

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH 'G', NEW DELHI**

**Before Sh. Amit Shukla, Judicial Member**

**Dr. B. R. R. Kumar, Accountant Member**

**ITA No. 4408/Del/2016 : Asstt. Year : 2012-13**

Income Tax Officer, International Taxation, Ward- 3(1)(1), New Delhi	Vs	M/s TV Today India Pvt. Ltd., F-26, 1 <sup>st</sup> Floor, Connaught Circus, New Delhi-110001
<b>(APPELLANT)</b>		<b>(RESPONDENT)</b>
<b>PAN No. AABCT0424B</b>		

**Assessee by : Sh. Salil Agarwal, Adv.**

**Revenue by : Sh. N. K. Bansal, Sr. DR**

**Date of Hearing: 26.08.2019**

**Date of Pronouncement: 14.10.2019**

**ORDER**

**Per Dr. B. R. R. Kumar, Accountant Member:**

The present appeal has been filed by the revenue against the order of the Id. CIT(A)-43, New Delhi dated 30.05.2016.

**Issue of Payment for transponder charges.**

2. All the grounds taken up by the revenue deal with the issue whether the payment made by the assessee amounts to royalty and liable to the provisions of TDS or not, and interpretation of provisions pertaining to Indo-US DTAA.

3. The Assessing Officer held that the assessee has failed to comply the provisions of TDS on the payment made to M/s Intelsat Corporation USA on account of payment of transponder charges for the satellite facility provided. The Assessing Officer held that fee for use of transponder and uplinking facility on the

satellite was covered under the definition of the royalty as per the provisions of the Income Tax Act. This issue has been dealt straight away by the Hon'ble Delhi High Court in ITA 473/2012 in DIT Vs New Skies Satellite BV. The relevant question framed by the Hon'ble Court is as under:

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

4. The Hon'ble Court while dismissing the appeal of the revenue held as under:

*"50. There are therefore two sets of circumstances. First, where there exists no definition of a word in issue within the DTAA itself, regard is to be had to the laws in force in the jurisdiction of the State called upon to interpret the word. The Bombay High Court seems to accept the ambulatory approach in such a situation, thus allowing for successive amendments into the realm of "laws in force". We express no opinion in this regard since it is not in issue before this Court. This Court's finding is in the context of the second situation, where there does exist a definition of a term within the DTAA. When that is the case, there is no need to refer to the laws in force in the Contracting States, especially to deduce the meaning of the definition under the DTAA and the ultimate taxability of the income under the agreement. That is not to say that the Court may be inconsistent in its interpretation of similar definitions. What that does imply however, is that just because there is a domestic definition similar to the one under the DTAA, amendments to the domestic law, in an attempt to contour, restrict or expand the definition under its statute, cannot extend to the definition under the DTAA. In other words, the domestic law remains static for the purposes of the DTAA. The Court in Sanofi (supra) had also held similarly:*

*"We are in agreement with the petitioners and in the light of our preceding analyses, discern no textual, grammatical or syntactic 45 supra note 43 Page 39 ambiguity in Article 14(5), warranting an interpretive recourse. In the circumstances, invoking provisions of*

*Article 3(2) by an artificial insemination of ambiguity (to accommodate an expanded meaning to the DTAA provision), would be contrary to good faith interpretation. A further problematic of contriving an ambiguity to unwarrantedly invite application of domestic law of a contracting State would be that while India would interpret an undefined DTAA provision according to the provisions of the Act, France could do so by reference to its tax code. As a consequence, the purpose of entering into a treaty with a view to avoiding double-taxation of cross-border transactions would be frustrated."*

51. Pertinently, this Court in *Director of Income Tax v Nokia Networks* specifically dealt with the question of the effect of amendments to domestic law and the manner of their operation on parallel treaties. The Court delivered its judgment in the context of the very amendments that are in question today; the Explanations to Section 9(1)(vi) vis a vis the interpretation of a Double Tax Avoidance Agreement. This Court rejected that any amendment could change the situation and render the service or activity taxable, in the following observations:

*"He, thus submitted that the question of "copyrighted article" or actual copyright does not arise in the context of software both in the DTAA and in the Income Tax Act since the right to use simpliciter of a software program itself is a part of the copyright in the software irrespective of whether or not a further right to make copies is granted. The decision of the Delhi Bench of the ITAT has dealt with this aspect in its judgment in *Gracemac Co. Vs. ADIT 134 TTJ (Delhi) 257* pointing out that even software bought off the shelf, does not constitute a "copyrighted article" as sought to be made out by the Special Bench of the ITAT in the present case. However, the above argument misses the vital point namely the assessee has opted to be governed by the treaty and 46 2013 (358) ITR 259 that the language of the said treaty differs from the amended Section 9 of the Act. It is categorically held in *CIT Vs. Siemens Aktiengesellschaft, 310 ITR 320 (Bom)* that the amendments cannot be read into the treaty. On the wording of the treaty, we have already held in *Ericsson (supra)* that a copyrighted article does not fall within the purview of Royalty.*

*Therefore, we decide question of law no.1 & 2 in favour of the assessee and against the Revenue."*

*52. Thus, an interpretive exercise by the Parliament cannot be taken so far as to control the meaning of a word expressly defined in a treaty. Parliament, supreme as it may be, is not equipped, with the power to amend a treaty. It is certainly true that law laid down by the Parliament in our domestic context, even if it were in violation of treaty principles, is to be given effect to; but where the State unilaterally seeks to amend a treaty through its legislature, the situation becomes one quite different from when it breaches the treaty. In the latter case, while internationally condemnable, the State's power to breach very much exists; Courts in India have no jurisdiction in the matter, because in the absence of enactment through appropriate legislation in accordance with Article 253 of the Constitution, courts do not possess any power to pronounce on the power of the State to enact a law contrary to its treaty obligations. The domestic courts, in other words, are not empowered to legally strike down such action, as they cannot dictate the executive action of the State in the context of an international treaty, unless of course, the Constitution enables them to. That being said, the amendment to a treaty is not on the same footing. The Parliament is simply not equipped with the power to, through domestic law, change the terms of a treaty. A treaty to begin with, is not drafted by the Parliament; it is an act of the Executive. Logically therefore, the Executive cannot employ an amendment within the domestic laws of the State to imply an amendment within the treaty. Moreover, a treaty of this nature is a carefully negotiated economic bargain between two States. No one party to the treaty can ascribe to itself the power to unilaterally change the terms of the treaty and annul this economic bargain. It may decide to not follow the treaty, it may chose to renege from its obligations under it and exit it, but it cannot amend the treaty, especially by employing domestic law. The principle is reciprocal. Every treaty entered into be the Indian State, unless self-executory, becomes operative within the State once Parliament passes a law to such effect, which governs the relationship between the treaty terms and the other laws of the State. It then becomes part of the general conspectus of domestic law. Now, if an amendment were to be effected to the terms of such treaty, unless the existing operationalizing domestic law states that*

*such amendments are to become automatically applicable, Parliament will have to by either a separate law, or through an amendment to the original law, make the amendment effective. Similarly, amendments to domestic law cannot be read into treaty provisions without amending the treaty itself.*

*53. Finally, States are expected to fulfill their obligations under a treaty in good faith. This includes the obligation to not defeat the purpose and object of the treaty. These obligations are rooted in customary international law, codified by the VCLT, especially Article 26 (binding nature of treaties and the obligation to perform them in good faith); Article 27 (Internal law and observance of treaties, i.e. provisions of internal or municipal law of a nation cannot be used to justify omission to perform a treaty); General rule of interpretation under Article 31 (1) ( i.e. that it shall be interpreted in good faith, in accordance with ordinary meaning to be given to the terms of a treaty) and Article 31 (4) (A special meaning shall be given to a term if it is established that the parties so intended). The expression "process" and treaty interpretation in this case.*

*54. Neither can an Act of Parliament supply or alter the boundaries of the definition under Article 12 of the DTAA's by supplying redundancy to any part of it. This becomes especially important in the context of Explanation 6, which states that whether the 'process' is secret or not is immaterial, the income from the use of such process is taxable, nonetheless. Explanation 6 precipitated from confusion on the question of whether it was vital that the "process" used must be secret or not. This confusion was brought about by a difference in the punctuation of the definitions in the DTAA's and the domestic definition. For greater clarity and to illustrate this difference, we reproduce the definitions of royalty across both DTAA's and sub clause (iii) to Explanation 2 to 9(1)(vi).*

