IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'C' BENCH, NEW DELHI (THROUGH VIDEO CONFERENCING]

BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND SHRI ANUBHAV SHARMA, JUDICIAL MEMBER

ITA No. 9590/DEL/2019 [A.Y 2015-16)

M/s B.T. Global Communications India Pvt. Ltd 11th Floor, Nehru Place New Delhi	Vs.	The Dy. C.I.T Circle – 4(2) New Delhi

PAN: AAACG 1534 A

ITA No. 9437/DEL/2019 [A.Y 2015-16)

The Dy C.I.T Circle – 4(2) New Delhi	Vs.	M/s B.T. Global Communications India Pvt. Ltd 11th Floor, Nehru Place, New Delhi New Delhi

PAN: AAACG 1534 A

(Applicant) (Respondent)

Assessee By : Shri Deepak Chopra, Adv
Shri Rohan Khare, Adv

Department By : Ms. Anupama Anand, CIT- DR

Date of Hearing : 15.03.2022

Date of Pronouncement : 23.03.2022

ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER:-

The above two captioned cross appeals by the assessee and the Revenue are preferred against the order of the ld. CIT(A) - 2, New Delhi dated 27.09.2019 pertaining to Assessment Year 2015-16. Both these appeals were heard together and are disposed of by this common order for the sake of convenience and brevity.

2. We will first address to the appeal of the assessee in ITA No. 9590/DEL/2019. The grievances of the assessee read as under:

> "The Appellant respectfully submits that on the facts and circumstances of the case and in law, while passing the order under section 250(6) of the Act (hereinafter referred to as 'impugned order'), the Hon'ble Commissioner of Income-tax (Appeals)-2, New Delhi [hereinafter referred to as 'the Hon'ble CIT (A)'] has erred as follows:
>
> 1. That on the facts and circumstances of the case and in law, the Hon'ble CIT(A) has erred in upholding the position adopted by the Learned Assessing Officer ('Learned AO') that the network connectivity charges are in

the nature of "Royalty" or "Fee for technical services" under the provisions of the Act and the India-United Kingdom Double Taxation Avoidance Agreement ('India-UK DTAA').

2. That on the facts and circumstances of the case and in law, the Hon'ble C1T(A) has erred in upholding the disallowance of network connectivity charges under section 40(a)(i) of the Act, in the hands of the Appellant.

3. That on the facts and circumstances of the case and in law, the Hon'ble CIT(A) has erred in disregarding the Appellant's submission that the subject payments by the Appellant to BT Pic are in the nature of business income of BT Pic and therefore not taxable in India in absence of Permanent Establishment of BT Pic in India in accordance with Article 5 read with Article 7 of the India-UK DTAA.

That the above grounds of appeal are without prejudice to each other. That the Appellant reserves its right to add, alter, amend or withdraw any ground of appeal either before or at the time of hearing of this appeal.

3. The representatives of both the sides were heard at length, the case records carefully perused and with the assistance of the ld. Counsel, we have considered the documentary evidences brought on record in the form of Paper Book in light of Rule 18(6) of ITAT Rules.

4. Briefly stated, the facts of the case are that the assessee is a wholly owned subsidiary of BT Telecom India Private Limited and is engaged in providing network connectivity services. The assessee has obtained International Long Distance, National Long Distance and Internet Service Provider license from the Department of Telecommunication.

5. During the course of scrutiny assessment proceedings and on perusal of Form No. 3CEB, the Assessing Officer found that the assessee has paid/credited Rs. 383,87,94,524/- as network connectivity services to British Telecommunications Pic (BT). This amount has been claimed as infrastructure cost. The Assessing Officer found that the assessee has entered into an agreement between BT Pic and BT Ltd. for provision of telecommunication services. The Assessing Officer was of the opinion that the assessee is providing telecommunication services in India by using the telecommunication/ networking skill of the British Company BT PLC.

6. The assessee was asked to furnish details of all the payments made to non-residents, alongwith the reasons/nature of transactions for such payments and was also asked to furnish the details of

withholding taxes made on such payments, and if no TDS is made, then the reasons to be provided.

7. The assessee filed detailed reply dated 10.12.2018 wherein it has been submitted that tax has not been withheld on payment for network connectivity services to BT. It was explained that BT does not have a PE in India, the payment is not in the nature of royalty, payment is not for use of any process and payments are not fee for technical services as technical knowledge etc was not made available.

8. It was further explained that the agreement between BT and the assessee is an agreement for provision of services and not for the use or right to use of any equipment /process or for use of any other similar property.

