate Tribunal to decide the appeal according to law."

4. Grounds of appeal filed by assessee in 2002-03 are as under:

Ground No 1

The learned Commissioner of Income-tax (Appeals) - XXXI ['CIT(A)'] has erred in disallowing the payment made by the Appellant to various non-resident television content aggregators ('channel companies') in computing the income of the Appellant.

The Appellant respectfully submits that the disallowance be deleted.

Ground No 2

The learned CIT(A) has erred in holding that the Appellant was required to deduct taxes at source from the payments made to the channel companies.

The Appellant respectfully submits that the above finding is erroneous and should be set aside.

Ground No 3

The learned CIT(A) has erred in holding that the provisions of Section 195 of the Income-tax Act, 1961 ('Act') apply to the payments made by the Appellant to the channel companies.

The Appellant respectfully submits that the above finding is erroneous and should be set aside. '

Ground No 4

The learned CIT(A) has erred in upholding the disallowance under Section 40(a)(i) of the Act in the absence of establishment of the chargeability to tax of the channel companies in India by the Income-tax Department.

The Appellant respectfully submits that the disallowance be deleted.

Ground No 5

The learned CIT(A) has erred in holding that the channel companies have a business connection in India as per the provisions of Section 9(1)(i) of the Act.

The Appellant respectfully submits that the above finding is erroneous and should be set aside.

Ground No 6

The learned CIT(A) has erred in holding that the channel companies carried out operations in India as per Explanation (a) to Section 9(1)(i) of the Act.

The Appellant respectfully submits that the above finding is erroneous and should be set aside.

Ground No 7

The learned CIT(A) has erred in relying on his order for Assessment Year 2000-01 and holding that the Appellant has not refuted, inter-alia, the following findings of the learned Assessing Officer, which are erroneous and contrary to facts:

- *predominant footprint of the satellite is only in India;*
- *the decoders are provided to the cable operators either by the Appellant or by the channel companies or their agents in India;*
- *Star India Private Limited ('SIPL') is a direct subsidiary of the Appellant;*
- *majority of the business operations of the channel companies are in India.*

The Appellant respectfully submits that the above findings are erroneous and contrary to facts and should be set aside.

Without prejudice to the above, it is also submitted that the above findings are not relevant in determining whether the channel companies carried out operations in India as per the provisions of Section 9(1)(i) of the Act and generally, in deciding the taxability of the channel companies.

Ground No 8

The learned CIT(A) has erred in disallowing the entire payment made by the Appellant to the channel companies without appropriately applying Explanation (a) to Section 9(1)(i) of the Act.

The Appellant respectfully submits that the above finding is erroneous and should be set aside.

Ground No 9

The learned CIT(A) has erred in holding the Appellant to be an agent of the channel companies.

The Appellant respectfully submits that the above finding is erroneous and should be set aside.

Ground No 10

The learned CIT(A) has erred in holding SIPL to be an agent of the channel companies.

The Appellant respectfully submits that the above finding is erroneous and should be set aside.

Ground No 11

The learned CIT(A) has erred in holding that the channel companies are taxable in India.

The Appellant respectfully submits that the above finding is erroneous and should be set aside.

Ground No 12

The learned CIT(A) has erred in holding that the provisions of Section 40(a)(i) of the Act apply to the payment made by the Appellant to the channel companies and treating the advertisement revenues as belonging to the Appellant despite treating the Appellant as an agent of the channel companies.

The Appellant respectfully submits that the advertisement revenues should not be regarded as belonging to the Appellant and that Section 40(a)(i) of the Act should not be applied.

Ground No 13

The learned CIT(A) has erred in not applying the provisions of Section 40(a)(i) of the Act to only that portion of the payment made to the channel companies that represents income that is chargeable to tax in India.

The Appellant prays that the disallowance be restricted accordingly.

Ground No 14

The margin retained by the Appellant, as an agent, from the activity of selling advertisement airtime is not taxable in India.

Ground No 15

The learned CIT(A) has erred in holding that the payments received by the Appellant from the channel companies for provision of content are taxable as royalty under Section 9(l)(vi) of the Act.

The Appellant respectfully submits that the addition made to the income of the Appellant be deleted.

Ground No 16

The learned CIT(A) has erred in holding that the provisions of Section 92B read with Section 92 of the Act apply to the payments received by the Appellant from the channel companies for provision of content.

The Appellant respectfully submits that the above finding is erroneous and should be set aside.

Ground No 17

The learned CIT(A) has erred in holding that the payments received by the Appellant from the channel companies towards the provision of transponder capacity are taxable as royalty under Section 9(l)(vi) of the Act.

The Appellant respectfully submits that the above finding is erroneous and should be set aside.

Ground No 18

The learned CIT(A) has erred in holding that the provisions of Section 92B read with Section 92 of the Act apply to the payments received by the Appellant from the channel companies towards the provision of transponder capacity.

The Appellant respectfully submits that the above finding is erroneous and should be set aside.

Ground No 19

The learned CIT(A) has erred in not determining the arm's length price of the payments received by the Appellant from the channel companies towards the provision of transponder capacity and directing the Assessing Officer to arrive at the appropriate price.

Ground No 20

The learned CIT(A) has erred in not allowing a deduction of the head office expenses amounting to Rs 83,502,000 claimed by the Appellant.

The Appellant respectfully submits that the deduction be allowed.

Ground No 21

The learned CIT(A) has erred in contending that International Global Networks BV (formerly known as Satellite Television Asian Region Advertising Sales BV) ['SAS BV'] is a 'conduit' for the Appellant and that the advertisement revenues earned by SAS BV are taxable in the hands of the Appellant.

The Appellant respectfully submits that the above finding is erroneous and should be set aside.

Ground No 22

The learned CIT(A) has erred in taxing the advertisement income earned by SAS BV in the hands of the Appellant on an accrual basis.

The Appellant respectfully submits that the above finding is erroneous and should be set aside.

Ground No 23

The learned CIT(A) has erred in not allowing deduction in respect of the commission paid to SIPL on the basis of invoices raised by the Appellant rather than on the basis of the collections made by SIPL.

The Appellant requests that the above grounds be decided based on the merits of the case.

5. Grounds of appeal filed by Revenue in 2002-03 are as under:

1. "On the fact and in the circumstances of the case and in law, the Hon'ble CIT(A) erred in holding that -

(a) the payments made by the assessee to Asia Sat were not liable to tax deduction at source.

(b) the provisions of Section 40(a)(i) of the I.T. Act do not apply to t made by the assessee to Asia Sat."

2. On the fact and in the circumstances of the case and in law, the Hon'bie CIT(A) erred in directing to delete the addition made, on account of advertisement revenues : by 'SAS BV for AY. 2002-03, in the hands of the assessee, without appreciating the fact that it is necessary to keep the issue alive since the assessee has not accepted the stand of the department that the advertisement revenue is to be taxed on accrual basis."