*Article 12(3), Indo Thai Double Tax Avoidance Agreement:*

*3. The term "royalties" as used in this article means payments of any kind received as a consideration for the alienation or the use of, or the right to use, any copyright of literary, artistic or scientific work (including cinematograph films, phonographic records and films or tapes for radio or*

*television broadcasting), any patent, trade mark, design or model, plan, secret formula or process, or for the use of, or the right to use industrial, commercial or scientific equipment, or for information concerning industrial, commercial or scientific experience.” (emphasis supplied)*

*Article 12(4), Indo Netherlands Double Tax Avoidance Agreement*

*“4. The term "royalties" as used in this Article means payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work including cinematograph films, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience.” (emphasis supplied)*

*Section 9(1)(vi), Explanation 2, Income Tax Act, 1961*

*(iii) the use of any patent, invention, model, design, secret formula or process or trade mark or similar property; (emphasis supplied)*

*55. The slight but apparently vital difference between the definitions under the DTAA and the domestic definition is the presence of a comma following the word process in the former. In the initial determinations before various ITATs across the country, much discussion took place on the implications of the presence or absence of the "comma". A lot has been said about the relevance or otherwise of punctuation in the context of statutory construction. In spoken English, it would be unwise to argue against the importance of punctuation, where the placement of commas is notorious for diametrically opposite implications. However in the realm of statutory interpretation, courts are circumspect in allowing punctuation to dictate the meaning of provisions. Judge Caldwell once famously said "The words control the punctuation marks, and not the punctuation marks the words." It has been held in *CGT v. Budur* and *Hindustan Const v. CIT* that while punctuation may assist in arriving at the correct construction, yet it cannot control the clear meaning of a statutory provision. It is but, a minor element in the construction of a statute, *Hindustan Const*.*

*56. The courts have however created an exception to the general rule that punctuation is not to be looked at to ascertain meaning. That exception*

*operates wherever a statute is carefully punctuated. Only then should weight undoubtedly be given to punctuation; CIT v. Loyal Textile; Sama Alana Abdulla vs. State of Gujarat; Mohd Shabbir vs. State of Maharashtra; Lewis Pugh Evans Pugh vs. Ashutosh Sen; Ashwini Kumar Ghose v. Arbinda Bose; Pope Alliance Corporation v. Spanish River Pulp and Paper Mills Ltd. An illustration of the aid derived from punctuation may be furnished from the case of Mohd. Shabbir v. State of Maharashtra where Section 27 of the Drugs and Cosmetics Act, 1940 came up for construction. By this section whoever "manufactures for sale, sells, stocks or exhibits for sale or distributes" a drug without a license is liable for punishment. In holding that mere stocking shall not amount to an offence under the section, the Supreme Court pointed out the presence of comma after "manufactures for sale" and "sells" and the absence of any comma after "stocks" was indicative of the fact "stocks" was to be read along with "for sale" and not in a manner so as to be divorced from it, an interpretation which would have been sound had there been a comma after the word "stocks". It was therefore held that only stocking for the purpose of sale would amount to an offence but not mere stocking.*

*57. However, the question, which then arises, is as follows. How is the court to decide whether a provision is carefully punctuated or not? The test to decide whether a statute is carefully (read consciously) punctuated or not would be to see what the consequence would be had the section been punctuated otherwise. Would there be any substantial difference in the import of the section if it were not punctuated the way it actually is? While this may not be conclusive evidence of a carefully punctuated provision, the repercussions go a long way to signify intent. If the inclusion or lack of a comma or a period gives rise to diametrically opposite consequences or large variations in taxing powers, as is in the present case, then the assumption must be that it was punctuated with a particular end in mind. The test therefore is not to see if it makes "grammatical sense" but to see if it takes on any "legal consequences".*

*58. Nevertheless, whether or not punctuation plays an important part in statute interpretation, the construction Parliament gives to such punctuation, or in this case, the irrelevancy that it imputes to it, cannot*