9. The contention of the assessee did not find any favour with the Assessing Officer who was of the firm belief that the provisions of Telegraph Laws (Amendment Act, 1961), wherein telegraph has been defined in section 3(1) of the said Act, squarely apply and came to the conclusion that it has not been using any apparatus provided by BTPLC is also not acceptable.

10. Referring to the amendment brought in the provisions of section 195 by introduction of Explanation 2, the Assessing Officer was of the opinion that withholding of tax should be done irrespective of the fact that whether the non-resident has any business connections/presence in India or not.

11. Referring to Article 13(3) of the India UK DTAA, the Assessing Officer was of the opinion that the payment for network connectivity services given to BT PLC is royalty.

12. Placing strong reliance on the judgment of the Hon'ble Madras High Court in the case of Verizon Communications, Singapore Pte Ltd 361 ITR 575, the Assessing Officer came to the conclusion that the payment given/credited by the assessee to BT Pic for network connectivity services is to be treated as payment of royalty within the meaning of clause (iii) of Explanation 2 to section 9(1)(vi) of the Act and, therefore, the assessee was liable for withholding of tax u/s 195 of the Act and since the assessee has failed to do so, disallowance of payment u/s 40(a)(ia) of the Act was made to the tune of Rs. 3,83,8794,524/-, which was upheld by the ld. CIT(A).

13. A perusal of the TSA Agreement shows that the assessee had installed its own equipment in India for providing necessary bandwidth services to its Indian customers. We find that it is only to achieve the foreign leg of the connectivity that the telecom services of the non-resident service provider were procured. We do not find any merit in this contention of the ld. DR that the assessee does not have any presence/equipment in India. Article 3.2(b) of the TSA reads as under:

> "With respect to all customers, OpCo undertakes to develop, operate and maintain at its cost such telecommunications network inside the territory as is reasonably required to provide tele communication services."

14. TSA clearly mentions that the assessee is required to develop, operate and maintain all telecommunication network within India. We find that there is no equipment of non-resident service provider being in India. We are of the considered view that there is a difference between an agreement that gives "Right to use equipment" and an agreement which involves provisions of services through use of equipment by service provider.

15. Our view is fortified by the decision of the Hon'ble Jurisdiction High Court of Delhi in the case of DIT Vs. New Skies Satellite BV 383 ITR 154.

16. The ld. DR has also placed reliance on the judgment of the Hon'ble Madras High Court in the case of Verizon Communications [supra] and at the behest of the ld. DR, the assessee has furnished an undertaking on its letter head that apart from TSA between the assessee and BT, there was no other agreement, technical or otherwise for provision of these services.

17. The contention of the ld. DR that the decision of the Hon'ble High Court of Delhi in the case of New Skies Satellite [supra] involved the DTAA between India and Netherlands and the definition of royalty is between India and UK DTAA are differently worded does not have any merit, in as much as the decision of the Hon'ble Delhi High Court in case of New Skies Satellite [supra] is a consolidated decision which covers two non-resident parties – one – tax resident of Netherlands and the other – tax resident of Thailand and, therefore, the decision deals with the definition of royalty provided for in DTAA between India and Netherlands and India Thailand and definition of Royalty as per India

Thailand DTAA is same as definition in India UK DTAA. Therefore, it cannot be said that the decision of the Hon'ble High Court of Delhi in the case of New Skies [supra] is not applicable on the facts of the case in hand.

18. We further find that the Hon'ble High Court of Delhi in the case of New Skies Satellite [supra] has categorically held that the amendments made in domestic law are not effective retrospectively. The definition of the term 'Royalty under the DTAA which has now been affirmed by the Hon'ble Supreme Court in the case of Engineering Analysis Center of Excellence Pvt Ltd. [2021] 432 ITR 471 wherein it has been held by the Hon'ble Supreme Court that the amendments in the domestic law cannot be read into treaties, unless DTAAs are amended by way of bilateral negotiations.

19. Next proposition made by the ld. DR is that the case in hand is a case of equipment royalty.

20. For this, we would like to refer to the terms of Article 13 of the India –UK DTAA wherein royalty has been defined as under:

> "13(3) 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 cinematography films or work on films, 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; and payments of any kind received as consideration for the use of, or the right to use, any industrial, commercial or scientific equipment, other than income derived by an enterprise of a Contracting State from the operation of ships or aircraft in international traffic."

