

**IN THE INCOME TAX APPELLATE TRIBUNAL
“I” Bench, Mumbai**

**Before Shri Pramod Kumar, Vice President
and Shri Ravish Sood, Judicial Member**

**ITA No.7025/Mum/2018
(Assessment Years: 2015-16)**

Inmarsat Global Limited
C/o SRBC & Associates LLP,
14th Floor, The Ruby,
20 Senapati Bapat Marg,
Dadar (W), Mumbai 400 028

Deputy Commissioner of Income
Tax (International Taxation)
Vs. Circle 2(2)(1), 17th Floor,
Air India Building, Nariman Point,
Mumbai 400 021

PAN – AAACI6098K

(Appellant)

(Respondent)

Appellant by: Shri P.J. Pardiwala &
Ms. Aarati Sathe, A.Rs

Respondent by: Shri Avaneesh Tiwari, D.R

Date of Hearing: 26.08.2020

Date of Pronouncement: 23.10.2020

ORDER

PER RAVISH SOOD, JM

The present appeal filed by the assessee is directed against the order passed by the A.O under Sec.143(3) r.w.s 144C(13) of the Income Tax Act, 1961 (for short 'Act'), dated 25.09.2018 for A.Y. 2015-16. The impugned order has been assailed before us on the following grounds of appeal:

“Based on the facts and the circumstances of the case, Inmarsat Global Limited (hereinafter referred to as the 'Appellant) respectfully craves leave to prefer an appeal under Section 253 of the Income-tax Act, 1961 ('Act') against the order passed by the Deputy Commissioner of Income-tax (International Taxation) - 2(2)(1) ('AO') dated 25 September 2018 in pursuance of the directions issued by Dispute Resolution Panel - I ('DRP'), Mumbai, dated 04 September 2018 on the following grounds which are independent and without prejudice to each other:

On the facts and in the circumstances of the case and in law, the learned DRP and the learned AO has –

Ground number 1

erred in determining the total income of the Appellant at Rs. 5,89,84,812 instead of 'Nil' income as declared by the appellant in the return of income;

Ground number 2

erred in holding the amounts received by the Appellant from Tata Communications Limited ('TCL') [earlier known as Videsh Sanchar Nigam Limited] to be 'Royalty' as defined under Section 9(1)(vi) of the Act as well as under Article 13(3)(a) of the Double Taxation Avoidance Agreement between India and United Kingdom ('India-UK Tax Treaty');

Ground number 3

erred in not following the decision of the jurisdictional Mumbai Tribunal in the Appellant's own case for previous Assessment Years 2000-01 to AY 2005-06 (ITA No. 5102/M/2004, 423/M/2005, 7555/M/2005, 3426/M/2007, 2583/M/2007 and 3213/M/2008) considering the facts in the instant previous year are similar to the facts of the previous years and taxing the receipts from TCL as 'Royalty' under Section 9(1)(vi) of the Act as well as Article 13(3)(a) of the India-UK Tax Treaty;

Ground number 4

The learned AO has erred in not following the advance ruling (as affirmed by Hon'ble Supreme court) obtained by Indian Space Research Organisation ('ISRO') (a customer of Inmarsat), and taxing the receipts from TCL as 'Royalty' pursuant to the retrospective amendment inserted vide Explanation 5 / 6 to Section 9(1)(vi) of the Act by Finance Act 2012 as well as Article 13(3)(a) of the India-UK Tax Treaty;

Ground number 5

The learned AO has not justified in holding that the definition of 'Royalty' by insertion of Explanation 5/6 to section 9(1)(vi) of the Act vide Finance Act, 2012 should also be applied to the definition of 'Royalty' as defined in Article 13 read with Article 3(3) of the India-UK Tax Treaty;

Ground number 6

The Hon'ble DRIP has erred in concluding that the Liaison Office (LO) constitutes a permanent establishment in India, without appreciating the fact there are no activities that are carried out by the LO in India;

Ground number 7

The Hon'ble DRIP has erred in concluding that the Land Earth Station ('LES') constitutes a permanent establishment of the Appellant in India, without appreciating the fact that the said LES was owned and operated by TCL and not Appellant, thereby not appreciating the facts appropriately;

Ground number 8

The learned AO has erred in considering the profitability on an ad-hoc basis at 30 percent of the gross receipts from TCL by applying Rule 10 of the Income-tax Rules, 1962 ('Rules'), without appreciating the fact that:

- The AO did not carry out any activities in India and did not have any employee during the relevant Assessment Year; and
- The LES in India was not owned or controlled by the Appellant.

Ground number 9

The learned AO has erred in levying surcharge, secondary education cess and higher secondary education cess over and above the tax computed at the rate prescribed under the India-UK Tax Treaty on the receipts of the Appellant while calculating income tax liability for the year under consideration;

Ground number 10

The learned AO has erred in granting the TDS credit of Rs.58,45,615 as against the TDS credit claimed by the Appellant of Rs.58,98,497;

Ground number 11

The learned AO has erred in levying interest amounting to Rs.1,47,546 under Section 234B of the Act:

Ground number 12

The learned AO has erred in initiating penalty proceedings under Section 271 (1)(c) of the Act.

The Appellant craves leave to add, alter, omit or substitute any or all of the above grounds of appeal, at any time before or at the time of the appeal, to enable the Hon'ble ITAT to decide the appeal in accordance with law."

2. Briefly stated, the assessee which is a company incorporated and registered under the laws of United Kingdom (for short "U.K") is engaged in the business of providing telecommunication services and leasing of space segment capacity of navigational transponder. The assessee is a tax resident of U.K. for the purpose of the India-U.K. tax treaty. Return of income declaring a total income of Rs.nil for A.Y. 2014-15 was filed by the assessee on 30.09.2015. Subsequently, the case of the assessee was selected for scrutiny assessment under Sec. 143(2) of the Act.

3. During the course of the assessment proceedings it was observed by the A.O that the assessee was engaged in the business of providing telecommunication services and leasing of space segment capacity of navigational transponder, which essentially involves making available a channel (frequency) in air through which the communication signals are transmitted. On a perusal of the records, it was observed by the A.O that the assessee had entered into an agreement with Tata Communications Ltd. (for short "TCL") [earlier known as Vidhesh Sanchar Nigam Limited (for short "VSNL")] dated 01.04.1999 (updated in 2004) for providing satellite telecommunication services. Observing, that the receipts from Tata Communication Ltd. (earlier known as VSNL) were in the assessments framed in the case of the assessee for the preceding years taxed as royalty income in its hands, the A.O called upon the assessee to explain as to why the amounts received from TCL may not be similarly taxed during the year under consideration. In reply, it was inter alia submitted by the assessee that the issue of its taxability in India had already been decided by the Tribunal in its favour in its appeals for A.Y 2000-01 to A.Y 2005-06 [ITA No. 5102/Mum/2004,423/Mum/2005,7555/Mum/2005,3426/Mum/2007,2583/Mum/2007 and 3213/Mum/2008]. It was submitted by the assessee that the

Tribunal in the aforesaid preceding years had held that the consideration received by the assessee from TCL was not in the nature of royalty either under the provisions of the Act or the India-U.K tax treaty. However, the reply filed by the assessee did not find favour with the A.O. Rebutting the claim of the assessee, it was observed by the A.O that the legal landscape with respect to taxability of transponder services had undergone a sea change over the years. In the backdrop of his aforesaid observation, the A.O was of the view that the judicial pronouncements relied upon by the assessee pertained to the pre-amendment era. Observing, that the services rendered by the assessee were clearly taxable as royalty under Sec. 9(1)(vi) of the Act and the India-U.K. tax treaty, the A.O was of the view that the amount of Rs.5,89,84,812/- received by the assessee from TCL was clearly taxable as royalty both under the Act as well as the India-U.K. tax treaty. Alternatively, it was observed by the A.O that as the assessee had not furnished any details of expenditure, therefore, the net income/profit from rendering of the aforesaid services could not be determined. Accordingly, the A.O invoked Rule 10 of the Income Tax Rules, 1962 and estimated the business profit of the assessee at 30% of its gross receipts of Rs.5,89,84,812/-, which worked out to an amount of Rs.1,76,95,444/-. It was observed by the A.O that if the assessee's income was subsequently held as not being in the nature of royalty, then its business income would be worked out in terms of his aforesaid observations. Accordingly, in the backdrop of his deliberations the A.O proposed to assess the total receipts of Rs.5,89,84,812/- as royalty in the hands of the assessee, which was subjected to tax by him @ 10% under the India-U.K. tax treaty, vide his draft assessment order passed under Sec.143(3) r.w.s 144C(1), dated 21.12.2017.