*be carried over to an international instrument where such comma may or may not have been evidence of a deliberate inclusion to influence the reading of the section. There is sufficient evidence for us to conclude that the process referred to in Article 12 must in fact be a secret process and was always meant to be such. In any event, the precincts of Indian law may not dictate such conclusion. That conclusion must be the result of an interpretation of the words employed in the law and the treatises, and discussions that are applicable and specially formulated for the purpose of that definition. The following extract from Asia Satellite<sup>58</sup> takes note of the OECD Commentary and Klaus Vogel on Double Tax Conventions, to show that the process must in fact be secret and that specifically, income from data transmission services do not partake of the nature of royalty.*

*"74. Even when we look into the matter from the standpoint of Double Taxation Avoidance Agreement (DTAA), the case of the appellant gets boost. The Organisation of Economic Cooperation and Development (OECD) has framed a model of Double Taxation Avoidance Agreement (DTAA) entered into by India are based. 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 Explanation 2 to Section 9(1) (vi) of the Act. This fact is also not in dispute. The learned counsel for the appellant had relied upon the commentary issued by the OECD on the aforesaid model DTAA and particularly, referred to the following amendment proposed by OECD to its commentary on Article 12, which reads as under:*

*'9.1 Satellite operators and their customers (including broadcasting and telecommunication enterprises) frequently enter into transponder leasing agreements under which the satellite operator allows the customer to utilize the capacity of a satellite transponder to transmit over large geographical areas. Payments made by customers under typical transponder leasing agreements are made for the use of the transponder transmitting capacity and will not constitute royalties under the definition of paragraph 2; these payments are not made in consideration for the use of, or right to use, property, or for information, that is referred to in the*

*definition (they cannot be viewed, for instance, as payments for information or for the use of, or right to use, a secret process since the satellite technology is not transferred to the customer). As regards treaties that include the leasing of industrial, commercial or scientific (ICS) equipment in the definition of royalties, the characterization of the payment will depend to a large extent on the relevant contractual arrangements. Whilst the relevant contracts often refer to the lease of a transponder, in most cases the customer does not acquire the physical possession of the transponder but simply its transmission capacity: the satellite is operated by the lessor and the lessee has no access to the transponder that has been assigned to it. In such cases, the payments made by the customers would therefore be in the nature of payments for services, to which Article 7 applies, rather than payments for the use, or right to use, ICS equipment. A different, but much less frequent, transaction would be where the owner of the satellite leases it to another party so that the latter may operate it and either use it for its own purposes or offer its data transmission capacity to third parties. In such a case, the payment made by the satellite operator to the satellite owner could well be considered as a payment for the leasing of industrial, commercial or scientific equipment. Similar considerations apply to payments made to lease or purchase the capacity of cables for the transmission of electrical power or communities (e.g. through a contract granting an indefeasible right of use of such capacity) or pipelines (e.g. for the transportation of gas or oil).*

75. Much reliance was placed upon the commentary written by Klaus Vogel on *Double Taxation Conventions (3rd Edition)*'. It is recorded therein:

*'The use of a satellite is a service, not a rental (thus correctly, Rabe, A., 38 RIW 135 (1992), on Germany's DTC with Luxembourg); this would not be the case only in the event the entire direction and control over the satellite, such ITA 473/2012, 474/2012, 500/2012 & 244/2014 Page 48 as its piloting or steering, etc. were transferred to the user.'*

76. Klaus Vogel has also made a distinction between letting an asset and use of the asset by the owner for providing services as below:

*'On the other hand, another distinction to be made is letting the proprietary right, experience, etc., on the one hand and use of it by the licensor himself, e.g., within the framework of an advisory activity. Within the range from services', viz. outright transfer of the asset involved (right, etc.) to the payer of the royalty. The other, just as clear-cut extreme is the exercise by the payee of activities in the service of the payer, activities for which the payee uses his own proprietary rights, know-how, etc., while not letting or transferring them to the payer.'*

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

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78. There are judgments of other High Courts also to the same effect.