3. "On the facts and in the circumstances of the case and in law, the CIT(A) erred in deleting the interest charge u/s. 234B and 234C of the Income-tax Act, 1961 on the ground that since the taxes were deductible at source from payments made by Indian and other advertisers, the assessee can not be saddled with the burden of the above interest ignoring the fact :

a. that the interest is in the nature of compensatory payment and is of penal in character

b. that since the tax was not deducted at source it was obligatory on the part of the assessee to make the deficit good by way of making payment towards advance tax;

c. that since the assessee failed to pay the advance tax, the provisions of section 234B and 234C of the Income-tax Act, 1961 have been correctly applied by the Assessing Officer"

The appellant prays that the order of the Ld.CIT(A) on the above grounds be set aside and that of the Assessing Officer restored.

6. Since the facts are common and appeals are heard together, these are being consolidated by way of this common order.

7. Brief facts are as under:-

The assessee, Satellite Television Asian Region Limited is a company incorporated in Hong Kong and is engaged in the media industry. With effect from April 1, 1999, the Assessee sold advertising airtime acquired from non-

resident television content aggregators (hereinafter referred to as "channel companies'), interalia, for the Star Plus, Star Movies, Star World, Channel V, Star Gold and Star News channels (hereinafter referred to as the "Channels').

For the purposes of selling advertising airtime in India, the Assessee appointed Star India Private Limited ('SIPL') [formerly known as News Television (India) Limited], a company incorporated in India for marketing of advertisement time in India on the Channels and collection of advertisement revenues. Under the agreements executed with the channel companies, the channel companies sold the advertising airtime on the Channels to the Assessee.

With effect from December 1, 1997, the Assessee granted the exclusive right to market, sell and distribute the channels of the Star TV network in India to Indian Sky Broadcasting Limited ('ISkyB'), a company incorporated in Hong Kong with its principal place of business in the United Kingdom. It permitted ISkyB to collect subscription revenues with respect to the channels of the Star TV Network, in its own right. ISkyB did not make nor was required to make any payments to the Assessee in consideration for these rights. Further, the Assessee had no role to play in the manner in which ISkyB dealt with these rights. ISkyB had in turn executed an agreement with SIPL, granting SIPL the right to distribute the channels through the cable distribution system and collect subscription revenues, in its own right. SIPL did not make nor was required to make any payments to ISkyB in consideration for these rights, except from 1st January, 2001 onwards. The cable subscription revenues have been offered to tax in the return of income of SIPL and payments received for the rights granted have been offered to tax in the hands of ISkyB. The agreement between ISkyB

and SIPL is stated to have been executed on a principal-to-principal basis. SIPL did not undertake any activities in India with respect to the subscription business on behalf of ISkyB.

Prior to April 1, 1999, the Assessee granted the rights for sale of advertising airtime (in India) on the channels of the Star TV network to Satellite Television Asian Region Advertising Sales BV ('SAS BV) [now known as International Global Networks BV], a company incorporated in the Netherlands. SAS BV appointed SIPL as its collecting agent in India with respect to sale of advertisements in India. The agreement between the Assessee and SAS BV expired with effect from April 1, 1999. Since SAS BV has been offering its income to tax on a receipt basis as per the provisions of Circular 742 issued by the Central Board of Direct Taxes ('CBDT'), the advertisement revenues collected during the Assessment Year 2001-02, pertaining to invoices raised by SAS BV prior to April 1, 1999, had been offered to tax in the return of income of SAS BV filed for the Assessment Year 2001-02.

The Assessee filed its return of income along with the audited financial statements prepared for the India operations for the Assessment Year 2001-02 on October 31, 2001, declaring a net taxable income of Rs. 40,09,85,520/-after claiming a deduction for the cost of advertising airtime purchased by it from the channel companies. Since the payments made to the channel companies were claimed to be not taxable in India, the Assessee did not withhold any taxes on payments made to the channel companies for the purchase of advertising airtime. Further, for the claimed reason that no income was received by the Assessee or

accrued to the Assessee in respect of the subscription revenues, the Assessee did not report any income to tax in this respect in its return of income.

The A.O. completed the assessment on the following basis:

Disallowing the payments to the channel companies for cost of advertising airtime purchased, under the provisions of Section 40(a)(i) of the I.T. Act, on the premise that the channel companies are taxable in India, and given that taxes have not been withheld from the payments to the channel companies.

- The channel companies have been held to be taxable in India on the premise that they have a business connection in India, on the ground that the Appellant is really an agent of the channel companies with respect to the sale of advertising airtime; and by SIPL being an agent of the Appellant the channel companies undertake operations in India (through SIPL).
- The subscription revenues earned by SIPL have been taxed in the hands of the Appellant as royalty on the ground that ISkyB is a sham entity and that SIPL is a dependent agent of the Appellant.
- The advertisement revenues in respect of the channels earned from India on a receipt basis by SAS BV have been taxed in the hands of the Appellant on a substantive basis by treating SAS BV as a 'conduit' for the Appellant (though on a protective basis).
- Consequential interest under Sections 234B and 234C of the I.T. Act has been levied.

8. On similar facts for A.Y.2002-03, the AO assessed as under:-

(i) *Disallowing the payments to the channel companies for cost of advertising airtime purchased, under the provisions of section 40(a)(i) of the I.T. Act, on the premise that the channel companies are taxable in India, and given that taxes have not been withheld from the payments to the channel companies.*

The channel companies have been held to be taxable in India on the premise that they have a business connection in India, on the ground that the Appellant is really an agent of the channel companies with respect to the sale of advertising airtime; and by SIPL being an agent of the Appellant the channel companies undertake operations in India (through SIPL).

(ii) *The subscription revenues earned by SIPL have been taxed in the hands of the Appellant as royalty on the ground that ISkyB is a sham entity and that SIPL is a dependent agent of the Appellant.*

(iii) *The advertisement revenues in respect of the channels earned from India on a receipt basis by SAS BV have been taxed in the hands of the Appellant on a substantive basis by treating SAS BV as a "conduit" for the Appellant (though on a protective basis).*

(iv) Taxing income earned from sub-lease of transponders to channel companies, on a net income basis. In doing so, the amount of income has been adjusted for the arms-length value under Section 92C, and the payments made to Asiasat have been disallowed in computing the net income under provisions of section 40(a)(i), on the grounds that Asiasat is taxable in India and no taxes have been deducted by the Appellant in respect of payments to it.

(v) Income received from various channel companies for provision of content has been taxed as royalty, on a net income basis. In this respect, the income of the Appellant has been adjusted in respect the arms-length value under section 92C.

(vi) Deduction claimed in respect of allocated head office expenses have been disallowed pursuant to an adjustment made to the arms length price under section 92.

(vii) Disallowing the claim made by the Appellant during the assessment proceedings that the deduction allowable in respect of commission payable to SIPL should be computed on the basis of invoices raised, rather than on the basis of actual collections as claimed at the time of filing the return.

(viii) Consequential interest under Sections 234B and 234C of the I.T. Act has been levied.