4. Objecting to the aforesaid draft assessment order the assessee filed objections with the Dispute Resolution Panel-1 (WZ), Mumbai. The assessee objected to the proposed treatment of the amounts received by the assessee from TCL as royalty under Sec.9(1)(vi) of the Act and Article 13 of the India-U.K. tax treaty. It was submitted by the assessee that the Tribunal while disposing off its

appeals for A.Y. 2000-01 to A.Y. 2005-06, vide its consolidated order dated 14.07.2017, had concluded, that the consideration received by the assessee from TCL was not to be held as royalty. Apart from that, it was submitted by the assessee that the A.O while characterising the amounts received by the assessee from TCL had failed to follow the advance ruling in the case of ISRO Satellite Centre [ISACT] Vs. DIT (Intl. Taxation) (2008) 307 ITR 59 (AAR), wherein the Hon'ble Authority for Advance Ruling (for short 'AAR') had held that the amount received by the assessee from ISRO in lieu of providing transponder services was not taxable either under the Act or the India-U.K. tax treaty. It was submitted by the assessee that the aforesaid order of the AAR had thereafter been affirmed by the Hon'ble Supreme Court and the SLP filed by the revenue was dismissed vide an order dated 31.08.2008 of the Hon'ble Apex Court. Also, the assessee had relied on the judgment of the Hon'ble High Court of Delhi in the case of Asia Satellite Telecommunication Company Ltd. (2011) 332 ITR 340 (Del). In the said case the Hon'ble High Court after extensively relying on the advance ruling in the case of ISRO Satellite Centre [ISACT] Vs. DIT (2008) 307 ITR 59 (AAR), had concluded, that the amounts received for providing use of transponder facility on satellite to television companies outside India was not in the nature of royalty. Further, the assessee objected to the view taken by the A.O that the Space Segment Monitoring System (SSMS) and the Liaison Office (LO) constituted a PE of the assessee in India. The aforesaid objections were raised by the assessee in the backdrop of the following facts:

- “(a) SSMS was not present in India during the year under consideration.
- (b) It was sent back to the UK in the year 2006.
- (c) SSMS was not used to provide telecommunications services to TCL.
- (d) There is not income generating activities carried on by LO in India.
- (e) During the year, LO had only one employee.
- (f) AAR in the case of ISRO supra held that assessee does not have PE in India.”

Lastly, the assessee objected to working out of its profitability on an adhoc basis @ 30% of its gross receipts from TCL by applying of Rule 10 of the Income Tax Rules, 1962 by the A.O.

5. The DRP after necessary deliberations did not find favour with the contentions advanced by the assessee and rejected the same. Insofar the claim of the assessee that the amounts received from TCL could not be treated as royalty was concerned, the DRP simply relied upon the view that was taken by the predecessor panel in

context of the issue under consideration in the preceding years i.e A.Y. 2010-11, A.Y. 2011-12, A.Y. 2013-14 and A.Y. 2014-15 and therein held that the aforesaid amounts received by the assessee from TCL were taxable in India being receipts in the nature of royalty both in terms of the Income-Tax Act as well as the India-U.K. tax treaty. Accordingly, the DRP observing that its predecessor panel had in the earlier years upheld the AO's view and had concluded that the amounts received by the assessee from TCL were to be treated as royalty, thus, for the said reason rejected the aforesaid claim of the assessee. As regards the claim of the assessee that it did not have a PE in India, the same too did not find favour with the DRP. Observing, that its predecessor panel in A.Y. 2014-15 had upheld the view taken by the A.O that the assessee had a PE in India, it was concluded by the DRP that the activities carried on the land through Land Earth Stations (LES) constituted a PE of the assessee in India. Accordingly, the assessee's claim that it had no PE in India was rejected by the DRP vide its observations recorded at Para 9.3 onwards of its order. As regards the claim of the assessee that the A.O had erred in considering its profitability on an adhoc basis at 30% of its gross receipts from TCL by applying Rule 10 of the Income Tax Rules, 1962, the same too was rejected by the DRP, observing as under:

"The contentions raised by the assessee have been considered. We find these to be not acceptable for following reasons:

- i) Nothing has been brought out by the assessee to show that it has maintained India specific accounts.
- ii) The services being provided by the U.K service provider, that too through the satellites, for use of clients in India, further, the end users being numerous individuals/corporations/bodies resident as well non-resident, all these factors and specially when India specific accounts are not maintained, make the income ascertainment very difficult.
- iii) Considering above facts and of the fact that despite being asked by the AO for the profitability/India specific accounts, the assessee has failed to produce anything in its support. In these circumstances, the AO has no option but to estimate the income by applying Rule 10 of the Income tax Rules. Hence, the AO's action of adopting Rule 10 cannot be erroneous and in fact he adopted the only option available to him.
- iv) It has never been challenged that PE has a turnover in India. Regarding income attribution to PE, it is noted that revenue gets generated in India, the service recipients are in India, the necessary approvals have come from India; the end users are in India. The service provider, though in UK, is providing service through the satellite based transponder and ground stations based in India.

- v) No India specific accounts, details, expense, ratio arguments/claims/propositions have been provided by the assessee.
- vi) Considering all the above factors, rate of 30% for income adoption cannot be faulted with.

The assessee's objection is therefore, rejected."

On the basis of its aforesaid deliberations the DRP rejected the objections raised by the assessee.

6. The A.O after receiving the order passed by the DRP under Sec.144C(5) of the Act, dated 04.09.2018 therein framed the assessment vide his order passed under Sec. 143(3) r.w.s 144C(13) of the Act, dated 25.09.2018, and treating the gross receipts of the assessee from TCL as royalty, subjected the same to tax @ 10% under the India-U.K. tax treaty. Alternatively, it was observed by the AO, that as in the preceding years, as no details of expenditure was either available on record nor provided by the assessee, thus, the business income/profit of the assessee was to be worked out on an estimate basis at 30% of its gross receipts of Rs.5,89,84,812/-, which amounted to Rs.1,76,95,444/- by invoking Rule 10 of the Income Tax Rules, 1962. It was observed by the A.O that his latter part of the order i.e assessing of the business income/profits of the assessee would be triggered if the assessee's income was held as business income and not royalty.

7. The assessee being aggrieved with the order passed by the A.O under Sec. 143(3) r.w.s 144C(13), dated 25.09.2018, has carried the matter in appeal before us. The assessee has assailed the assessment framed by the A.O inter alia on three issues viz. (i) that the amounts received by the assessee from TCL were not to be held as 'royalty' under Sec. 9(1)(vi) of the Act and Article 13(3)(a) of the India-U.K. Tax Treaty; (ii) that the AO/DRP had erred in concluding that the Liaison Office (LO) and the Land Earth Station (LES) constituted a PE of the assessee in India; and (iii) that the A.O had erred in alternatively considering the profitability of the assessee on an adhoc basis at 30% of its gross receipts from TCL by applying Rule 10 of the Income Tax Rules, 1962.

8. We shall first deal with the claim of the assessee that the amounts received from providing Satellite Telecommunication Services to TCL (earlier known as Vidhesh Sanchar Nigam Limited) (VSNL) were not to be treated as royalty under Sec.9(1)(vi) of the Act and Article 13 of the India-U.K. Tax Treaty. As observed by us

hereinabove, it was the claim of the assessee before the lower authorities that the issue that the amounts received by it from TCL were not to be held as royalty was squarely covered by the order passed by the Tribunal in its own case for A.Y. 2000-01 to A.Y. 2005-06, vide its consolidated order dated 14.07.2017. In the course of the hearing of the appeal the Id. Authorized Representative (for short 'A.R') for the assessee took us through the consolidated order passed by the Tribunal while disposing off the assessee's appeals for A.Y. 2000-01 to A.Y. 2005-06, dated 14.07.2017. It was further submitted by the Id. A.R, that the issue pertaining to treating of the amounts received by the assessee from TCL for providing Satellite Telecommunication Services, as royalty, by the A.O/DRP, had again came up before the Tribunal in the assessee's own case for A.Y. 2007-08 to A.Y. 2012-13, wherein after exhaustive deliberations and relying on its earlier order, the Tribunal had concluded that the same was not to be treated as royalty.

