

**IN THE INCOME TAX APPELLATE TRIBUNAL  
“I” BENCH, MUMBAI**

**BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER &  
SHRI AMARJIT SINGH, ACCOUNTANT MEMBER**

**ITA Nos.1065,1066, 1069, 1070, 1071 & 1073/Mum/2021  
(A.Ys. 2016-17 & 2020-21)**

|                                                                                                                         |     |                                                                                                                                              |
|-------------------------------------------------------------------------------------------------------------------------|-----|----------------------------------------------------------------------------------------------------------------------------------------------|
| ACIT (IT)-4(3)(1)<br>Room No. 1613, 16 <sup>th</sup><br>Floor, Air India Building,<br>Nariman Point,<br>Mumbai – 400021 | Vs. | M/s Viacom 18 Media<br>Private Limited, Zion<br>Bizworld, Subhash Road-<br>A, Near Garware Office,<br>Ville Parle (East),<br>Mumbai - 400057 |
| स्थायी लेखा सं./जीआइआर सं./PAN/GIR No: AAACM9146E                                                                       |     |                                                                                                                                              |
| Revenu                                                                                                                  | ..  | Assessee                                                                                                                                     |

|               |               |
|---------------|---------------|
| Assessee by : | Nimesh Vora   |
| Revenue by :  | Milind Chavan |

|                       |            |
|-----------------------|------------|
| Date of Hearing       | 11.05.2022 |
| Date of Pronouncement | 17.05.2022 |

**आदेश / O R D E R**

**PER BENCH:**

These appeals by the revenue directed against the separate order of even dates passed by the ld. Commissioner of Income Tax (Appeals)-58, Mumbai [in short 'ld. CIT(A)] for A.Ys. 2016-17 & 2020-21, arising from the order of A.O u/s 195(2) of the Income Tax Act, directing the assessee to withhold tax on payment to non-resident companies. Identical grounds have been raised in same set of facts and circumstances,

therefore, we have heard these appeals together and disposed off by way of this consolidated order for the sake of convenience.

2. In these appeals, identical grounds have been raised, therefore, for brevity the grounds of appeal in ITA No. 1069/Mum/2021 for A.Y. 2016-17 are reproduced as under:

- “1. *Whether on the facts and circumstances of the case and in law, the CIT(A) has erred in holding that the assessee was not liable to deduct tax at source u/s 195 of the Act on payments made to Intelsat Corporation, USA/IGSM, UK/MEASAT, Malaysia for transponder charges on the ground that payment did not constitute royalty u/s 9(1)(vi) of the Act or under the relevant DTAA?*
2. *Whether on the facts and circumstances of the case and in law, the CIT(A) has erred in not taking into account that the payments made by the assessee to Intelsat for transponder charges are specifically covered by Explanation 6 to section 9(1)(vi) as being included in the expression 'process' and hence fall under definition of royalty as per Explanation 2 to section 9(1)(vi) of the Act?*
3. *Whether on the facts and circumstances of the case and in law, the CIT(A) has erred in not taking into account that Explanation 6 to section 9(1)(vi) of the Act was inserted by the Legislature by way of Finance Act, 2012 as a declaratory and clarificatory amendment with retrospective effect from the day the source rule on royalty came into effect to specify the intent of the law as it was always meant and understood?*
4. *Whether on the facts and circumstances of the case and in law, the CIT(A) has erred in not taking into account that the term 'process' is not defined in the relevant DTAA and hence its meaning has to be derived from the domestic law of India?”*

3. The fact in brief is that the assessee company is incorporated in India and was engaged in broadcasting television channels from India which included marketing of advertising Air time of different channels and distribution of these channels etc. During the year under consideration the assessee has made payment of transponder services fees to following entities:

- “1. *Intelsat Corporation, USA (Intelsat)*
2. *Intelsat Global Sales and Marketing, UK (IGSM)*
3. *MEAST Satellite System, Malaysia (MEASAT)”*