9. Against the above order, assessee is in appeal before the learned CIT(A).

The learned CIT(A) dealt with the issue relating to disallowance u/s.40(a)(i) by referring to his earlier order for A.Y.2000-01, following the same he affirmed the AO's action in making the disallowance on account of non-deduction of tax at source u/s.40(a)(i). Learned CIT(A) held as under:-

“As held therein, the contention of the Appellant that the sale of airtime takes place outside India and therefore no income deems to accrue or arise in India is not acceptable. The sale of Ad air-time is in fact taking place through SIPL in India who is entering into contracts with third party advertisers on behalf of STAR TV - i.e. channel companies. In light of the above, I am of the considered opinion that not only the channel companies have a business connection in India, but income can be deemed to accrue or arise to them from operations in India and thus making it taxable under section 9(l)(i) of the I.T. Act.

Since, admittedly, the Appellant has not withheld taxes on the payments made to the channel companies, who are non-resident in India, the issue of disallowing the expenditure claimed by the Appellant in buying the air-

time from the channel companies on account of the non-deduction of tax at source, under section 40(a)(i) is sustained.”

10. As regards assessee's contention that AO has erred in applying the provisions of Section 40(a)(i) to the entire amount of payment made to channel companies and not to the portion of payment which represents income as chargeable to tax in India. Learned CIT(A) confirmed the AO's action following his order of A.Y.2000-01.

11. As regards assessee's contention to the application of provision of Section 40(a)(i) to the assessee despite the entire sums received by the assessee having been processed u/s.195 of the Act in accordance with the order of the Income-Tax Department itself issued u/s.197 of the Act. Learned CIT(A) confirmed the order of the AO for the A.Y.2000-01.

12. Similarly following the assessment order for 2000-01, learned CIT(A) dismissed assessee's contention that CBDT Circular No.742 was applicable to the assessee's case and the AO has wrongly held the same as not applicable.

13. As regards assessee's contention that subscription revenue of Rs.104,60,03,594/- as assessed in SIPL and not taxable in the hands of assessee and even if taxable are not in the nature of 'royalty' and CIT(A) again refer to his order for A.Y.1999-2000. He held as under:-

“As held therein, it is clear that the distribution income belongs to SIPL and not to the Appellant. The income cannot be subject to tax in the hands of the Appellant. The A.O. is directed to delete the addition of Rs. 104,60,03,594/- on account of distribution income earned by SIPL while computing the taxable income of the Appellant. Also as concluded in the appeal order for Assessment Year 1999-2000, though the distribution right is a right, it is not covered by the definition of royalty under section 9(l)(vi) of the I.T. Act.”

14. As regards assessee's contention that SAS BV is not a 'conduit' for the assessee and that the advertisement revenues are not taxable in the hands of the assessee, either on this count or on account of it being received from SAS BV. Even if the advertisement revenues are taxed in the hands of the assessee, these should be taxed as per the provisions of Circular 742 on a receipt basis. The Id. CIT(A) directed for the deletion of addition.

15. Learned CIT(A) in this regard reads as under:-

“Prior to April 1, 1999, the Appellant granted the rights for sale of advertising airtime (in India) on the channels of the Star TV network to SAS BV. The agreement between the Appellant and SAS BV expired with effect from April 1, 1999. Since SAS BV has been offering its income to tax on a receipt basis as per the provisions of Circular 742 issued by the Central Board of Direct Taxes, the advertisement revenues collected during the Assessment Year 2001-02, pertaining to invoices raised by SAS BV prior to April 1, 1999, had been offered to tax in the return of income of SAS BV filed for the Assessment Year 2001-02. Even though the A.O. had treated SAS BV as conduit company and taxed the advertisement revenues on accrual basis in the hands of the Appellant in earlier years, however, for the reason that the matter is still being agitated by the Appellant in appeals, the advertisement revenues in respect of the channels earned from India on a receipt basis by SAS BV have been taxed in the hands of the Appellant on a protective basis. This matter has been discussed in detail in the appeal order passed by me in respect of SAS BV for Assessment Year 1998-99 (No. CIT(A)XXXI/Jt.CIT.S.R.12/01-02/03-04 dated 19.12.2003) and in the Case of the Appellant for Assessment Year 1999-2000 (Order No. CIT(A)XXXI/Jt.CIT.Sp.Rg.12/IT-208/01-02/03-04 dated 27th February, 2004) and for Assessment Year 2000-01 (Order No. CIT(A)XXXI/DDIT(IT)2(1)/IT-134/ 03-04 dated 30th March, 2004). In respect of the issue whether the revenues should be considered on actual collection basis or invoices raised, I have directed in the appeal order that the advertisement revenues be taxed on the basis of the invoices raised during the year. During the subject assessment year, SAS BV has not earned any advertisement revenues on the basis of invoices raised. Given that the advertisement revenues have already been taxed on the basis of invoices raised in prior assessment years, there is no question of taxing the same now on receipt basis. I, therefore, direct that the addition of Rs. 2,12,66,657/- made on this account be deleted.”

16. Against the above order, assessee and Revenue are in cross appeal before us.

17. Learned Counsel has elaborately made his submissions. He summarized the same as under:

For assessee's appeal :

Sr. No.	Particulars; Issues	Gr. No AY 2001 - 02	Gr. No AY 2002- 03	Remarks
1	<p>(a) Disallowance of payments made to Channel Companies under Section 40(a) (i) of the Act based on retrospective amendment in Section 195 of the Act cannot be made as law cannot expect you to do the impossible</p> <p>(b) No retrospective amendment having been made in Section 40(a)(i) of the Act, no disallowance can be made</p> <p>(c) Disallowance can only be made on 'net' income under Section 40(a){i} of the Act and not of 'gross' income</p>	<p>1-3</p> <p>1-3</p> <p>7&13</p>	<p>1-3</p> <p>1-3</p> <p>8 & 13</p>	<p>- Mumbai ITAT in Appellant own case for subsequent years, i.e. AY 2007-08 and AY 2008-09 (Sr no 1 and 2 of legal paperbook)</p> <p>- Bombay HC in NGC Networks (India) Limited (ITA No 397 of 2015} (Sr no 9 of legal paperbook)</p> <p>- SC in case of Vodafone (341 ITR 1) (Sr no 6 of legal paperbook) - Mumbai ITAT in Appellant's own case for Section 271C issue for the same year (56 SOT 22} [Affirmed by Bombay HC (ITA No 181 and 183 of 2013) and Supreme Court] (Sr no 3 to 5 of legal paperbook) - Mumbai ITAT in Rhodia Speciality Chemicals India Limited (ITA No 830/M/2014) (Attached as Annexure 1)</p> <p>- Mumbai ITAT in Kotak Mahmdra Old Mutual Insurance Limited (ITA No 3819/M/2014) (Attached as Annexure 2)</p> <p>- Bombay HC in NGC Networks (India) Limited (if A~No 397~of 2015) (Sr no 9 of legal paperbook)</p> <p>- Mumbai ITAT in SKOL Breweries Ltd. v. ACIT (142 ITD 49) (Sr no 13 of legal paperbook)</p> <p>- Mumbai ITAT in Sonata Infomation Technology vs. DCIT (54 SOT 233) (Sr no 14 of legal paperbook)</p> <p>- Circular No. 3 of 2015 dated 15 February 2015 (Sr no 17 of legal paperbook) - Instruction No. 2 of 2014 (Sr no 18 of legal paperbook)</p>