9. Per contra, the Id. Departmental Representative (for short 'D.R') relied on the orders of the lower authorities. However, the Id. D.R could not controvert the claim of the assessee's counsel that the issue was squarely covered by the orders passed by the Tribunal in the assessee's own case for the preceding years.

10. We have given a thoughtful consideration to the aforesaid issue, and find, that the Tribunal while disposing off the assessee's appeals for A.Y. 2007-08 to A.Y. 2012-13, vide its consolidated order dated 12.12.2018, had held, that the amount received by the assessee company from providing Satellite Telecommunication Services to TCL was not to be treated as royalty. The Tribunal while dealing with the aforesaid issue had followed its earlier view that was taken while disposing off the assessee's appeals for A.Y. 2000-01 to A.Y. 2005-06, and vide its order dated 14.07.2017 had observed as under :

"5. In order to appreciate the controversy, the following discussion is relevant. The appellant is a company incorporated in United Kingdom and is also a tax resident of United Kingdom. The appellant is engaged in the business of providing telecommunication services and for Assessment Year 2007-08, it filed its return of income declaring NIL income, *inter-alia*, contending that its income was not taxable in India. So far as the income earned by the assessee in this year is concerned, the same stands on similar footing as in the past years, namely, from rendering of telecommunication services to Videsh Sanchar Nigam Ltd. (in short 'VSNL'), whose name has subsequently been changed to Tata Communication Ltd. (in short 'TCL'). The receipts from rendering of telecommunication services to TCL were claimed to be not taxable in India; however, the Assessing Officer has taxed the same as

Royalty under the Act as well as in terms of the India-UK Double Taxation Avoidance Agreement (in short 'India-UK DTAA'). The stand of the assessee has been that its receipts from TCL are in the nature of 'business profits' covered by Article 7 of the India-UK DTAA and, in the absence of any PE in India, the same are not taxable in India. It was a common ground between the parties that the manner in which the services have been rendered by the assessee in the instant year is similar to the manner in which the services have been rendered in the past years. Broadly speaking, the following fact-situation asserted by the assessee before the Assessing Officer brings out the mechanics of the manner in which the assessee is providing telecommunication services from outside India and deriving its earning from TCL, the same is reproduced below :-

"2.1 Background

Inmarsat is engaged in the business of providing telecommunication services from outside India. The aforesaid nature of services essentially involves making available a channel (frequency) in air through which the communication signals are transmitted. This frequency is made available by a network which includes the following resources :

- Satellite
- Network Co-ordinating Station ('NCS')
- Network Operation Centre ('NOC')
- Satellite Control Centre
- Other infrastructure

Inmarsat provides a telecommunication link between the user of mobile telephone system known as Mobile Earth Station ('MES') and Land Earth Station ('LES'). MES is an equipment located on a ship, aircraft or vehicle or carried in hand held case. The users of the equipment are third parties who are not connected with Inmarsat. The LES is a fixed site (with large satellite dishes and related equipment), which is operated by a third party i.e a Land Earth Service Operator ('LESO').

Inmarsat is engaged in rendering various telecommunication services including the following :

- Voice transmission services
- Fax transmission service
- Data transmission service

- E-mail transmission – private/corporate networks, value added networks transmission

- Internet access-browsing e-mail
- Video conferencing-store and forward video, real time, etc.

In this connection, we enclose herewith in Annexure 7, a diagrammatic representation which describes the above mentioned activities.

The LESO in India is VSNL. Inmarsat has entered into a LESO Agreement with VSNL for providing satellite telecommunication services. We have enclosed herewith in Annexure 8 a copy of the LESO agreement dated 12 April 1999, entered into by Inmarsat with VSNL for provision of telecommunication services.

The LES is linked on the ground to the local public telecommunication network. This system enables communication to take place between users of the MES equipment and either other users of similar equipment or users of the public telephone network. In each case, the communication passes via an Inmarsat satellite and is co-ordinated and connected by the LESO."

6. The Assessing Officer, however, took the stand, following the stand of the assessing authorities of the past years that the impugned receipts earned by the assessee from TCL are in the nature of 'Royalty'. We find that the DRP has also affirmed the decision of the Assessing Officer.

7. On this aspect of the royalty issue controversy, it has been pointed out before us that the Tribunal vide its order in ITA Nos. 5102/Mum/2004 & others dated 14.07.2017 in the context of Assessment Years 2000-01 to 2005-06 has evaluated the rival stands and have disagreed with the stand of the Revenue that the nature of receipt was Royalty. At the time of hearing, the learned representative for the assessee has taken us through the detailed decision made by the Tribunal in its order dated 14.07.2017 (supra), whose relevant portion we are tempted to reproduce as under :-

"10. We have heard the rival submissions and perused the material available on record. We find that the material facts of the present case are largely identical to the facts as considered by AAR in the ruling in the case of ISRO Satellite Centre(2008) 307 ITR 59 (AAR). We note that the reasoning and conclusion on facts similar to the facts in the present proceedings with ISRO which has been followed after a detailed discussion and in fact extracted by the Hon'ble Delhi High Court in the case of Asia Satellite Telecommunications Co. Ltd. (2011) 332 ITR 340(Del.). We note that no arguments have been advanced by the Revenue to rebut the assessee's arguments that facts as considered in ISRO Satellite Centre are identical in the present proceedings also. We have taken into consideration that the learned CIT-DR has placed reliance on the decisions of the Hon'ble Madras High Court in the case of Verizon Communications Singapore Pte Ltd. vs. Income Tax Officer (IT) (2014) 361 ITR 575 (Mad), the decision of the Karnataka High Court in the case of CIT vs. CGI Information Systems and Management Consultants (P) Ltd. and the decision of the Hon'ble Jurisdictional High Court in the case of CIT vs. Siemens Aktiongeswellschaft (2009) 310 ITR 320 (Bom). Reliance has been placed on the order of the Mumbai Bench of the Tribunal in the case of Viacom 18 Media P. Ltd. vs. ADIT (International Taxation)-2(2), Mumbai(2014) 44 taxmann.com 1 (Mum-Trib) in support of the argument that this is the view taken by the Mumbai Bench of the Tribunal. Notwithstanding the fact that at that point of time the Coordinate Bench did not have the benefit of the orders of the Hon'ble Delhi High Court in Asia Satellite Communication Co. Ltd. We also note that consistently the Mumbai Bench of the Tribunal has taken into the consideration the distinction in facts, law and the issue which was posed before different forums for consideration and find that it has been consistently held relying upon the decisions of the Hon'ble Delhi High Court in the cases of New Skies Satellite(2016) 382 ITR 1, DIT vs. Nokia Networks OY (2013) 358 ITR 259 and Asia Satellite Communications Co. Ltd. (supra) in the decisions of Alcatel-Lucent USA Inc. dated 25.04.2007 in ITA Nos. 7299 & 7300/ Mum/2010 for A.Y. 2005-06 and 2007-08, DDIT vs. Shell Information Technology International BV dated 15.03.2017 in ITA No. 5051/Mum/ 2009 & Others for A.Y. 2006-07 to 2008-09 and ADIT vs. Taj TV Ltd. dated 05.07.2016 in ITA No. 4678/Mum2007 for A.Y. 2003-04 to 2005-06. We have also noted that reliance placed by the learned CIT-DR on the decision of the Hon'ble Jurisdictional High Court in Siemens Aktiongeswellschaft (supra) supports its case is misplaced. Specific mention may be made to para 20 of the said decision. Reference therein has been made to a decision of the Canadian Court in the case of Her Majesty the Queen vs. Melford Development Inc. 82 DTC 6281 and the categorical observation on unilateral amendment by a nation which is party to the agreement leaves the issue in no doubt about the view favoured. Accordingly we quote here the decision of the Hon'ble Delhi High Court in DIT vs. New Skies Satellite BV cited supra to support the conclusion why the consistent orders of the ITAT on the issue are being followed: -

"48. In Commissioner of Income Tax v. Seimens Aktiongeswellschaft, [2009] 310 ITR 320 (Bom), the Bombay High Court citing R v. Melford Developments Inc. held that

“The ratio of the judgment, in our opinion, would mean that by a unilateral amendment it is not possible for one nation which is party to an agreement to tax income which otherwise was not subject to tax. Such income would not be subject to tax under the expression “laws in force”.