(a) *Commissioner of Income Tax Vs. Ahmedabad Manufacturing and Calico Printing Co., [139 ITR 806 (Guj.)] at Pages 820-822.*

(b) *Commissioner of Income Tax Vs. Vishakhapatnam Port Trust [(1983) 144 ITR 146 (AP)] at pages 156-157.*

(c) *N.V. Philips Vs. Commissioner of Income Tax [172 ITR 521] at pages 527 & 538-539."*

59. On a final note, India's change in position to the OECD Commentary cannot be a fact that influences the interpretation of the words defining

*royalty as they stand today. The only manner in which such change in position can be relevant is if such change is incorporated into the agreement itself and not otherwise. A change in executive position cannot bring about a unilateral legislative amendment into a treaty concluded between two sovereign states. It is fallacious to assume that any change made to domestic law to rectify a situation of mistaken interpretation can spontaneously further their case in an international treaty. Therefore, mere amendment to Section 9(1)(vi) cannot result in a change. It is imperative that such amendment is brought about in the agreement as well. Any attempt short of this, even if it is evidence of the State's discomfort at letting data broadcast revenues slip by, will be insufficient to persuade this Court to hold that such amendments are applicable to the DTAAAs.*

*60. Consequently, since we have held that the Finance Act, 2012 will not affect Article 12 of the DTAAAs, it would follow that the first determinative interpretation given to the word "royalty" in Asia Satellite<sup>59</sup>, when the definitions were in fact *pari materia* (in the absence of any contouring explanations), will continue to hold the field for the purpose of assessment years preceding the Finance Act, 2012 and in all cases which involve a Double Tax Avoidance Agreement, unless the said DTAAAs are amended jointly by both parties to incorporate income from data transmission services as partaking of the nature of royalty, or amend the definition in a manner so that such income automatically becomes royalty. It is reiterated that the Court has not returned a finding on whether the amendment is in fact retrospective and applicable to cases preceding the Finance Act of 2012 where there exists no Double Tax Avoidance Agreement.*

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

5. Further, similar issue has been adjudicated by the Coordinate bench of ITAT, in the case of Taj TV Ltd. in ITA No.9079/Mum/2010 vide order dated December 23, 2016. The

judgment was authored by one of the members of this Bench, wherein it has been held as under:

18. Now, coming to the issue of disallowance of various expenses under section 40(a)(i) like, 'transponder charges' and 'uplinking charges' as raised in ground No.2(i) and 2(u), it is seen that these, payments has been paid to PanAmSat International Systems Inc. USA for providing facility of 29 transponder for telecasting 'Ten Sports' channel in various countries including India. The assessee entered into an agreement with PanAmSat to utilize the transponder facility providing by the said US based company for telecasting its sports channel which are on the footprint of transponder of PanAmSat. The Revenue's case before us is that, firstly, it is taxable under section 9(1)(vi) as 'royalty' and also under Article 12(3)(b) of Indo-US-DTAA. Similarly, the up linking charges paid for up linking the channels to PanAmSat Satellite for delay in transmission and for up linking signals for live events from the venue of the events to the satellite have been treated to be 'royalty'. Since, the assessee had not deducted TDS under section 195, disallowance under section 40(a)(i) has been made. The assessee's case before us is that, firstly, PanAmSat is a USA based company, therefore, Indo-US IDTAA is applicable and since it does not have any PE or business connection in India, therefore, the payment made to a non-resident outside India for availing service of equipment placed outside India cannot be taxed in India. In support of such a contention decision of Hon'ble Bombay High Court in the case of DIT vs. Set Satellite (supra) has been relied upon. In any case, it has been submitted that, even otherwise also the definition of "royalty" under Article 12(3) of Indo-US-DTAA is also not applicable, because transponder charges is only use of facility and it is not an equipment and does not amount to use of any copyright effecting work, secret formula, process etc or any other term described in para 3 of Article 12. The Ld. CIT(A) has held that it is not a 'royalty' and secondly, even otherwise also by virtue of Article 12(7) such a royalty cannot be taxed in India, because it is not borne by PE or fixed place of the US company in India. The Ld. DR has strongly relied upon amended definition of the 'royalty' under the Act, wherein, the scope and definition of 'royalty' has been enlarged by the newly inserted Explanation (vi) and (vi) by the Finance Act, 2012 with retrospective effect from 01.06.1976 and has contended that the said definition is to be read into DTAA also, that is, the definition of 'royalty' has to be taken from the Domestic Law. In support, Ld. DR has strongly relied upon the decision of Madras High Court in the case of Verizon Communications Singapore Pte Ltd. (supra) and the ITAT decision in the case of Viacom 18 Media Pvt. Ltd.