	(d) Where taxes are paid by Channel companies and assessments are completed, no disallowance under Section 40(a)(i) of the Act	1-3	1-3	- Mumbai ITAT in Appellant own case for subsequent years, i.e. AY 2007-08 and AY 2008-09 (Sr no 1 and 2 of legal paperbook) - Delhi High Court in case of JDS Apparels (P) Ltd (53taxmann.com 139) (Sr no 15 of legal paperbook)
2.	Taxability of Channel Companies in India	4-6, 8, 10-11	4-7, 10-11	These grounds will become academic in nature in view of decision on Ground 1 to 3
3	No further attribution/addition in the hands of Star Ltd once it is held to be an agent of Channel Companies	9, 12, 14 and additional ground	9, 12, 14 and additional ground	Academic once Grounds 1-3 are decided in Assessee's favour.
4	Holding SAS BV (now known as IGN BV) as an alleged 'conduit' of Star Ltd and taxing ad revenues in hands of Star Ltd on accrual basis	15 & 16	21 & 22	- Mumbai ITAT in case of IGN BV (84 taxmann.com 188 and ITA No 1840/Mum/ 04} [and also by Bombay HC in case of IGN BV (ITA No 2461 and 2462 of 201 1) (Sr no 19 to 21 of legal paperbook) - Bombay HC in case of Star Ltd (ITA No 1676 of 2013)] (Sr no 22 of legal paperbook)
5	Deduction of commission paid to SIPL on basis of invoices raised by Star Ltd rather than on basis of collections made by SIPL	17	23	Not to be pressed
6	Taxation of payment received from Channel Companies for provision of content as	-	15&16	Not to be pressed
7	Taxation of payment received from Channel Companies for provision of transponder capacity as 'Royalty'	-	17-19	Not to be pressed
8	Deduction of Head office expenses under Section 44C of the Act	-	20	1) Section 44C was introduced to eliminate/minimize the burden of maintenance of documentation in respect of head office expenses. Reliance is placed on CBDT Circular No 202 dated 5 July 1976 pertaining to ceiling limit in respect of head office expenses and the decision and the decision of the Calcutta HC in case of Rupenjuli Tea Co. Ltd (1 86 ITR 301) (Sr no 31 and 33 of legal paperbook) 2) Also, considering that the Global Audited Accounts of Star Ltd were provided to the AO during the assessment proceedings, the AO could

			<p>have himself computed the reasonably attributable head office expenses Reliance is placed on the decision of the Mumbai Tribunal in case of Mitsui Bank Ltd (35 TTJ 426) (Sr no 32 of legal paperbook)</p> <p>3) An amount of Rs 8,35,02,000 was incurred by the Assessee on General and administration expenses on a total turnover of Rs.6,53.43,84,000. The Assessee claimed an amount of Rs 2,83,06,650 as deduction under Section 44C of the Act being 5% of the adjusted total income being lower than the actual expenditure of Rs 8,35,02,000.</p>
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For Revenue's appeal :

Sr. No.	Particulars/ Issues	Gr. No.	Remarks
1.	Disallowance of payments made AsiaSat for transponder hire charges under Section 40(a) (i) of the Act	1	Delhi HC in case of Asia Satellite Telecommunication (,332 ITR 340) (Sr no 28 of legal paperbook, - Delhi ITAT in ADIT vs Intelsat Corporation {ITA No 977/Del/201 1) (Sr no 29 of legal paperbook) - Refer Arguments taken in Assessee's appeal for Gr No 1-3
2.	Taxation of advertisement revenues received by SAS BV (now known as IGN BV) in the hands of Star Ltd on receipt on protective basis	2	- Academic once Grounds 22-23 of the Assessee's appeal are decided in its favour. - Mumbai ITAT in Respondents own case in departmental appeal for AY 2001-02 (Copy Attached as Annexure 3)
3.	Levy of interest under Section 234B and 234C of the Act	3	- Mumbai ITAT in Respondents own case in departmental appeal for AY 2001-02 (Copy Attached as Annexure 3) - Mumbai ITAT in Respondents own case for AY 2007-08 and. AY 2008-09 Sr no 1 and 2 of legal paper book) - Bombay HC in case of NGC Network Asia LLC (313 ITR 187)(Sr.No.41 of the paper book.

18. Per contra, learned DR relied upon the orders of the CIT(A) and the Assessing Officer.

19. We have carefully considered the submissions and perused the records. The first common issue raised in assessee appeals related to disallowance of payment made to channel companies. In this connection it is the plea of the

assessee that disallowance of payment made to channel companies u/s.40(a)(ia) of the Act is based upon retrospective amendment in section 195 of the Act and cannot be made as no one can be expected to do the impossible. In this regard, Id counsel of the assessee has referred to various case laws this includes ITAT decision in assessee's own case for subsequent years (A.Y. 2007-08 and A.Y. 2008-09). In this regard, we note that ITAT vide order dated 02.02.2016 in assessee's own case for A.Y. 2007-08 has held as under:

Likewise, in the case of the disallowance of cost on advertisement revenue, no separate addition is called for; firstly, the provision of withholding tax cannot be applied on the basis of any amendment which has come subsequently by giving retrospective effect, as held by various Courts, on the reasoning that assessee cannot be expected to withhold tax when there was no such provision under the statute and secondly, prior to such amendment, there was a judgment of Hon'ble Supreme Court in the case of Vodafone International Holdings BY (supra) that payment made by one non-resident to another non-resident, provisions of TDS are not applicable; thirdly, when income has been determined under PSM, inter-company transactions are eliminated and in such a methodology the combined net profit is first worked out and then divided as per the relevant functions and role of each entity. Last but not the least, the channel companies have been separately assessed and they have discharged their tax liability and, therefore, there is no requirement by the assessee to deduct tax and accordingly, no disallowance can be made.

20. Similar proposition has been laid down by honourable Bombay High Court in the case laws mentioned here in above. We find that the Hon'ble jurisdictional High Court in the case of *CIT vs. M/s. NGC Networks (India) Pvt. Ltd.* (in Income Tax Appeal No. 397 of 2015 vide order dated 29.01.2018) has dealt with the similar issue as under:

2 Revenue urges the following question of law, for our consideration:

“(a) “Whether on the facts and in the circumstance of the case and in law, the Tribunal is justified in holding that the disallowance of Channel Placement Fee cannot be made u/s.40(a)(ia) of the I.T.Act when the tax was deducted thereon u/s. 94C instead of Sec. 194J of the I.T. Act?”