The assessee has applied u/s 195(2) of the Act for nil withholding tax certificate in respect of payment made for transponder services to the abovementioned service providers. However, the A.O has rejected the application of the assessee stating that payment fall under the definition of royalty both under the provision of the Act as well as DTAA between India & relevant country, therefore, payment are liable for withholding of tax. The A.O vide order u/s 195 held that payment made to those parties are liable to tax in India as “royalty” as per the Double Taxation Avoidance Agreement (DTAA between and respective country) and accordingly the assessee is liable to withhold the tax at source. The A.O was of the view that a royalty as per treaty includes the payment made for any process and the term ‘process’ is not defined in the treaty and hence the same shall be imported from the Act. The A.O has also stated that as per new Explanation 6 (inserted by Finance Act, 2012) to Sec. 9(1)(v) of the Act, the term ‘process’ includes transmission by satellite (including uplinking amplification, conversion for downlinking of any signal). It is also mentioned that the new explanation also states that process (which includes transmission by satellite) shall be ‘royalty’ under the I.T. Act whether or not such ‘process’ is secret. Therefore, the A.O held that payment of transponder service fee to Intelsat by assessee is a process and it is in the nature of royalty income taxable in India in terms of the provision of Section 9(1)(vi) of the Act as well as treaty.

4. The assessee filed the appeal before the ld. CIT(A). The ld. CIT(A) has deleted the addition after following the decision of Hon’ble Bombay High Court in the case of Neo Sports Broadcast Pvt. Ltd. (ITA No. 1487 of 2018) and the decision of Hon’ble Delhi High Court in the case of Asia

Satellite Communication Company Ltd. (2011) 332 ITR 340 & Skies Satellite BV (2016) 382 ITR 114, the relevant part of decision of CIT(A) is reproduced as under:

*“The assessee is engaged in the business of marketing advertising air time of different television channels, distribution of these channels etc.*

*The assessee has made payment for transponder service fees paid to three entities namely:*

- 1. Intelsat Corporation, USA (Intelsat)*
- 2. Intelsat Global Sales and Marketing, UK (IGSM)*
- 3. MEAST Satellite System, Malaysia (MEASAT)*

*The payment to the above three recipients is involved in a number of cases, therefore the same is divided together.*

*The assessee applied for an order u/s 195 (2) for nil withholding tax certificate for payment of transponder service fees to the above service providers.*

*The Assessing Officer rejected the assessee's application observing as under:*

*“The submission of the applicant have been perused. The Finance Act 2012 has inserted a new explanation to section 9(1)(vi) which defines the term 'royalty'. As per the new Explanation 6, the term 'process', as referred to the definition of 'royalty' under the IT Act, includes transmission by satellite (Including up-linking, amplification, conversion for down-linking of any signal). The new explanation also states that 'process' (which includes transmission by satellite) shall be 'royalty' under the IT Act whether or not such process is secret. In light of the said explanation, it is held that payment of transponder service fees to Intelsat by Applicant is a 'process' and thus it is in the nature of royalty income taxable in India in terms of the provisions of Section 9(1)(vi) of the IT Act as well as treaty.*

*The definition of Royalties as per Article 12 of the India - USA Tax Treaty includes the payment made for use of any 'process'. The terms 'process' is not defined in the India-USA Tax Treaty. Therefore, the definition of the term process has to be imposed from the Act. Thus, the payment made for transmission by satellite is a royalty even under the tax treaty.*

*The reference to decision of the Hon'ble Delhi High Court made by the applicant has not been accepted by the department and the SLP has been preferred in this case. Also, the orders passed earlier, in the case of the applicant treating the transponder services fee as 'royalty income' has been upheld by the Ld. CIT(A) and ITAT.”*

*Basically, the Assessing Officer held these payments as royalty on the basis of Honourable ITAT order and on the basis of explanation to section 9(1)(vi) of the IT Act.*

*Hon'ble ITAT in the case of Intelsat initially confirmed the finding of Assessing Officer however subsequently on the basis of Delhi High Court wherein the honourable High Court has held that the income of Intelsat is not taxable in India, held that these payments are not subject to TDS.*