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While considering the Double Tax Avoidance Agreement the expression “laws in force” would not only include a tax already covered by the treaty but would also include any other tax as taxes of a substantially similar character subsequent to the date of the agreement as set out in article I(2). Considering the express language of article I(2) it is not possible to accept the broad proposition urged on behalf of the assessee that the law would be the law as applicable or as define when the Double Tax Avoidance Agreement was entered into.”

49. It is essential to note the context in which this judgment was delivered. There, the Court was confronted with a situation where the word royalty was not defined in the German DTAA. Following from our previous discussion on the bifurcation of terms within the treaty, in situations where words remain undefined, assistance is to be drawn from the definition and import of the words as they exist in the domestic “laws in force”. It was in this context that the Bombay High Court held that they were unable to accept the assessee’s contention that the law applicable would be the law as it existed at the time the Double Tax Avoidance Agreement was entered into.

This is the context in which the ambulatory approach to tax treaty interpretation was not rejected. The situation before this Court however is materially different as there is in fact a definition of the word royalty under Article 12 of both DTAA, thus dispensing with the need for recourse to Article 3.

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 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, 2013 (358) ITR 259 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 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 by 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.”

10.1 The next decision also cited by the CIT-DR is the case of Formula One World Championship Ltd. vs. CIT (International Taxation) for the proposition that the decision of the Hon'ble Delhi High Court in the case of Asia Satellite Communication Co. Ltd. and New Skies Satellite is overruled. On a reading of the said decision we note that the reliance is misplaced. The issue for consideration before the Hon'ble Apex Court was on an entirely different set of facts and circumstances and an entirely different issue was being considered. The said decisions were neither cited before the Court nor referred to by it nor considered in the said judgement. Accordingly on a reading of the decisions rendered on peculiar facts of the present case which we have brought out in detail in the earlier part of this order we find ourselves in agreement with the detailed finding and conclusion drawn by the Coordinate Benches and respectfully following the same conclude that the appeals of the assessee are to be allowed. For ready reference we extract from one of the decisions cited before us. We reproduce the relevant extract from the decision in the case of Alcatel Lucent USA Inc. being the most latest in point of time hereunder: -

"5. We have heard the rival submissions and perused the material before us. We find that the basic issue to be decided is as to whether the payments received by the assessee from Reliance can be taxed as royalty in view of the amendment to section 9(1) of the Act. It is said that a DTAA is a result of negotiations between two countries as to the extent to which special concessional tax provisions can be made notwithstanding that there might be a loss of revenue. A plain reading of section 90(2) of the Act makes it clear that the provisions of the DTAA would prevail over the Act unless the Act is more beneficial to the assessee. Therefore, except to the extent a provision of the Act is more beneficial to it, the DTAA will override the Act. This is irrespective of whether the Act contains a provision that corresponds to the treaty provision. In our opinion, international- taxation issues have to be decided keeping in mind the above broad principles.

5.1. It is found that all the issues raised by the DR, before us, have been dealt with by the Tribunal in the case of Antwerp Diamond (supra). We are reproducing the arguments of the representatives of both the sides and the relevant portion of that order and it reads as under:

"2. At the outset, the Ld. Counsel, Mr. K. K. Ved submitted that similar issue has been decided by the Tribunal in favour of the assessee in assessee's own case right from the assessment years 2004-05, 2005-06 and 2008-09. The second issue relating to disallowance of interest paid to the Head Office also has been decided in favour of the assessee by the Special Bench in Sumitomo Mitsui Banking Corpn., wherein, the assessee was one of the party.

3. On the other hand, Ld. DR strongly relied upon the order of the Assessing Officer and submitted that, so far as Data Processing Cost is concerned, the same is in the nature of 'Royalty' and in support he has strongly relied upon the two Karnataka High Court decisions in the case of: - i) CIT vs. Wipro Ltd., reported in 355 ITR 284; ii) CIT vs. CGI Information Systems & Management Consultants (P) Ltd., 226 Taxman 319. The issue whether the amendment brought by Finance Act 2012 in Section 9(1)(vi) by way of Explanations inserted in the Income-tax Act with retrospective effect can be read into DTAA or not has to be seen in the light of the decision of Hon'ble Bombay High Court in the case of CIT v Siemens Aktiengesellschaft, reported in 310 ITR 320 (Bom HC) accordingly, he submitted that other decisions rendered by the Delhi High Court and the Tribunal may not be applicable. While appreciating the Siemens AG (supra) he submitted that, it may kind be borne in mind that: i) The question of law before the Hon'ble High Court was not that whether amendments in the Income-tax Act can be read into the DTAA or not; ii) In the said case, old DTAA (1960) between India and Germany was under consideration; iii) The said decision was rendered in 2008 when the only clarificatory provision by way of Explanation in section 9 was the Explanation below S.9(2) inserted by the Finance Act, 2007 doing with the requirement of PE for Royalty; iv) That amendments/Explanations in the Income-tax Act are being sought to be read into DTAA by virtue of Article 3(12) of the modern treaties; v) Section 9(1)(vi) up to and including Explanation 2 are substantive provisions as inserted by Finance Act 1976 and thereafter, Explanation 3 to 6 are only clarificatory provisions inserted subsequently; and vi) It is not disputed by the revenue that the provisions of DTAA if beneficial to the assessee shall be preferred over the provisions of the Income-tax Act. He further submitted that, the Hon'ble Bombay High Court decision in the case of Siemens Aktiengesellschaft (supra) would reveal that, i) Nowhere in the said order, the High Court has held that Amendments/Explanations cannot be read into DTAA as it was not question before the Hon'ble High Court; ii) The natures of services rendered in the said case were found to be not Royalty under the DTAA though found to be Royalty under the Act. Those services were found to fall under the

expression "commercial or industrial profits" as per the then DTAA (Old) and therefore could not be taxed in India in absence of PE. The provisions of DTAA being the beneficial to the assessee were preferred over the provisions of the Income-tax Act; iii) In paras 13, 22 and 28 of its order, the Hon'ble High Court has approved the insertion of Explanation below section 9(2) inserted by the Finance Act 2007, thereby implying that the explanations inserted by FA 2007 could be read into modern DTAA's; iv) Mumbai Tribunal in the case of Viacom 18 Media (P.) Ltd. [2014] 162 TJJ 336 (Mum) has explained the import of Bombay High Court decision in right perspective in paras 16 and 17 of its order while rejecting the assessee's argument that the HC has held that amendments in the Act cannot be read into DTAA's; and v) The Bombay High Court has approved ambulatory approach (para 22) to interpretation of treaties against Static approach adopted by the Delhi High Court. So far as the interest paid by the Branch Office to the Head Office income of Headquarter, he submitted that, expenditure including interest attributable of earning of income which does not form part of the total income has to be disallowed under section 14A if it has to be held that in view of the Special Bench decision in the case of the assessee, the interest paid by the Branch Office to the Head Office is not the commission of the Head Office. In support, he relied upon the decision of Oman International Bank AG on the admissibility of the belief, he relied upon the decision of Hon'ble Supreme Court in the case of NTPC vs. CIT, reported in 229 ITR 383.

4. After considering the aforesaid submissions and on perusal of the impugned orders, we find that so far as the issue raised vide ground No.1 to 3 is concerned it is a recurring issue in the case of the assessee right from the earlier years. The Ld.CIT (A) too has followed the CIT(A)'s orders for the assessment years 2003-04 to 2004-05, 2005-06 and 2008-09. The Tribunal in the assessment year 2004-05 in ITA No.7347/Mum/2007 on the issue of disallowance of Data Processing Cost has dealt and decided this issue in the following manner:-