(b) Whether on the facts and in the circumstances of the case and in law, the Tribunal is justified in holding that the Channel Placement Fee is not in the nature of royalty u/s. 9(1)(vi) and so the tax is not required to be deducted u/s. 194J of the I.T. Act despite Explanation 6 thereto inserted w.e.f.01/06/1976?"

3 Re Question (a):—

(a) During the subject Assessment Year, the Respondent—Assessee had paid channel placement fee of Rs.7.18 Crores to the cable operators. On the aforesaid payment of tax, it had deducted tax at source under Section 194C of the Act at the rate of 2%. During the Assessment Proceedings, the Assessing Officer was of the view that the tax deducted at source on payment of Rs.7.18 Crores to the cable operator, had to be at the rate of 10% and not at the rate of 2%. This on the ground that, the provision applicable was Section 194J of the Act and not 194C of the Act, as the payment made, was in the nature of royalty, as defined in Explanation 6 to Section 9(1)(vii) of the Act. In the above view, in the draft Assessment Order dated 25th March, 2013 passed under Section 144C of the Act, the Assessing Officer disallowed the entire expenditure of Rs.7.18 Crores under Section 40(a)(ia) of the Act, for failure to deduct tax under Section 194J of the Act;

(b) On receipt of the draft assessment order dated 25th March, 2013, the Respondent preferred its objections to it before the Dispute Resolution Panel (DRP). By an order dated 31st December, 2013, the DRP upheld the objections by holding that deduction of tax at source under Section 194C of the Act, was appropriately made by the Respondent as the payment made for channel placement fee, would not fall within the ambit of royalty as defined in Section 9(1) (vi) of the Act.

(c) Consequent to the directions dated 31st December, 2013 of the DRP, the Assessing Officer passed as Assessment Order dated 20th January, 2014 under Section 143(3) r/w. 144C(13) of the Act. Being aggrieved with the Assessment Order dated 20th January, 2014, the Revenue filed an appeal to the Tribunal. By the impugned order dated 9th July, 2014, the Tribunal by following a decision of Co-ordinate Bench in the case of M/s. Channel Guide India Ltd., v/s. ACIT (ITXA No. 1221/M/2006 rendered on 29th August, 2012) held that Assessee is not liable to deduct the tax at source, at higher rates only on account of subsequent amendment made in Act, with retrospective effect from 1976. Thus, dismissed the Revenue's Appeal.

(d) We find that view taken by the impugned order dated 9th July, 2014 of the Tribunal that a party cannot be called upon to perform an impossible Act i.e. to comply with a provision not in force at the relevant time but introduced later by retrospective amendment. This is in accord with the view taken by this Court in CIT v/s. CelloPlast (2012) 209 Taxmann 617 – wherein this Court has applied the legal maxim *lex non cogit ad impossibilia* (law does not compel a man to do what he cannot possibly perform).

(e) In the present facts, the amendment by introduction of Explanation-6 to Section 9(1)(vi) of the Act took place in the year 2012 with retrospective effect from 1976. This could not have been contemplated by the Respondent when he made the payment which was subject to tax deduction at source under Section 194C of the Act during the subject Assessment Year, would require deduction under Section 194J of the Act due to some future amendment with retrospective effect.

(f) Further, we also notice that under Section 40(a)(i) of the Act, under which the expenditure has been disallowed by the Revenue, meaning of royalty as defined therein, is that as provided in Explanation 2 to Section 9(1)(vi) of the Act and not Explanation 6 to Section 9(1)(vi) of the Act. Thus, the disallowance of expenditure under Section 40(a)(i) of the Act can only be if the payment is 'Royalty' in terms of Explanation 2 to Section 9(1)(vi) of the Act. Undisputedly, the payment made for channel placement as a fee, is not royalty in terms of Explanation 2 to Section 9(1)(vi) of the Act. Therefore, no disallowance of expenditure under Section 40(a)(i) of the Act, can be made in the present facts.

(g) In the above view, as it is a self evident position from the reading Section 40(a)(i) of the Act, no substantial question of law. Thus, question (a) not entertained.

4 Re Question (b):---

(a) In view of the appeal not being entertained on question (a), as pointed out herein above, the issue raised in question(b) become academic. This is so, as irrespective of the nature of payment made in the present facts, no expenditure can be disallowed under Section 40(a)(i) of the Act in respect of fee paid for Channel Placement. (b) Thus, question

(b) in these facts being academic, does not give rise to any substantial question of law. Thus, not entertained.

21. Respectfully following the precedent's we are of the considered opinion that since it is not disputed that the retrospective amendment in section 195 was made subsequently, the assessee cannot be expected to have deducted TDS u/s.40(a)(i) anticipating the amendment.

Furthermore we note that honourable apex court in the case of *Vodafone International Holdings B.V. vs. Union of India* [2012] 341 ITR 1 (SC) had held that withholding tax provisions under section 195 of the act would be

applicable when payments are made by a resident to another non-resident and not between two non residents outside of India. Since the payments as one in the present case are between two non-residents, as per the ratio emanating from above said honourable apex court decision the provisions of withholding tax are not applicable. On the basis of the above said discussion and precedent's we are of the considered opinion that disallowance under section 40(a)(i) cannot be made in this case.

22. Since we have decided this issue in favor of assessee, other related grounds raised by the assessee are only of academic interest. Hence, we are not adjudicating the same. This proposition has been duly accepted by the learned counsel of the assessee.

23. Another common issue raised in assessee's appeal relate to holding SASBV (now known as IGNBV) as an alleged conduit of Star Ltd. and taxing the revenue in the hands of Star India Private Limited ('SIPL') on accrual basis. In this regard it is the contention of the ld. counsel of the assessee that this issue has been decided in favour of the assessee by the Hon'ble jurisdictional High Court in the case of *Director of Income Tax (IT) vs. Satellite Television Asian Region Ltd.* (in Income Tax Appeal No. 1676 of 2013 vide order dated 16.06.2015), one of the question raised by the following:

- (1) Whether on the facts and in circumstances of the case and in law the Tribunal erred in holding that SAS BV (IGN BV) was not a conduit for the assessee or a sham entity even though it has been established by the Assessing Officer in the assessment order that there was no commercial expediency in setting up via media companies and the only aim of this arrangement was to avoid assessee's direct taxability in India.?