*In the case of IGSM and MEASAT Honourable ITAT held that TDS is deductible in India. Before me, the assessee submitted that subsequent to the above honourable jurisdictional High Court i.e. Bombay High Court in the case of Neo Sports Broadcast Pvt. Ltd. (ITA no. 1487 of 2018) held that transponder charges paid to non-resident is not taxable as royalty. While doing so the honourable Bombay High Court has relied on Delhi High Court order in the case of Asia Satellite Communication Company Ltd. (2011) 332 ITR 340 and Skies Satellites BV (2016) 382 ITR 114.*

*It was also submitted that the facts of assessee's case are similar to the above case and in the view of binding decision of jurisdictional High Court transponder charges cannot be held as royalty and, therefore the assessee cannot be asked to deduct IDS on the same.*

*Therefore, to decide the issue in the present case, we have to decide following two points:-*

*1) Whether the issue is covered by the decision of Bombay High Court in the case of Neo Sports.*

*2) Whether the honourable High Court has considered explanation to section 9(1)(vi) wherein the royalty is defined.*

*For ready references, the finding in the case of the Neo Sports is reproduced below;*

*“1. This Appeal is filed by the revenue to challenge the judgment of Income Tax Appellate Tribunal. Following questions are presented for our consideration;*

*(a) Whether, on the facts and in the circumstances of the case and in law, the Hon'ble ITAT erred in deleting the addition towards Satellite Space Fees/transponder charges relying on the decision of Hon'ble Delhi High Court in the case of Asia Satellite Telecommunication 238 CTR (Del) 233, without considering the amendment in section 9(1)(vi) w.r.e.f. 01.06.1976 [by Finance Act, 2012], wherein the intent of legislature in respect of 'royalty' has been clarified thereby deeming the said charges to be 'royalty' in nature?*

*(b) Whether, on the facts and in the circumstances of the case and in law, the Hon'ble ITA T erred in deleting the addition of Rs.5,44,17,143/after considering the ex-post facto agreement between the assessee and the Nimbus and not considering the main agreement dtd. 18.03.2006 between the assessee and the Nimbus?*

*2. In Question (a) the revenue contends that the Satellite Space Fees and transponder Charges paid by the assessee were in the nature of royalty payments. From the perusal of the impugned judgment of Income Tax Tribunal ('Tribunal' for short) we notice that the revenue's main thrust before the Tribunal was that the charges paid were capital*

*expenditure and not revenue expenditure. However, in this context, the Tribunal did observe fleetingly on the question of charges being royalty payments. We have therefore heard the learned Counsel for the parties on merits on this issue raised by the revenue.*

4. *We notice that an identical issue came up for consideration before Delhi High Court in case of Asia Satellite Telecommunications Co. Ltd. Vs. DIT, reported in (2011) 332 ITR 340. It was the case in which the assessee a non-resident was engaged in satellite communication, having control of satellites. The assessee would provide use of transponder facility on satellite to the television companies outside India, which in turn would be routed to the operators in India, who would pass them on to the customers. The question was whether the payments made to the non-resident were in the nature of royalty and therefore come within the scope of section 9(1) of the Income Tax Act, 1961 ('the Act' for short). The Court by a detailed judgment held that the payments were not in the nature of royalty charges. The Court made a distinction between transfer of rights in respect of property and transfer of rights in the property.*
5. *Later on similar issue once again came before Delhi High Court in the case of Directorate of Income tax Vs. New Skies Satellite BV, reported in (2016) 382 ITR 114. The Court followed the earlier decision in case of Asia Satellite Telecommunication (supra) and dismissed the revenue's Appeal. It was held that the explanations added below section 9(1) of the Act were not merely clarificatory in nature. Respectfully agreeing with the said decisions of the Delhi High Court, this question is not considered."*

*While doing so, the honourable Bombay High Court relied on the judgement of honourable Delhi High Court mentioned above.*