19. First of all, let us examine the definition of "royalty" as been defined under Article 12 of the Indo-US-DTAA, which has been defined in the following manner:

*"3. The term "royalties" as used in this Article means:*

*a) payments of any kind received as a consideration for the use of or the right to use, any copyright of a literary, artistic, or scientific work, including cinematograph films or work on film, tape or other means of reproduction for use in connection with radio or television broadcasting, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience, including gains derived from the alienation of any such right or property which are contingent on the productivity, use, or disposition thereof; and*

*b) payments of any kind received as consideration for the use of or the right to use, any industrial, commercial, or scientific equipment, other than payments derived by an enterprise described in paragraph 1 of Article 8 (Shipping and Air Transport) from activities described in paragraph 2(c) or 3 of Article 8".*

*The article gives exhaustive definition of the term 'royalty' and therefore, the definition and scope of 'royalty' is to be seen from the Article alone and no definition under the domestic Act or law is required to be considered or seen or any amendment made in such definition whether retrospective or prospective which can be read in a manner so as to extend any operation to the terms as defined or understood in the Treaty. The Legislature or Parliament while carrying out amendment to interpret or define a given provision under the Domestic Law of the country cannot supersede or control the meaning of the word which has been expressly defined in a Treaty negotiated between executives of two sovereign nations. The payment of transponder charges to PanAmSat and up linking charges cannot be treated as a consideration for 'use' or 'right to use' any copyright of various terms used in para 3(a) like copyright of a literary, artistic, or scientific work, including cinematograph films or work on film, tape or other means of reproduction for use in connection with radio or television broadcasting or in any manner relates to any patent or trademark, design, secret formula or process. It is also not use or right to use any industrial, commercial, or scientific equipment. There is no such kind of right to use which is given by Pan Am Sat to assessee. Thus, the said payment does not fall within the ambit of the terms used in para 3 of Article 12. So far as the reading of amended definition of 'royalty' as given in section 9(1)(vi) into treaty, Hon'ble Delhi High Court in its latest judgment in the case of DIT vs. New Skies Satellite (supra), wherein it has considered Hon'ble Madras High Court decision in the case of Verizon Communications Singapore Pte Ltd. (supra) also, have discussed the issue threadbare and came to the conclusion in the following manner:-*

*"60. Consequently, since we have held that the Finance Act, 2012 will not affect Article 12 of the DTAA's, it would follow that the first determinative interpretation given to the word "royalty" in Asia Satellite, supra note 1, when the definitions were in fact pari material (in the absence of any contouring explanations), will continue to hold the plea for the purpose of assessment years preceding the Finance Act, 2012 and in all cases which involve a Double Tax Avoidance Agreement, unless the said DTAA's are amended jointly by both partners to incorporate income from data transmission services as partaking of the nature of royalty, or amend the definition in a manner so that such income automatically becomes royalty. It is reiterated that the Court has not returned a finding on whether the amendment is in fact retrospective and applicable to cases preceding the Finance Act of 2012 where there exists no Double Tax Avoidance Agreement".*

*The aforesaid decision takes care of all the arguments relied upon by the Id. DR including that of the Verizon Communications Singapore Pte Ltd's. The Hon'ble High Court has specifically clarified as to why the said decision of Madras High Court cannot be applied in such cases after observing as under:-*

*"31. In a judgment by the Madras High Court in Verizon Communications Singapore Pte Ltd. V. The Income Tax Officer, International Taxation j, [2014] 361 ITR 575 (Mad), the Court held the Explanations to be applicable to not only the domestic definition but also carried them to influence the meaning of royalty under Article 12. Notably, in both cases, the clarificatory nature of the amendment was not questioned, but was instead applied squarely to assessment years predating the amendment. The crucial difference between the judgments however lies in the application of the amendments to the DTAA. While TV Today, supra note 22 recognizes that the question will have to be decided and the submission argued, Verizon, supra note 23 cites no reason for the extension of the amendments to the DTAA.*