24. The Hon'ble High Court has decided the issue as under:

3. So far as question No.1 is concerned, the respondent-assessee assessee incorporated in Hong Kong, is engaged in broadcasting. With effect from 1 June 1994 the respondent-assessed/ engaged Satellite Television Asian Region Advertising Sales B.V. (SAS BV), its wholly owned subsidiary for the purpose of undertaking advertisement-sales activity. SAS BV was thereafter renamed as International Global Networks BV (IGN BV). The SAS BV (IGN BV) had returned income on its activity of advertisement-sales, however, the revenue was of the view that SAS BV (IGN BV) is a conduit and the returned income of SAS BV (IGN BV) has to be assessed in the hands of the respondent-assessee. M/s. SAS BV (IGN BV) challenged the finding Officer and carried the matter in appeal. Finally, by its order dated 21 May 2010 for the subject Year 1999-00 held that SAS BV (IGN BV) is not a Conduit of the appellant and the amount earned by it is liable to be taxed. This order of the Tribunal dated 21 May 2010 passed by the Tribunal was accepted by the revenue for the Assessment Year 1999-00. In the present appeal, the revenue is seeking to tax the very same income which has already been subjected to tax in the hands of SAS BV (IGN BV). This, even after the Tribunal by order dated 21 May 2010 has already held that SAS BV (IGN BV) is not a conduit or a sham entity and they are chargeable to tax on the income earned on account of their advertisement activity. In the⁴ above view, the impugned order holds that there can occasion to tax the same income in the hands of the respondent- assessee when the same has been subjected to tax in the hands of M/s.SAS BV (IGN BV). This is particularly so, bearing in mind that the revenue has accepted the order of the Tribunal dated 21 May 2010 in case of SAS BV (IGN BV). It is relevant to note that, for the Assessment Year 2000-01 and 2002-03 on the same issue in respect of SAS BV (IGN BV) the revenue had challenged in this Court the order of the Tribunal holding that SAS BV (IGN BV) is not a conduit of Star Limited, the respondent-assessee herein by Income Tax Appeal Nos.2462/ of 2011 and 2461 of 2011. This Court on 13 March 2013 dismissed the revenue's appeal for the Assessment Years 2000-01 and 2003-03.

25. Respectfully following the above precedent we decide this issue in favour of the assessing.

26. Another issue raised in assessment year 2002-03 relate to deduction of head office expenses u/s. 44C of the Act.

On this issue, the A.O. has held that the deduction claimed in respect of allocated head office expenses have been disallowed pursuant to an adjustment made to the arms length price u/s. 92. During the Assessment Year 2002-03, the assessee had incurred general and administrative expenses in relation to its worldwide advertising operations amounting to Rs.49,45,93,000/-. As the assessee undertakes ad-sales business, through an agent in India, for 6 channels in India, based on the advertising revenues earned by these channels from the Indian operations the expense attributable to the assessee was calculated at Rs.8,35,02,000/- (as reflected in the assessee's Indian accounts) and same was allocated to the Indian operations. As per the limitations of section 44C the deduction claimed was limited to Rs 2,83,06,650/-. However, the entire expenditure has been disallowed on the grounds that certain details in relation to HO expenses allocated to the Indian operations, sought for by the T.P.O., were not submitted. Accordingly, the T.P.O. determined the arm's length price in relation to the HO expenses allocated to/the Indian operations at 'Nil', which was adopted by the Assessing Officer.

27. Upon the assessee's appeal, the ld. CIT(A) confirmed the addition.

28. Against this order, the assessee is in appeal before us.

29. We have heard both the counsel and perused the records. The ld. Counsel of the assessee's submission in this regard is as under:

1) Section 44C was introduced to eliminate/ minimize the burden of maintenance of documentation in respect of head office expenses. Reliance is placed on CBDT Circular No 202 dated 5 July 1976 pertaining to ceiling limit in respect of head office expenses and the decision and the

decision of the Calcutta HC in case of Rupenjuli Tea Co. Ltd (1 86 ITR 301) (Sr no 31 and 33 of legal paperbook)

2) Also, considering that the Global Audited Accounts of Star Ltd were provided to the AO during the assessment proceedings, the AO could have himself computed the reasonably attributable head office expenses. Reliance is placed on the decision of the Mumbai Tribunal in case of Mitsui Bank Ltd (35 TTJ 426) (Sr no 32 of legal paperbook)

3) An amount of Rs 8,35,02,000 was incurred by the Assessee on General and administration expenses on a total turnover of Rs.6,53,43,84,000. The Assessee claimed an amount of Rs 2,83,06,650 as deduction under Section 44C of the Act being 5% of the adjusted total income being lower than the actual expenditure of Rs 8,35,02,000.

30. Further, the Id. Counsel of the assessee in this regard submitted that the Transfer Pricing Officer in his short order has mentioned that the assessee has not submitted anything. The Id. Counsel of the assessee submitted that the assessee had provided all the necessary details which have not been referred by the TPO.

31. Upon careful consideration, we are of the view that the issue needs to be remitted to the file of the A.O. to compute reasonable attribution on the basis of documents being submitted by the assessee. Accordingly, this issue is so remitted.

32. Ground number 17 for assessment year 2001-02 and ground nos. 15 to 19 and ground 23 for assessment year 2002-03 have not been pressed by the learned counsel of the assessee. Hence, these grounds are dismissed as not pressed.

Revenue's appeal:

33. The first issue raised relates to the disallowance of payments made to AsiaSat for transponder hire charges under Section 40(a) (i) of the Income Tax Act, 1961. In this regard, the Id. Counsel of the assessee submitted that this issue

is covered in favour of the assessee by the decision of Hon'ble Delhi High Court in case of *Asia Satellite Telecommunication* (332 ITR 340) and the decision of Delhi ITAT in the case of *ADIT vs Intelsat Corporation* (in ITA No 977/Del/2011).

34. On this issue, the Id. CIT(A) has followed the decision of the Delhi ITAT in the case of *Asia Satellite Telecommunications Co. Ltd. v. Dy. CIT* [2003] 85 ITD 478 (Delhi) for the proposition that the payments for the lease of transponder amount to royalty. The Hon'ble Delhi High Court decision in this case has elaborately dealt with the issue and has reversed the ITAT order. Head notes from this order of the Hon'ble High Court may be gainfully referred as under:

It is clear from the reading of section 5(2) that a non-resident is liable to pay tax on the income derived by him, which is received or deemed to be received in India or which accrues or arises or is deemed to accrue or arise in India during the relevant year. Thus, a non-resident is under an obligation to pay tax in respect of the income generated/earned by him in India. Section 9 lays down the various circumstances under which income would be deemed to accrue or arise in India.

In the instant case, the endeavour of the revenue was to bring the case of the assessee within the mischief of all or any of the clauses (i) and (vi) of sub-section (1) of section 9 in order to bring the assessee within the tax net in India.

Applicability of section 9(1)(i)

The findings of the Tribunal on the non-applicability of section 9(1)(i) were proper, justified and legally sustainable. The Explanation (a) to this section, lays down that in a case in which all the operations are not carried out in India, the income of the business deemed to have accrued or arisen 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 of the operations in India, wholly or at least partly, is sine qua non for the application of clause (i) of sub-section (1) of section 9. Under the agreement with TV channels, role attributed to the assessee could be paraphrased in the following steps :

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

(ii) After receipt of the programmes at the satellite (at the locations not situated in the Indian airspace), those were amplified through a complicated process.