"15. Now, coming to the main issue i.e., whether the reimbursement of data processing cost of Rs.34,03,734, amounts to royalty or not, we find from the record that the assessee is engaged in the banking business and operates in India through branch in Mumbai. It has acquired banking application software named as "Flexcube" from an Indian software company which is exclusively used for the banking purpose by the assessee all over the world. When the Mumbai Branch was set-up, the Branch was allowed to use the said software by making it assessable through servers located at Belgium. The Branch sends its data to the Belgium server from where the data gets processed as per the requirement of the banking operations. As per the terms of agreement between the Branch and the Head Office for the usage of software by the Branch, which has been incorporated above, it is evident that the Head Office only has the non-exclusive non-transferrable rights to use the computer software brought for personal use and clause 16 of the said agreement specifically provides that the Head Office does not have any right to assign, sub-license or otherwise transfer the license of this agreement. Thus, the payment by the Branch for use of computer software is not the right in the copy right but only for doing the work from the said software which subsist in the copy right of the software. The branch is using the computer software and the I.T. resources installed at Belgium for which the payment is made by the Head Office towards the use of such software license. Since the Branch is using the same software for the purpose of business operations, the Head Office allocates the said expenditure on a prorata basis for the use of the said resources which is being reimbursed by the Branch to the Head Office. It is not in dispute that the assessee has sought the benefit of treaty between India and Belgium and had specifically relied upon the definition of "royalty" as given in the Article 12. Clause (a) of Para-3 of Article-12, which defines the term "royalty" in the following manner:- 3(a) 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, trademark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience. 16. The above definition of "royalty" thus provides that, when the payment of any kind is received as a consideration for "use" of or "the right to use" of any of the copy right of any item or for various terms used in the said Article, then only it can be held to be for the purpose of "royalty". The said definition of "royalty" is exhaustive and not inclusive and, therefore, it has to be given the meaning as contained in the Article itself and no other meaning should be looked upon. If the assessee is claiming the application of the DTAA, then the definition and scope of "royalty" given in the domestic law, in the present case, section 9(1)(vi) should not be read into or looked upon. The character of payment towards royalty depends upon the independent "use" or the "right to use" of the computer software, which is a kind of copy right. In the present case, the payment made by the Branch is not for "use" of or "right to use" of software which is being exclusively done by the Head Office only, installed in Belgium. The Branch does not have any independent right to use or control over such main frame of the computer software installed in Belgium, but it simply sends the data to the Head Office for getting it processed. Insofar as the Branch is concerned, it is only reimbursing the cost of processing of such data to the Head Office, which has been allocated on prorata basis. Such reimbursement of payment does not fall within the ambit of definition of "royalty" within the Article 12(3)(a). To fall within its ambit, the Branch should have exclusive and independent use or right to use the software and for such usage, payment has to be made in consideration thereof. It is not the case of the Revenue that the Head Office has provided any copy right of software or any copyrighted article developed by the Head Office for the exclusive use of the assessee for, which the assessee is making the payment along with the mark-up exclusively for the purpose of royalty. If the payment for license for the software which is installed in

the Head Office is being made by the Head Office, then any allocation of cost and reimbursement thereof by the Branch to the Head Office cannot be termed as independent payment for the purpose of royalty. To fall within the ambit of "royalty" under Article, the payment should be exclusively qua the use or the right to use the software exclusively by the Branch. The character of the payment under the royalty transactions depends upon the rights that the transferee acquires in relation to the use and exploitation of the software programme. Here, there is no such right which has been acquired by the Branch in relation to the usage of software, because the Head Office alone has the exclusive right of the license to use the software. Thus, the reimbursement of the data processing cost to the Head Office does not fall within the ambit of definition of "royalty" under Article 12(3)(a).

17. The learned Commissioner (Appeals) and the learned Senior Counsel have strongly relied upon the decision of the co-ordinate bench of the Tribunal in *Kotak Mahindra Primus Ltd.* (supra). On a perusal of the said decision, it is seen that the conclusion drawn by the Tribunal, is directly applicable to the facts of the assessee's case also, which is evident from the following observations and conclusions drawn by the Tribunal:-

"11. The consideration of payment is only this data process work. No part of this payment can be said to be for the use of specialized software on which data is processed or for the use of mainframe computer because the Indian company does not have any independent right to use the computer or even physical access to the mainframe computer, so as to use the mainframe computer or the specialized software. All that the right is for processing of data, and the use of mainframe computer is permitted only for that purpose. The Indian company can feed the raw data in the mainframe computer in Australia, with the help of the telecommunication link, and the output data, after due processing is transmitted back to the Indian company. There is no privilege or right granted to the Indian company by the Australian company. The control of the Indian company is only on the input transmission and the right is to get the output processed data back. The actual processing of data is the exclusive control of the Australian company and it is for this work that the Australian company gets paid. In our considered view, therefore, in essence the impugned payment is made to the Australian company in consideration of its processing of data belonging to the Indian company. As far as the scope of article 12(3)(a) is concerned, we find that it covers only a payment for the use of, or the right to use of, any copyright, patent, design or model, plan, secret formula or process, trademark, or other like property or right. The case of the revenue is that the payment is made for the use of specialized software with the help of which data is processed. We are not persuaded. As we have concluded earlier in this order, on the facts of this case, the payment made by the Indian company is not for the use of, or right to use of, software, the payment is for data processing. Be that as it may, even if stand of the revenue is to be upheld and it is to be concluded that the payment is made for software per se, that does not lead to taxability of receipt in the hands of the Australian company either. It is also by now settled that the payment for software is for a copyrighted article and not copyright per se, and, therefore, is not covered by the scope of payment for copyright. The authority for this proposition is contained in Special Bench decision in the case of *Motorola Inc. v. Dy. CIT (2005) 95 ITD 269 (Del)(SB)*, *Samsung Electronics Company Ltd. v. ITO (2005) 94 ITD 91 (Bang)*, and *Lucent Technologies Hindustan Ltd. v. ITO (2005) 92 ITD 366 (Bang)*. It is not even the revenues case that the payment in question is not (sic) for the use of, or right to use of, patent, design or model, plan, secret formula or process, or trade mark. In any event, having perused these classifications and having considered the facts before us, we are of the considered view that the payment does not fit into any of these classifications. It is, however, contended that the impugned payment is covered by the residuary clause, i.e., "other like property or right". It is contended that by making payment of US \$ 60,000 per annum, the Indian company gets a valuable property and right as the payment cannot be said to have been made in vacuum and without any consideration. This plea also does not impress us. It is not every property or right which can be covered by these expressions appearing in the end of article 12(3)(a), because, following the principles of *ejusdem generis* meaning of the general words following the specific words have to take colour from the specific words preceding it. When that property or right, even if it so exists, is not of the nature of any of the specific categories set out in article 12(3)(a), it cannot be covered by the general words following those categories either. For all these reasons, we are of the considered view that provisions of article 12(3)(a) cannot be invoked on the facts of the case before us. That takes us to the question whether the provisions of article 12(3)(b), as relied upon by the revenue authorities, can be invoked on the facts of the present case. Article 12(3)(b) can apply only when the payment in question can be held to be payment for "the use of, or the right to use, any industrial, commercial or scientific equipment". This condition can only be satisfied when it is established that the impugned payment is made for the use of, or right to use of, mainframe computer. The Indian company does not have any control over, or physical access to, the mainframe computer in Australia. There cannot, therefore, be any question of payment for use of the mainframe computer. It is indeed true that the use of mainframe computer is integral to the data processing but what is important to bear in mind is the fact that the payment is not for the use of mainframe computer per se, that the Indian company does not have any control over the mainframe computer or physical access to the mainframe computer, and that the payment is for act of specialized data processing by the Australian company. Use of mainframe computer in the course of processing of data is one of the important aspects of the whole activity but that is not the purpose of, and consideration for, the impugned payment being made to Australian company. The payment, as we have observed earlier, is for the activity of specialized data processing. It is neither practicable, nor permissible, to assign monetary value to each of the segment of this economic activity and consider that amount in isolation, for the purpose of deciding character of that amount. Therefore, neither the impugned payment can be said to be towards use of, or right to use of, the mainframe computer, nor is it

permissible to allocate apart of the impugned payment, as attributable to use of, or right to use of, mainframe computer. Accordingly, the provisions of article 12(3)(b) cannot have any application in the matter."

18. Insofar as the reliance placed by the learned Departmental Representative on the decisions of the Madras High Court and also the scope of "royalty" as given in Explanation 4 and 5 to section 9(1)(vi) brought in statute by the Finance Act, 2012 are concerned, we find that the same is not tenable for the reason that once the assessee has opted for the benefit of the DTAA, then there is no requirement for resorting to the definition and the scope of "royalty" as given in section 9(1)(vi). The said amendment cannot be read into the treaty and will not influence the definition of "royalty", as given in Article 12(3). This proposition is squarely covered by the decision of the Bombay High Court in Siemens Aktiengesellschaft (supra), the decision of Delhi High Court in Nokia Network (supra) and DIT v/s Ericson AB, [2012] 343 ITR 470. Even the decisions of Madras High Court as relied upon by the learned Departmental Representative is not applicable which is evident from the issue involved as is evident from the substantial question of law which were formulated by the High Court for adjudication. Hence, the said decisions are not applicable.