*enlarged by Finance Act, 2012 with retrospective effect will not have any affect in Article 12 of DTAA.*

*20. Otherwise also, now it is quite trite position that, at the time of making the payment when there is no amendment in the statute, then assessee cannot be expected to withhold the tax, especially when under the old provision or by virtue of any judicial precedent such payment does not fall or has been held to be not falling within the ambit and scope of 'royalty'. In these kinds of cases there were various decisions including that of the Hon'ble Bombay High Court in the case of CIT vs. Set Satellite that payment made to the non-resident outside India for rendering the services of equipment outside India is not taxable in India. Hon'ble Delhi High Court in the case of Asia Satellite Telecommunications vs. DIT, reported in (2011) 332*

*ITR 340 later on reiterated that there is no royalty payment in such cases under the domestic law, that is, section 9(1)(vi), prior to amendment. Thus judicial precedents supported the case of the assessee. Here, the maxim of "lex non cogit ad impossibilia, that is, the law of the possibly compelling a person to do something which is impossible, that is, when there is no provision for taxing an amount in India then how it can be expected that a tax should be deducted on such a payment. This view has been upheld by in catena of decisions including the ITAT Mumbai Benches in the case of Channel Guide India Ltd (supra) wherein, it has been held that, assessee cannot held to be liable for deducting TDS in view of the retrospective amendment which has come at a much later date. Thus, we hold that assessee was not liable to deduct TDS at the time of making the payments. Accordingly, disallowance under section 40(a)(i) could not have been made by the AO and the order of the CIT(A) is affirmed. Ground No.2(a) & (b) raised by the revenue are dismissed.*

*21. So far as ground No.3 is concerned, that the distribution of income should be taxable as 'royalty' under section 9(1)(vi) up to 12th July, 2002, we are unable to concur with the divergent stand taken by the AO that for three months the payment will constitute 'royalty' and for balance nine months, the payment will constitute 'business income'. It has also been brought to our knowledge that in the subsequent years the AO has treated 'distribution income' as business income and not as royalty. Thus, prior to period 12th July, 2002, also when assessee was not registered under the Laws of Mauritius then also it will not affect the nature of income. In any case, as stated earlier, under the distribution agreement, the assessee company has not granted any license to use any copyright to the distributor or to the cable operators. The assessee only makes available the content to the cable operators which are transmitted by them to the ultimate customer/ viewers. Further, rights over the content at all times lies with the Assessee Company and are never made available with the distributors or cable operators. Thus, the finding of the CIT(A) on this score is also confirmed that even for the first period 01.04.2002 to 12th July, 2002 the said income will not constitute 'royalty'.*

*22. So far as the reliance placed by the Ld. DR on the decision of ITAT Mumbai Bench in the case of NGC Network (supra), we find that in that case the issue of distribution income was set aside to the file of the AO to examine whether it falls within the ambit of 'royalty' as defined under the Income-tax Act or not. Here in this case, as pointed out by the Ld. Sr. Counsel, the AO himself has treated the income from distribution activity as business income for the period of 9 months and in the subsequent years. The same income cannot have two treatments, one as royalty and other as business income. Thus, the said decision will not apply on facts of the present case." In view of the findings given above, we hold that no disallowance*

*u/s 40 (a) (i) can be made on account of "programming cost" paid to various non-residents and also payments made to PanAmSat and other non-residents. Thus, ground No.2 and 3 are also treated as allowed."*

6. Since, the issue has been squarely covered by the order of the Co-ordinate Bench of ITAT, Mumbai in the case of Taj TV Ltd. in ITA No.9079/Mum./2010 dated 23.12.2016 and by the order of the Hon'ble Jurisdictional High Court in the case of New Skies Satellite BV 382 ITR 114 dated 08.02.2016, we hereby decline to interfere with the order of the Id. CIT (A). With this, all the grounds of the revenue are treated as disposed off.

7. In the result, the appeal of the revenue is dismissed.  
Order Pronounced in the Open Court on 14/10/2019

Sd/-

**(Amit Shukla)**  
**Judicial Member**

**Dated: 14/10/2019**

\*Subodh\*

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

Sd/-

**(Dr. B. R. R. Kumar)**  
**Accountant Member**

**ASSISTANT REGISTRAR**