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

Accepted position was that the first two steps were not carried out in India and the entire thrust of the revenue was limited to the third step and the argument was that the relaying of the programmes in India amounted to the operations carried out in India. That argument was not sustainable. Merely because the footprint area included India and the ultimate consumers/viewers were watching the programmes in India, even when they were uplinked and relayed outside India, would not mean that the assessee was carrying out its business operations in India. The Tribunal had rightly emphasized on the expressions 'operations' and 'carried out in India' occurring in the Explanation (a) to hold that these expressions signify that it was necessary to establish that any part of the assessee's operations was being carried out in India. No machinery or computer, etc., was installed by the assessee in India through which the programmes were reaching India. The process of amplifying and relaying the programmes was performed within the satellite which was not situated in the Indian airspace and even the Tracking, Telemetry and Control (TTC) operations were also performed outside India in Hongkong. No man, material or machinery or any combination thereof was used by the assessee in the Indian territory. There was no contract or agreement between the assessee with the cable operators or with the viewers for reception of the signals in India.

Thus, section 9(1)(i) was not attracted in the instant case.

Applicability of section 9(1)(vi)

The entire controversy revolved around the interpretation to be given to clause (vi) of section 9(1). This clause makes income by way of royalty payable by certain persons as chargeable to tax.

Following principles are to be kept in mind while interpreting provisions of clause (vi) of section 9(1) :

(1) Section 9 is a deeming provision and if the situation specified therein exists, it is to be deemed that income has accrued or arisen in India.

(2) Clause (i) says that the imparting of any information concerning the working of or the use of a patent, invention, model, design, secret formula or process or trade mark or similar property.

(3) It is a settled-law that the words of a statute are first understood in their natural, ordinary or popular sense and phrases and sentences are construed according to their grammatical meaning, unless that leads to some absurdity or unless there is something in the context or in the object of the statute to suggest to the contrary. In case the language of the statute is not clear and there is need to resort to aids of construction, such aids can either be internal or external. Internal aids of constructions are definitions, exceptions, the Explanations, fictions, deeming provisions, headings, marginal notes, preamble, provisos, punctuations, saving clauses, non obstante clauses, etc. The external aids are dictionaries, the earlier Acts, history of the legislation, the Parliamentary history, the Parliamentary proceedings, state of law as it existed when the law was passed, the mischief sought to be suppressed and the remedy sought to be advanced by

the Act. Therefore, need for these aids would arise only if some ambiguity is found in the definition of term 'royalty' appearing in the aforesaid provision.

(4)As per section 9(1)(vi), the income by way of royalty payable by the Government or a resident or a non-resident shall be deemed to accrue or arise in India. The term 'royalty' has been defined in the Explanation 2 to section 9(1)(vi). In the case of *Keshavji Ravji & Co. v. CIT* [1990] 183 ITR 1/ 49 Taxman 87, the Supreme Court held that an Explanation, generally speaking, is intended to explain the meaning of certain phrases and expressions contained in the statutory provisions. There is no general theory as to the effect and intendment of an Explanation, except that the purpose and intendment are determined by its own words. An Explanation, depending upon its own language, might supply or take away something from the contents of a provision. It is also true that an Explanation may be introduced by way of an abundant caution in order to clear any mental cobwebs surrounding the meaning of the statutory provision spun by interpretative errors and to place what the Legislature considers to be true meaning, beyond any controversy or doubt. In view of the decision of the Supreme Court in *Keshavji Ravji & Co.'s case* (supra), the Explanation 2 has to be read as part and parcel of section 9(1)(vi).

From a plain reading of the Explanation to section 9 inserted with effect from 1-6-1976 by the Finance Act, 2007 which has been again substituted by the Finance Act, 2010 with retrospective effect from 1-6-1976, it is clear that income of a non-resident shall be deemed to accrue or arise in India under clause (v) or clause (vi) or clause (vii), irrespective of the fact whether the non-resident has a residence or a place of business or business connection in India or the non-resident has rendered services in India. Therefore, once the consideration is received by non-resident for the transfer of all or any rights, including the granting of a licence in respect of a patent, invention, model, design, secret formula or process or similar property or any copyright for literary, artistic or scientific work, the consideration received shall be deemed to accrue or arise in India and will be taxable in India. Section 90 provides relief from double taxation. The four clauses of sub-section (1) of section 90 lay down the scope of power of the Central Government to enter into an agreement with another country. Clause (a) contemplates situations where tax has already been paid on the same income in both the countries and in that case it empowers the Central Government to grant relief in respect of such double taxation. Clause (b) of section 90(1), which is wider than clause (a), provides that an agreement may be made for the avoidance of double taxation of income under the Act and the corresponding laws may be enforced in that country. Clauses (c) and (d) essentially deal with the agreements made for exchange of information, investigation of cases and recovery of income-tax. The effect of an agreement made pursuant to section 90 is that if no tax liability is imposed under the Act, the question of resorting to agreement would not arise. No provision of the agreement can fasten a tax liability when the liability is not imposed by the Act. If a tax liability is imposed by the Act, the agreement may be resorted to for negating or reducing it. In case of difference between the provisions of the Act and the provisions of an agreement under section 90, the provisions of the agreement shall prevail over the provisions of the Act and can be enforced by an appellate authority or the Court. However, as provided by sub-section (2), the provisions of the Act will apply to the assessee in the event they are more beneficial to him. Where there is no specific provision in the agreement, it is the

basic law, i.e., the Income-tax Act which will govern the taxation of income. [Para 54]

Keeping in view the aforesaid principles, one should embark upon the interpretative process while defining the ambit and scope of the term 'royalty' appearing in the Explanation 2 to clause (vi) of section 9(1). Clause (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 clause 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 the first category, the rights are purchased which enable use of those rights, while in the second category, no purchase is involved; only the 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. When the 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 for 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 the 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 of the property or right remains with the owner and the transferee is permitted to use the right in respect of such a 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, not 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.

In the instant case, the assessee was deriving income from the lease of the transponder capacity of its satellites. It was 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 assessee was to relay their programmes in India. The responsibility of the assessee was to make available programmes of the TV channels in India through transponders on its satellite. The function of the satellite in the transmission chain was to receive the modulator carrier that earth stations emitted on uplinking, amplifying them and re-transmitting them and downlink for reception at the destination earth stations. The meaning of the word 'process' being a series of actions or steps taken in order to achieve a particular end, considering the role of the assessee in the light of meaning of the term 'process', it was 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. [Para 56]

It was clear from various clauses of the agreement that the assessee was the operator of the satellites. It also remained in the control of the satellites. It had not leased out the equipments to the customers.

A close scrutiny of the ruling of the AAR in ISRO Satellite Centre (ISACT), In re [2008] 307 ITR 59 / 175 Taxman 97 (New Delhi) would clearly reveal that where the operator has entered into an agreement for lease of the transponder capacity and has not given any control over parts of the satellite/transponder, the provisions of clause (vi) would not apply. In the instant case also, the assessee had merely given access to a broadband available in a transponder which could be utilized for the purpose of transmitting the signals of the customers. [Para 60]

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. 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 the following :

(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 re-transmitting signals 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 re-transmits 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 above mentioned systems are monitored and their operations are duly controlled and appropriate adjustments are made, as and when required.