19. Thus, in view of the aforesaid reasons, we hold that the impugned payment made by the Branch to the H.O. towards reimbursement of cost of data processing cannot be held to be covered within the scope of expression "royalty" under Article 12(3)(a) of the India Belgium DTAA. Accordingly, the conclusion drawn by the learned Commissioner (Appeals) is affirmed. 20. Since we have already held that the data processing cost paid by the assessee does not amount to royalty, consequently, there is no requirement for deducting tax at source on such payment. Therefore, the provisions of section 40(a)(i) will not apply. Accordingly, the issue arising out of ground no.1 and 2 is dismissed". This decision of the Tribunal have been followed in the subsequent years by the Tribunal, i.e., in AY2006-07 and 2007-08. In the aforesaid decision of the Tribunal, the decision of Bombay High Court in the case of Siemens Aktiengesellschaft (supra) and Delhi High Court decision in the case of Nokia Network, reported in [2012] 253 CTR (De) 417 and DIT v Sony Ericson AB, reported in [2012] 343 ITR 470 have been taken note of. Thus, this issue has been decided in favour of the assessee after detail analysis and discussion. Moreover, we find that in the latest decision of Hon'ble Delhi High Court in the case of DIT vs. News Sky Satellite BV passed in ITA 473/2012, order dated 8.02.2016 have explained the ratio and principle of Hon'ble Bombay High Court in the case of Siemens Aktiengesellschaft (supra). The relevant observation of the Hon'ble Delhi High Court in the said case reads as under:-

"48 In Commissioner of Income Tax v. Seimens Aktiengesellschaft, [2009] 310 ITR 320 (Bom), the Bombay High Court citing R v. Melford Developments Inc. held that "The ratio of the judgment, in our opinion, would mean that by a unilateral amendment it is not possible for one nation which is party to an agreement to tax income which otherwise was not subject to tax. Such income would not be subject to tax under the expression "laws in force". While considering the Double Tax Avoidance Agreement the expression "laws in force" would not only include a tax already covered by the treaty but would also include any other tax as taxes of a substantially similar character subsequent to the date of the agreement as set out in article 1(2). Considering the express language of article 1(2) it is not possible to accept the broad proposition urged on behalf of the assessee that the law would be the law as applicable or as define when the Double Tax Avoidance Agreement was entered into."

49. It is essential to note the context in which this judgment was delivered. There, the Court was confronted with a situation where the word royalty was not defined in the German DTAA. Following from our previous discussion on the bifurcation of terms within the treaty, in situations where words remain undefined, assistance is to be drawn from the definition and import of the words as they exist in the domestic "laws in force". It was in this context that the Bombay High Court held that they were unable to accept the assessee's contention that the law applicable would be the law as it existed at the time the Double Tax Avoidance Agreement was entered into. This is the context in which the ambulatory approach to tax treaty interpretation was not rejected. The situation before this Court however is materially different as there is in fact a definition of the word royalty under Article 12 of both DTAA, thus dispensing with the need for recourse to Article 3.

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".

5. Thus, on the facts of the present case, we are bound to follow the judicial precedence in assessee's own case for the earlier years and in view of the finding given therein, we upheld the order of the CIT (A) and dismiss the grounds raised by the revenue. Accordingly, grounds no.1, 2 & 3 are dismissed.

5.2. As far as filing of writ petition to be filed before the Hon'ble High court is concerned if would be sufficient to mention that nothing was brought on record to prove that writ had been filed and heard. Had the final hearing taken place, it would have been a different situation. So, in anticipation of filing of a writ-petition, we are not

inclined to defer the decision especially when same is covered by the orders for the earlier years.

Considering the above and respectfully following the orders of the Tribunal in the cases of Antwerp Diamond Bank NV Engineering Centre (supra) and Antwerp Diamond Bank NV(supra), we decide the effective ground of appeal in favour of the assessee.

10.2 In view of the above reasoning on facts and law we find that the judicial precedent as cited before us and as discussed and considered at length by the Hon'ble Delhi High Court in facts as upheld in the ruling of AAR in the case of ISRO (supra) is also found supported by the Hon'ble Jurisdictional High Court supports the view taken and the decision of the Hon'ble Madras High Court stands considered and the decision of the Hon'ble Karnataka High Court it is noted having been rendered on 9th June, 2014 did not have the benefit of the view taken by the Hon'ble Delhi High Court in the order of the Coordinate Bench in Viacom 18 the benefit of the said decisions was not available and in the said decisions relied upon by the Revenue, the similarity of the peculiar facts with the facts of AAR's ruling in ISRO as considered by the Hon'ble Delhi High Court was not considered. Thus the lone ITAT decision cited by the learned CIT-DR of the Mumbai Tribunal it has been noticed did not have the benefit of the decisions of the Hon'ble Delhi High Court and in fact relies on the order of the Special Bench of the ITAT and the position of law as was then available. Accordingly, in view of the preponderance of the consistent views of Coordinate Benches the appeals of the assessee are allowed. ”

8. Since the facts and circumstances in this year remain the same as in the past years, which has been considered by the Tribunal, we find no reason to distract from the earlier decision of the Tribunal dated 14.07.2017 (supra). Pertinently, it is also not the case of the Revenue that there is any change in the nature of the income being earned by the assessee from TCL than that considered by the Tribunal in its order dated 14.07.2017 (supra). Therefore, following the precedent in assessee's own case for Assessment Years 2000-01 to 2005-06, the stand of the assessee has to be approved.

9. So, however, before parting, we may make a mention of the discussion sought to be made by the DRP in the impugned order regarding the inapplicability of the ratio of the decision of the AAR in the case of ISRO Satellite Centre reported in 307 ITR 59 (AAR). In this context, we find that this aspect of the controversy has been expressly considered by our coordinate Bench while rendering its decision dated 14.07.2017 (supra). Therefore, we find no reason to uphold the stand of the Revenue in this year following the precedent in the assessee's own case. Therefore, so far as Ground of appeal nos. 2 & 3 are concerned, the same are allowed, as above.”

11. As the facts and the issue involved in the case before us remains the same as was there before the Tribunal in the preceding years, therefore, we respectfully follow the view therein taken, and conclude, that the amounts received by the assessee from TCL for providing Satellite Telecommunication Services is not to be held as royalty in its hands. The **Grounds of appeal Nos. 2 to 5** are allowed in terms of our aforesaid observations.

12. We shall now deal with the issue as to whether or not the assessee had a PE in India during the year under consideration. As observed by us hereinabove, the A.O/DRP had concluded that the Land Earth Station (LES) constituted a PE of the assessee in India. It has been the claim of the assessee before the lower authorities that as the LES was owned and operated by TCL and not by the assessee, therefore, on the said count it could not have been held to have constituted a PE of the assessee in India. Also, as is discernible from the orders of the lower authorities, the A.O/DRP had observed that the Liaison Office (LO) constituted a PE of the assessee in India. As observed by us hereinabove, it was the claim of the assessee that as the LO had not carried out any activities in India, it could therefore not be treated as the assessee's PE in India. The Id. A.R submitted that the factual position qua the issue as to whether the assessee had a PE in India on both of the aforesaid counts had been looked into by the Tribunal while disposing off the appeals of the assessee for the preceding years i.e A.Y. 2007-08 to A.Y. 2012-13, vide its order dated 12.12.2018. The Id. A.R taking us through the aforesaid order of the Tribunal in context of the issue under consideration submitted, that as the factual matrix during the year under consideration remained the same as was there before the Tribunal in the aforementioned preceding years, hence, the view therein taken by the Tribunal that the assessee did not have a PE in India would equally apply for adjudicating the said issue for the year under consideration.

13. Per contra, the Id. D.R relied on the orders of the lower authorities. However, the Id. D.R could not controvert the claim of the assessee's counsel that the issue herein involved was squarely covered by the orders passed by the Tribunal in the assessee's own case for the preceding years.