21. For this contention of the ld. DR, we have to see whether the assessee had any right to use equipment for it to be encompassed under the definition of Royalty under Article 13 [supra]. We have elsewhere referred to clause 3.2(b) of the TSA which provides that equipment in India are owned by the assessee only and BT does not own any equipment in India.

22. We further find that in Article 1A of the TSA, no such right has been provided and all entities are directed to maintain their own equipment. The relevant portion of Article 1A of the TSA reads as under:

"Telecommunications services means any transmission, emission, reception of signs, signals, writing, images and sounds or intelligence of any nature by wire, radio, optical, satellite or any other electromagnetic system including but not limited to transmission, switching, applications, voice, internet protocol and data services. *These services will be provided* through the own*ership, management and/or operation of till network tiers* (local access, national and international network) and network based application data centres, second and third level service support/ network capacity planning and management of capacity inventory; network build, provide, assure and operate; management of cable and satellite investments, provision of specialist technical services to BT Group and third parties; *ownership and management of technical property and /facilities that support the provision of voice and/or data transmission and tiny other service which ore ancillary to the provision of such* telecom*mu*nication s*ervices* "

23. It can be seen from the above that all the parties to the agreement are owners who manage and opearte their own equipment for provison of telecommunication services.

24. It would be pertinet to understand the service module by which it can be seen that the aragment between the assessee and BT is in the nature of service contract pursuant to which BT is responsible for

provision of network connectivity service for transmision of telecommunication services outside India in consdieration for appropriate service charges.

25. A closer look at the business module shows that network of BT including the related equipment is used by BT. Thus, for provision of network connectivity services of the assessee in relation to its subscribers and no access/control whatsoever in relation to such network, any equipment is provided to the assessee.

26. If we consider the business module in a practical aspect, then we would know that there may be multiple routes by way of any given transmission of telecom traffic can reach the desired destination and the assessee has no knowledge of the equipment being used for provison of the service.

27. For example, if a person is making an international call from India to a resident of UK, then the service provider of that person does not know through which service provider call reaches the desired destination, as service provider in India has no knowledge of the equipment being used for provision of the service.

28. Consdiering the facts of the case in hand, the assessee as a service provider is only concerned with the transfer of telecommunication traffic through availing service from BT without having any knowldege or any manner of acess in respect of the equipment being used for these services. Thus, it can be safelyy concluded that the assessee does not obtain/receive any right to use the networking of BT.

29. The entire basis of the findings of the Assessing Officer/ld. CIT(A)/ld. DR is on the fact that the payment made by the assessee is a royalty for use of equipment of BT ignoring the crucial fact that the said payment is to receive international leg of connectivity service and not right to use any equipment of BT.

30. Once again, we have to refer to the decision of the Hon'ble Delhi High Court in the case of New Skies Satellite [supra] wherein the Hon'ble High Court has relied upon the decision given by it in the case of Asia Satellite 332 ITR 340 wherein the Hon'ble High Court has held that where the customer does not use equipment or process of equipment itself payment cannot be termed as royalty for use of a process or equipment.

31. Basis the decision of the Hon'ble Madras High Court in the case of Verizon Communicaitons [supra], the Assessing Officer/ld. CIT(A) have framed respective orders.

32. We have carefully perused the decision of the Hon'ble Madras High Court in the csae of Verizon Communications [supra]. We are of the consdiered view that the facts of Verizon Communicaiton [supra] are totally different in terms of who was provididng service and the manner in which was being provided in India.

33. In fact, in the case of Verizon Communicaiton [supra] had itself provided some customers premise, equipment for use to its customers in India under the terms of its contract with Indian customers whereas the facts of the case in hand are devoid of such things. In fact, there is no finding by the Assessing Officer/ld. CIT(A) that any part of BT equipment is located in India or offered by BT for use/operation by the assessee in India.

34. The co-ordinate bench in the case of Bharti Airtel 46 CCH 304 has consdiered the issue on identical facts and has distinguished the decision of the Hon'ble Madras High Court in the case of Verizon Communications [supra]. The relevant findings read as under:

> *"18. Further, it would be imperative to mention that the decision of the Hon'ble Madras High Court was distinguished by the co-ordinate bench in the decision of Bharti Airtel Limited v ITO, (2016) 46 CCH 304 (Delhi-Trib) wherein this Hon'blc Tribunal whilst dealing with the issue of Inter-Connect Usage charges (similar to the charges being paid by the Assessee in the case at hand) and whilst correctly following the decisions of the Hon'ble Delhi High Court in New Skies (Supra) held as under:-*
>
> "64. Re*cently, the tlon 'hie* Delhi Hig*h Court* in the case <j *PIT vs. New Skies Salellile* BT <X- *Ors. hi IT A No. 473/2012* **<ft** *Ors. Vide iudement dated 8.2.2016 has held us* under:-
>
> "39. It is now essential to decide the second question i.e. whether the assessees in the present case will obtain any relief from the provisions of the DTAAs. Under Article 12 of the Double Tax Avoidance Agreements, the general rule states that whereas the State of Residence shall have the primary right to tux royalties, the Source State shall concurrently have the right to tax the income, to the extent of 15% of the total income. Before the amendment brought about by the Finance Act of

2012, the definition of royalty under the Act and the DTAAs were treated as pari materia. The definitions are reproduced below:

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. "

Article 12(4), Indo Netherlands Double Tax Avoidance Agreement ITA ŧ473/2012, 474/2012, 500/2012 & 2.44/2014 Page 31

"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. "

Section 9(l)(vi), Explanation 2, Income Tax Act, 1961 "(Hi) the use of any patent, invention, model, design, secret formula or process or trade mark or similar property"

40. In Asia Satellite Telecommunication the Court, while interpreting the definition of royalty under the Act, placed reliance on the definition in the OECD Model Convention. Similar cases, before the Tax Tribunals through the nation, even while disagreeing on the ultimate import of the definition of the word royalty in the context of data transmission services, systematically and without exception, have treated the two definitions as pari materia. This Court cannot take a different view, nor is inclined to disagree with this approach for it is imperative that definitions that are similarly worded be interpreted similarly in order to avoid incongruity between the two. This is, of course, unless law mandates that they be treated differently. The Finance Act of 2012 has now, as observed earlier, introduced Explanations 4, 5, and 6 to the Section 9(l)(vi). The question is therefore, whether in an attempt to interpret the two definitions uniformly, i.e. the domestic definition and the treaty definition, the amendments will have to be read into the treaty as well. In essence, will the interpretation given to the DTAAs fluctuate with successive Finance Act amendments, whether retrospective or prospective? The Revenue argues that it must, while the Assessees argue to the contrary. This Court is inclined to uphold the contention of the latter.

41. This Court is of the view that no amendment to the Act, whether retrospective or prospective, can be read in a manner so as to extend in operation to the terms of an international treaty. In other words, a clariftcatory or declaratory

amendment, much less one which may seek to overcome cm unv elcome judicial interpretation of law, cannot be allowed to have the same retroactive effect :n an international instrument effected between two sovereign states prior to such amendment In the context of international law, while not every attempt to subvert the obligations under the treaty is a breach, il is nevertheless a failure to give effect to the intended trajectory of the treaty. Employing interpretive amendments in domestic law as a means to imply contoured effects in the enforcement of treaties is one such attempt, which falls just short of a breach, but is nevertheless, in the opinion of this Court, indefensible.

64.1 After considering the Vienna Convention on the Law of Treaties, 1969 (VCLT) and the judgments of the Hon 'ble Supreme Court of Canada and other precedents, the Hon ble High Court further has held as under

"60. Consequently, since we have held that the Finance Act, 2012 will not affect Article 12 of the DTAAs, it would follow that the first determinative interpretation given to the word "royalty" in Asia Satellite, when the definitions were in fact pari materia (in the absence of any contouring explanations), will continue to hold the field for the purpose of assessment years preceding the Finance Act, 2012 and in all cases which involve a Double Tax Avoidance Agreement, unless the said DTAAs are amended jointly by both parties to incorporate income from data transmission services as partaking of the nature of royalty, or amend the definition in a manner so supra note I IIA 473/2012,

> 474/2012, 500/2012 &. 244/2014 Page 50 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. "
>
> 65. Thus, respectfully following the jurisdictional High Court decision as well as the judgments of the other Courts, we agree with the submission of the Ld. Counsel for the assessee that the amendments to the Finance Acts cannot be read into the DTAA's.

35. As mentioned elsewhere, in the case in hand, no equipment is given by FTO to the assessee. The assessee merely delivers the calls using its own network through international connection with FTO which picks up the calls and furhter transmits at the desired destination by using its own network.

36. Considering the facts in totality, we are of the consdiered opinion that the payment made for connectivity services are not taxable as royalty in terms of Article 13 of the India –UK DTAA. No doubt, that service is being provided with the help of scientific equipment and technology.

37. However, that by way itself fcould not qualify the payment as royalty. We accordingly, direct the Assessing Officer to delete the impugned addition.