Each transponder requires continuous and sustained support of each of the above mentioned systems of the satellite, without which it simply cannot function. Consequently, it would be 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 the instant case, control of the satellite or the transponder always remained with the assessee. 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. On going through the various clauses of the said agreement, it was clear that the control always remained with the assessee who had merely given access to a broadband available with the transponder to particular customers.

The fact remained that there was no use of 'process' by the TV channels. Moreover, no such purported use had taken place in India. The telecast

companies/customers were situated outside India and so was the assessee. Even the agreements were executed abroad under which the services were provided by the assessee to its customers. The transponder was in the orbit. Merely because it had its footprint areas on various continents, it would not mean that the process had taken place in India.

The Tribunal had made an attempt to trace the fund flow and observed that since the end consumers, i.e., persons watching TV in India were paying the amounts to the cable operators who, in turn, were paying the same to the TV channels, the flow of the fund was traced to India. That was a far-fetched ground to rope in the assessee in the taxation net. The Tribunal had glossed over an important fact that the money which was received from the cable operators by the telecast operators was treated as income by those telecast operators which had accrued in India and they had offered and paid tax. Thus, the income generated in India had been duly subjected to tax in India. It was the payment made by the telecast operators situated abroad to the assessee, also a non-resident, that was sought to be brought within the tax net.

For the aforesaid reasons, it was difficult to accept such a far-fetched reasoning with no causal connection.

Even when one looked into the matter from the standpoint of Double Taxation Avoidance Agreement (DTAA), the case of the assessee got a boost. The Organisation of Economic Cooperation and Development (OECD) has framed a model of Double Taxation Avoidance Agreement (DTAA) entered into by India. Article 12 of the said model DTAA contains a definition of 'royalty' which is in all material respects virtually the same as the definition of 'royalty' contained in clause (iii) of the Explanation 2 to section 9(1)(vi). The assessee had relied upon the commentary issued by the OECD on the aforesaid model DTAA.

The Tribunal had discarded the aforesaid commentary of the OECD only on the ground that it was not safe to rely upon the same. However, what was ignored was that when the technical terms used in the DTAA are the same as in section 9(1)(vi), for better understanding all these very terms, the OECD commentary can always be relied upon. The Apex Court has emphasized so in a number of judgments, clearly holding that the well-settled internationally accepted meaning and interpretation placed on identical or similar terms employed in the various DTAA's should be followed by the Courts in India when it comes to construing similar terms occurring in the Indian Income-tax Act.

For the aforesaid reasons, the view taken by the Tribunal in the impugned judgment on the interpretation of section 9(1)(vi) could not be accepted. [Para 79]

Thus, the Tribunal was not justified in holding that the amount paid to the assessee by its customers represented income by way of royalty, as the said expression is defined in the Explanation 2 to section 9(1)(vi).

35. Following the aforesaid precedent we set aside the order of the Id. CIT(A) and decide the issue in favour of the assessee.

36. The next issue raised relates to the deletion of the addition made on account of advertisement revenue's received by SAS BV in the hands of the assessee on receipt on protective basis in this regard. The Id. Counsel of the assessee submitted that this issue will become academic once the grounds raised in Gd. Nos. 22 and 23 are decided in favour of the assessee. Furthermore, he referred to Mumbai ITAT decision in the assessee's own case in Department's appeal for A.Y. 2011-02.

37. Upon careful consideration, we note that this issue was dealt by ITAT in ITA No. 7934/Mum/2004 for A.Y. 2001-02 in assessee's own case vide order dated 21.05.2010 as under:

Issue

On the facts and in the circumstances of the case and in law, the CIT(A) erred in directing to delete the addition made, on account of advertising revenues received by SAS BV for assessment year 2001-02, in the hands of the assessee, without appreciating the fact that it is necessary to keep the issue alive since the assessee has not accepted the stand of the department that the advertisement revenue is to be taxed on accrual basis.

3. Learned representatives fairly agree that this issue is now covered, in principle, in favour of the assessee by Tribunal's order dated 24th March 2004 in the case of JCIT Vs Satellite Television Asian Region Advertising Skies BV (ITA No. 4988/Mum/2000; AY 1997-98). A copy of the said order was placed on record. The order of the CIT(A) being in consonance with the said decision, and no contrary decision having been brought to our notice, we see no reasons to interference in the conclusions arrived at by the CIT(A). We decline to interfere.

38. We respectfully follow the precedent and order accordingly.

39. The last issue relates to the levy of interest u/s. 234B and 234C of the Act. The Id. Counsel of the assessee submitted that this issue is covered in favour of the assessee while the Mumbai ITAT decision in assessee's own case vide

department's appeal for A.Y. 2001-02 and for A.Y. 2007-08 and 2008-09. Further he submitted that this issue is also covered in favour of the assessee vide the Hon'ble Bombay High Court decision in the case of *NGC Network Asia LLC* (313 ITR 187).

40. This issue has also been dealt in the Tribunal order for A.Y. 2001-02 as referred above in the following manner:

6. As regards this grievance raised by the assessee, there is no Dispute with the elementary factual position that the persons making payment to the assesses were required to deduct tax on income embedded in the payments made to the assessee. The assessee before us is non resident and it was obligation of the person making payment to the non resident to deduct tax at source, as may be applicable, under Section 195, The short issue requiring our adjudication is whether or not levy of interest under Section 234 B and 234 C, in respect of income from such payments received by the non resident, is justified. While the Assessing Officer has levied the interest under section 234 B and 234 C, the CIT(A) has deleted the same by following his orders for the earlier years.

7. The learned representatives agree that the issue is now covered in favour of the assessee by a large number of decisions of the Tribunal, including Special Bench decision in the case of *Motorola Inc Vs DCIT(95 ITD SB 269)* which has since been approved by the Hon'ble jurisdictional High Court in the case of *DIT Vs NGC Network LLC (2009 TIOL 43 HC Mum IT)*. Respectfully following these decisions, we approve the conclusions arrived at by the CIT(A) and decline to interfere in the matter.

41. Respectfully following the above precedent, we uphold the order of the Id. CIT(A).

42. In the result, all the appeals by the assessee and the Revenue are partly allowed.

Order pronounced in the open court on this 05/10/2018

Sd/-
(RAM LAL NEGI)
JUDICIAL MEMBER

Sd/-
(SHAMIM YAHYA)
ACCOUNTANT MEMBER

Mumbai; Dated : 05/10/2018
Karuna Sr.PS & Roshani, Sr. PS
Copy of the Order forwarded to :

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

BY ORDER,

सत्यापित प्रति //True Copy//

(Asstt. Registrar)
ITAT,

Mumbai