14. We find that the lower authorities had concluded that the assessee had a PE in India on two grounds, viz. (i) that the Liaison Office (LO) of the assessee constituted its PE in India; and (ii) that the Land Earth Stations (LES) constituted a PE of the assessee in India. We find that the factual position pertaining to the aforesaid two aspects on the basis of which a view had been taken by the lower authorities that the assessee had a PE in India remains the same as was there in the preceding years, and had been looked into by the Tribunal at length while disposing off the appeals of the assessee for the said respective years. In fact, a perusal of the order of the DRP reveals that the view taken by the A.O that the assessee had a PE

in India was endorsed by the DRP, for the reason, that its predecessor panel had while disposing off the assessee's objections for A.Y. 2014-15 upheld the AO's order. In the backdrop of the aforesaid facts, we are of the considered view that the basis and the facts therein involved for concluding that the assessee had a PE in India during the year under consideration had not witnessed any change as in comparison to the facts which were there in its case for the preceding years. On a perusal of the order of the Tribunal for A.Y. 2007-08 to A.Y. 2012-13, we find, that after exhaustive deliberations the Tribunal had concluded that the assessee did not had a PE in India, observing as under:

"10. So far as Ground of appeal no. 4 is concerned, the same deals with the grievance of the assessee against the income-tax authorities holding that it has a PE in India. In this context, the relevant facts are that the Assessing Officer noted that assessee owned Space Segment Monitoring System (SSMS), which was equipment installed/located at Arvi, Maharashtra. The Assessing Officer further notes that the Land Earth Station (LES) of VSNL/TCL is also located at this place and that the SSMS equipment plays a critical role in providing telecommunication services to the Land Earth Service Operator (LESO), which is VSNL. The Assessing Officer noted that the said equipment is installed and maintained by the assessee and that assessee also has a liaison office in India. The Assessing Officer notes that the activities of the liaison office cannot be *"said to be just a mere liaisoning work in India"*. The Assessing Officer further notes that the employees/staff of the liaison office provide various services to the assessee-company in connection with the contract with VSNL. Therefore, the Assessing Officer concluded that the location of SSMS equipment in India and the presence of the liaison office in India constituted a PE of the assessee in India and, therefore, the payment received by the assessee from VSNL was attributable to the assessee's PE in India. Thus, notwithstanding his stand that the receipts from VSNL were in the nature of Royalty, the Assessing Officer held that even going by Article 7 of the India-UK DTAA (by which such receipts are treated as business profits), because of the presence of a PE in India, income arising from receipts from VSNL was attributable to a 'business connection' in India. Therefore, he applied Rule 10 of the Income Tax Rules, 1962 and estimated the profit of the PE at 30% of the gross receipts. The aforesaid addition proposed by the Assessing Officer was objected to by the assessee before the DRP by raising various objections. The DRP, however, affirmed the ultimate conclusion of the Assessing Officer to the effect that assessee has a PE in India. In coming to such a decision, the DRP has confined its observation to the presence of the liaison office of the assessee in India and not given any finding on the aspect of location of SSMS equipment. As per the DRP, the activities of the liaison office could not be *"considered to be preparatory and ancillary, as the basic job of the office to act as a fixed place with respect to the final agreements being entered into by the clients like ISRO, VSNL with the assessee"*. For the said reason, the DRP affirmed the stand of the Assessing Officer that there existed a PE of the assessee in India.

11. Against the aforesaid, the learned representative for the assessee vehemently pointed out that since beginning and upto the Assessment Year 2006-07, there has been no finding by the income-tax authorities that either the liaison office or the SSMS equipment constituted a PE in India although the arrangement with VSNL/TCL

was the same as in the instant years. On the point of law, the learned representative for the assessee relied on the judgment of the Hon'ble Delhi High Court in the case of *DIT vs Mitsui & Co. Ltd.*, [2017] 84 taxmann.com 3 (Delhi) to point out that the onus was on the Revenue to show that any activity in the nature of business or trading was carried out in the liaison office. It was pointed out that the liaison office of the assessee has been in existence since it was initially approved by the RBI vide its permission dated 20.10.1999, a copy of which has been placed in the Paper Book at pages 39 to 42. It has been further pointed out that the approval granted by the RBI has been renewed from time to time and so far as the captioned period is concerned, the approval of the RBI vide order dated 10.10.2008 subsists. It is pointed out that the very fact that the RBI continues to accord approval for the liaison office shows that there is no activity of trading, commercial or industrial nature which is carried out so as to treat such liaison office as a PE.

12. So far as the reference made by the lower authorities to SSMS equipment is concerned, the learned representative for the assessee pointed out that in the past years also such equipment was existing, but no adverse view has been taken and, in any case, so far as the instant period is concerned, the assessee has foregone the use of such equipment for providing services. In this context, our attention has been drawn to page 64 of the Paper Book wherein a communication dated 28.04.2005 is placed which is addressed to VSNL whereby it is informed that the facility of SSMS equipment would not be used for providing services w.e.f. 17.06.2005. It has been pointed out that such change was on account of an operational requirement as assessee has launched its 4th generation satellite which was thereafter used to provide the services which were earlier being provided by the use of SSMS equipment.

13. It was, therefore, contended that it is wholly erroneous on the part of the lower authorities to hold that the liaison office and SSMS equipment constituted a PE of the assessee in India.

14. On the other hand, the Id. DR appearing for the Revenue defended the stand of the lower authorities by placing reliance on the respective orders. Further, insofar as the assessment years 2010-11 to 2012-13 is concerned, the Id. DR raised a further point based on the observation of the DRP. In the aforesaid three years, the Assessing Officer held the existence of a PE in India on the basis of the existence of the liaison office and location of SSMS equipment. On the other hand, the DRP in Assessment Years 2007-08 to 2009-10 concluded the existence of a PE on the basis of existence of liaison office whereas for Assessment Years 2010-11 to 2012-13, the DRP has based its decision on the existence of liaison office as well as the use of LES by the assessee for providing services. In this manner, the Id. DR has defended the stand of the lower authorities.

15. We have carefully considered the rival submissions. Factually speaking, it is seen that the assessee has a liaison office in India which has been initially permitted by the RBI under the relevant provisions of Foreign Exchange Regulation Act, 1973. In fact, initially the permission to set-up a liaison office was granted on 20.10.1999 for a period of three years, subject to certain terms and conditions. One of the specific condition was that the liaison office shall only undertake liaison activities, i.e. to act as a communication channel between the Head office and the parties in India. The condition imposed by the RBI specifically prohibited the liaison office from undertaking any other activity of trading, commercial or industrial nature. The liaison office was also, *inter-alia*, prohibited from entering into any business contract in its own name. It further prescribed that the liaison office will not charge any Commission

or fee for its liaisoning activity/services rendered by it. The standard terms and conditions also stated that the entire expense of the liaison office were to be met exclusively out of the funds received from abroad and that the liaison office could not borrow or lend any money from or to any person in India without prior approval, etc. The aforesaid permission has been further renewed and there is no dispute that for the period under consideration also the requisite approval of the RBI exists for the liaison office of the assessee. We are only highlighting the aforesaid features of the permission granted by the RBI to point out that the liaison office is prohibited from carrying out any business or trading activity. At the time of hearing, it was also stated by the learned representative for the assessee at Bar that till now there is no infringement or any other adverse view taken by the RBI *qua* the activities which are being carried out by the liaison office in India. This singular aspect is quite pertinent to establish that if the Assessing Officer is to hold to the contrary, i.e. to say that the liaison office was undertaking activities in the nature of business or commerce, then, the onus was on him to establish so. Another notable feature is that the liaison office of the assessee has been in existence since 1999 and, even in the past assessment years when the Assessing Officer disagreed with the assessee on the nature of the receipts from VSNL/TCL, there was no adverse conclusion with regard to the nature of activities being carried out by the liaison office. The Hon'ble Delhi High Court in the case of *Mitsui & Co. Ltd. (supra)* noted that in a case where assessee was found adhering to the conditions imposed by the RBI for running of a liaison office, it increases the burden of the Revenue to show that notwithstanding the subsisting RBI permission, the liaison office can be construed as a PE in India. In our view, the factual matrix in the instant case clearly attracts the legal position enunciated by the Hon'ble Delhi High Court in the case of *Mitsui & Co. Ltd. (supra)* and, therefore, we proceed further to examine as to whether the Revenue has discharged its burden on this aspect in the present case. In this context, we have perused the discussion made by the Assessing Officer, wherein he has concluded the existence of a PE in para 11.1 of his order based on the existence of liaison office and the location of SSMS equipment owned by the assessee. We find that apart from making bald assertions that the activity of the liaison office cannot be "*mere liaisoning*", no other specific point has been made out by the Assessing Officer. The Assessing Officer also notes that the liaison office "*is performing functions which are much more than liaisoning nature*", so however, we do not find even an iota of evidence referred to by the Assessing Officer in this regard. In fact, in the course of hearing, a question was put across to the parties as to whether during the assessment proceedings this aspect was specifically shown to be caused to the assessee or not? The learned representative for the assessee submitted that after receipt of the draft assessment order, assessee had raised objections before the DRP in the following manner :-

"4.1 The Assessee has a SSMS located in India at VSNL's Land Earth Station ('LES') at Arvi. The purpose of the SSMS is to provide a degree of surveillance capability to the Inmarsat Network Operations Centre in the UK whereby the Assessee can monitor the transmitted power levels of individual channels (both signalling and voice carriers) to and from satellites in the Indian Ocean region and the frequency deviations. SSMS is not a critical component to the services rendered by the Assessee and even without SSMS, these services can be continued to be rendered. The cost of this equipment is approximately USD 150,000. This investment is insignificant when compared with the total cost of the Assessee's assets worldwide (including satellites) which is USD 2,230,839,000 as per the audited accounts for the year 1998. Thus, SSMS is not contributing to the revenues and hence, no part of the amounts receivable is attributable to SSMS.