38. In the result, the appeal of the assessee is allowed.

39. The revenue has raised the following grounds of appeal:

> "1. On the facts and circumstances of the case, whether the Id. CIT(A) was correct in restricting the disallowance u/s 40(a)(ia) of the IT Act, 1961 to the amount 'payable' on the basis of decision of Hon'ble Supreme Court in the case of Victor Shipping Services Pvt. Ltd. and ignoring the fact that the same has been overruled by the Hon'ble Apex Court in the case of M/s Palam Gas Service vs CIT.
>
> 2. On the facts and circumstances of the cas^, whether the Id. CIT(A) was correct in allowing the deduction U/s 80IA@30% of eligible profits, ignoring the fact that the matter is pending for adjudication before the Hon'ble Delhi High Court in AY 2010-11.
>
> 3. On the facts and circumstances of the case, whether the Id. CIT(A) was correct in allowing the appeal of the assessee on the ground of disallowance of variable license fee, ignoring the

fact that the Department has filed SLPs in the cases of CIT Vs. Bharti Hexacom Limited (2013) 40 taxmann. Com 40(Delhi) and Vodafone Mobile Services Limited Vs Delhi High Court [ITA No 730 of 2016] on the same issue.

4. The appellant craves leave for reserving the right to amend, modify, alter, add or forego any ground(s) of appeal at any time before or during the hearing of this appeal."

40. Since we have allowed the appeal of the assessee in ITA No. 9590/DEL/2019, Ground No. 1 of Revenue's appeal becomes otiose.

41. Ground No. 2 relates to the deduction u/s 80IA of the Act @ 30% of eligible profit.

42. A perusal of the ground itself shows that the Revenue is in appeal because it has taken the matter before the Hon'ble High Court of Delhi in Assessment Year 2010-11.

43. In our considered view, unless the operation of the decision of the co-ordinate bench is stayed by the Hon'ble High Court, the same needs to be followed. We find that in ITA NO. 5354/MUM/2012 order dated 12.09.2018, the co-ordinate bench has held as under:

> "15. In the backdrop of our aforesaid observations we herein conclude that as the assessee had opted A.Y 2007-08 as the initial assessment year for claim of deduction under Sec. 80IA(2), therefore, it would be entitled for 100% deduction from A.Y 2007-08 to A.Y 2011-12 and thereafter 30% from A.Y 2012-13 to A.Y 2016-17, subject to satisfaction of all other conditions."

44. Respectfully following the findings of the co-ordinate bench [supra] Ground No. 2 is dismissed.

45. In so far as Ground No. 3 is concerned, the same has been decided by this Tribunal in ITA No. 7576/DEL/2018 order dated 25.11.2021 in Assessment Year 2014-15. The relevant findings read as under:

> "8. We have heard the rival submissions and perused the materials available on record. The issue in the present ground is with respect to the disallowance of license fee paid by the assessee. It is an undisputed fact that agreement pursuant to which the impugned license fee has been paid was entered by the assessee in the year 2006 and assessee has been paying the

license fee and in the past the payment of license fee has been accepted by Revenue as no addition by disallowing the same has been made. The addition has been made only in the year under consideration for the reason that Department has filed SLP in the case of Bharti Hexacom Ltd. (supra) & Vodafone Mobile Services Ltd. (supra). Hon'ble Bombay High Court in the case of CIT vs. Forest Development of Maharashtra Ltd. (2017) 84 Taxmann.com 294 (Bom) has observed that even if the principle of res judicata does not apply in tax matters yet consistency and certainty of law would require the State to take uniform position and not change their stand in the absence of change in facts and /or law. In the present case, admittedly there is no change in the facts and/or law. In such a situation, merely because on SLP has been filed by 6 Revenue in some other case on identical facts, cannot be justification for the disallowance of expenditure. We thus find no justification in the order of AO for disallowing the expenditure. We therefore direct the deletion of addition made by AO. Thus the ground of assessee is allowed

46. Respectfully following the same, Ground No 3 is dismissed.

47. In the result, the appeal of the assessee in ITA No. 9590/DEL/2019 is allowed and that of the Revenue in ITA No. 9437/DEL/2019 is dismissed.

The order is pronounced in the open court on 23.03.2022.

Sd/-	**Sd/-**
[ANUBHAV SHARMA] **JUDICIAL MEMBER**	**[N.K. BILLAIYA]** **ACCOUNTANT MEMBER**

Dated: 23rd March, 2022.

VL/

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr.PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	