4.2 The Assessee has a LO in India, which has been set-up with the approval of the Reserve Bank of India ('RBI'). All the activities of the LO are in accordance with the

RBI's approval. The LO undertakes liaison and coordination activities on behalf of the Assessee. There are no income generating activities carried out by the LO in India. The LO was engaged in coordinating a pilot project to assist VSNL and Department of Telecommunications to provide satellite based village public telephone in rural areas. Presently, the LO interacts with the Indian Government to get information and coordinates with the regulatory authorities in connection with the use of Inmarsat's services in India. The LO's activities do not play any role in the rendering of telecommunication services to VSNL.

4.3 Based on the above, Inmarsat submits that the presence of the SSMS and the LO in India does not constitute a PE of Inmarsat in India.”

16. The aforesaid fact-situation asserted by the assessee has not been countered by the DRP in any manner. In fact, the learned representative for the assessee has pointed out that with regard to the discontinuation of the use of SSMS equipment, communication to VSNL dated 28.04.2005 (copy placed at page 64 of the Paper Book) was also furnished, which clearly establishes that the same was not used in rendering services during the period under consideration.

17. Thus, we find that the assertions of the assessee *qua* the activity of the assessee and liaison office as well as the significance of the use of SSMS equipment located in India *qua* the services provided to VSNL clearly establishes that the same could not be construed to constitute a PE in India. The DRP, in our view, has also not referred to any specific instances in the functioning of the liaison office to point out that it was rendering services which could be construed as being a PE in India. Considering the orders of the authorities below as well as the material led by the assessee before the lower authorities, in the present case, it is safe to deduce that the Revenue has failed to discharge its burden of proving that the activities of the liaison office were such as to construe it to be a PE in India.

18. On the aspect of use of SSMS equipment also, we find that there is no reason to hold that it could be construed as a PE in India. So far as the reference to the LES made by the DRP in Assessment Years 2010-11 to 2012- 13 is concerned, the same, in our view, is quite misplaced. The DRP itself notes that the LES is owned by the LESO, i.e. VSNL. It is also a feature of assessee's agreement for providing services that it is the LESO, i.e. VSNL, who has the full right and responsibility with regard to the LES. In any case, it is undeniable that the LES is not owned by the assessee, an aspect which the DRP itself has noted in its order. Therefore, considering the matter in its entirety, we find it erroneous on the part of the Assessing Officer to hold that there exists a PE of the assessee in India. Thus, assessee succeeds on this aspect also.

19. Insofar as Ground of appeal no. 5 is concerned, the same relates to income computed by the Assessing Officer, which can be attributable to the PE of the assessee in India. Since we have upheld the primary stand of the assessee that there does not exist any PE of the assessee in India, the dispute in Ground of appeal no. 5 is rendered academic and is dismissed as infructuous.”

15. As the facts in the backdrop of which the A.O/DRP had in the aforesaid preceding years concluded that the LO and LES were to be treated as the PE on the assessee in India, remains the same, as are involved in the appeal of the assessee for the year under consideration, we therefore respectfully follow the aforesaid order of the Tribunal. Accordingly, in the backdrop of our aforesaid observations, we herein

conclude that the assessee did not have any PE in India during the year under consideration. The **Grounds of appeal Nos. 6 & 7** are allowed in terms of our aforesaid observations.

16. We shall now deal with the contention of the assessee that the AO had erred in considering its profitability on an adhoc basis at 30% of its gross receipts from TCL by applying Rule 10 of the Income Tax Rules, 1962. We find that the aforesaid issue pertains to the computing of the income of the assessee attributable to its PE in India. Since we have upheld the primary stand of the assessee that there does not exist any PE of the assessee in India, thus, the dispute in **Ground of appeal No. 8** having been rendered as merely academic is dismissed as infructuos.

17. The assessee has assailed the assessment order on the ground that the A.O had erred in levying surcharge, secondary education cess and higher secondary education cess over and above the tax computed at the rate prescribed under the India-U.K. tax treaty on the receipts of the assessee while calculating its income tax liability for the year under consideration. We find that the aforesaid issue is squarely covered by the order of the ITAT, Kolkata in the case of DDIT Vs. The BOC Group Ltd. [ITA No. 571/Kol/2013, dated 30.11.2015]. In its aforesaid order, it was observed by the Tribunal that Article 2 of the India-U.K. tax treaty provides that income tax includes any surcharge thereon, and that the convention shall also apply to any identical or substantially similar taxes which are imposed by either contracting state after the date of signing of the convention in addition to or in place of the taxes of the contracting state referred to in paragraph 1 of the article. The Tribunal had concluded that when the tax rate is determined under the tax treaty, then the tax rate prescribed thereon shall have to be followed strictly without any additional taxes thereon in the form of surcharge or education cess. The Tribunal while concluding as hereinabove had relied on a similar view taken by the coordinate benches viz. (i) DIC Asia Pacific Pte. Ltd. Vs. ADIT, (Intl. Taxation) (2012) 52 SOT 447 (Kol); (ii) Sunil V. Motiani Vs. ITO (Intl. Taxation) (2013) 33 taxman.com 252; (iii) Parke Davis & Co. LLC Vs. ACIT (2014) 41 taxman.com 193 (Mum); and (iv) ITO (Intl. Taxation) Vs. M/s M. Far Hotels Ltd. [ITA Nos. 430-435/Coch/2011, dated 05.04.2013] (Cochin). Accordingly, following the view taken by the coordinate benches of the Tribunal in the aforesaid cases, we herein conclude that the tax computed at the rate prescribed under the India-U.K. tax treaty is not be subjected to any additional taxes in the form

of surcharge or education cess. We thus set aside the view taken by the lower authorities and direct the A.O to recompute the tax liability of the assessee in terms of our aforesaid observations. The **Ground of appeal No. 9** is allowed.

18. The assessee has assailed the order of the A.O, on the ground, that he has erred in granting TDS credit of Rs.58,45,615/- as against the assessee's claim of credit of Rs.58,98,497/-. As the adjudication of the said issue would require verification of the records, we therefore, restore the matter to the file of the A.O to verify the factual position. In case there is a short credit of TDS allowed to the assessee, then the credit for the balance amount shall be allowed by the A.O, as per law. The **Ground of appeal No. 10** is allowed for statistical purpose.

19. The assessee has assailed the levy of interest under Sec. 234B of Rs.1,47,546/-. As the assessee has not raised any submission as regards the aforesaid issue, the same is therefore dismissed as not pressed. The **Ground of appeal No. 11** is dismissed.

20. The assessee has assailed the initiation of penalty proceedings under Sec.271(1)(c) of the Act. As the aforesaid ground raised by the assessee is premature, the same is therefore dismissed. The **Ground of appeal No. 12** is dismissed.

21. The appeal of the assessee is allowed in terms of our aforesaid observations.

Order pronounced under rule 34(4) of the Income Tax (Appellate Tribunal) Rules, 1963, by placing the details on the notice board.

Sd/-
Pramod Kumar
(VICE PRESIDENT)

Sd/-
Ravish Sood
(JUDICIAL MEMBER)

Mumbai, Date: 23.10.2020
R. Kumar

Copy of the Order forwarded to :

1. Assessee
2. Respondent
3. The concerned CIT(A)
4. The concerned CIT
5. DR "G" Bench, ITAT, Mumbai
6. Guard File

BY ORDER,

Dy./Asst. Registrar
ITAT, Mumbai