*The honourable Delhi High Court has considered the amendment to section 9(1)(vi) and has held that no amendment to the Act, whether retrospective and prospective can be read in a manner so as to extent in operation to the terms of an international treaty- in other words clarificatory or declaratory amendment, much less one which may seek to overcome an unwelcome judicial interpretation of law, cannot be allowed to have same retrospective effect on an international instrument effected between two sovereign states prior to subject amendment - amendment to domestic law cannot be read into treaty provisions without amending the treaty itself.*

*In view of the above, it can be held that honourable High Courts have decided that the transponder charges cannot be treated as royalty and while doing so they have considered the amendment to Section 9(1)(vi).*

*Now, to be on safer side, we have to see whether the term royalty defined in different treaties (USA, UK, Malaysia) have the same/similar words or not.*

*For ready reference, the definitions of royalty in these DTAA's are reproduced here under:*

### **Indo-US DTAA**

*ARTICLE 12 - Royalties and fees for included services - 1. Royalties and fees for included services arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State. 2. However, such royalties and fees for included services may also be taxed in the Contracting State in which they arise and according to the laws of that State; but if the beneficial owner of the royalties or fees for included services is a resident of the other Contracting State, the tax so charged shall not exceed: (a) in the case of royalties referred to in sub-paragraph (a) of paragraph 3 and fees for included services as defined in this Article [other than services described in subparagraph (b) of this paragraph] : (i) during the first five taxable years for which this Convention has effect, (a) 15 per cent of the gross amount of the royalties or fees for included services as defined in this Article, where the payer of the royalties or fees is the Government of that Contracting State, a political sub-division or a public sector company; and (b) 20 per cent of the gross amount of the royalties or fees for included services in all other cases; and (ii) during the subsequent years, 15 per cent of the gross amount of royalties or fees for included services ; and (b) in the case of royalties referred to in sub-paragraph (b) of paragraph 3 and fees for included services as defined in this Article that are ancillary and subsidiary to the enjoyment of the property for which payment is received under paragraph 3(b) of this Article, 10 per cent of the gross amount of the royalties or fees for included services.*

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

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

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

### **Indo-UKDTAA**

*ARTICLE 13 -Royalties and fees for technical services - 1. Royalties and fees for technical services arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State. 2. However, such royalties and fees for technical services may also be taxed in the Contracting State in which they arise and according to the law of that State; but if the beneficial owner of the royalties or fees for technical services is a resident of the other Contracting State, the tax so charged shall not exceed: (a) in the case of royalties within paragraph 3(a) of this Articles, and fees for technical services*

*within paragraphs 4(a) and (c) of this Article,— (i) during the first five years for which this Convention has effect; (aa) 15 per cent of the gross amount of such royalties or fees for technical services when the payer of the royalties or fees for technical services is the Government of the first mentioned Contracting State or a political sub-division of that State, and (bb) 20 per cent of the gross amount of such royalties or fees for technical services in all other cases; and (ii) during subsequent years, 15 per cent of the gross amount of such royalties or fees for technical services; and (b) in the case of royalties within paragraph 3(b) of this Article and fees for technical services defined in paragraph 4(b) of this Article, 10 per cent of the \_ gross amount of such royalties and fees for technical services.*

*3. For the purposes of this Article, the term "royalties" means:*

*(a) payments of any kind received as a consideration for the use of, or the right to use, any copyright of a literary, artistic or scientific work, including 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*

*(b) payments of any kind received as consideration for the use of, or the right to use, any industrial, commercial or scientific equipment, other than income derived by an enterprise of a Contracting State from the operation of ships or aircraft in international traffic*

### **Indo-Malaysia DTAA**

#### **ARTICLE 12**

*1. Royalties arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.*

*2. However, such royalties may also be taxed in the Contracting State in which they arise, and according to the laws of that State, but if the recipient is the beneficial owner of the royalties, the tax so charged shall not exceed 10 per cent of the gross amount of the royalties.*

*3. 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 or films or tapes used for television or radio 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 (know-how) concerning industrial, commercial or scientific experience.*

*4. The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of the royalties, being a resident of a Contracting State, carries on business in the other Contracting State in which the royalties arise through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the right or property in respect of which the royalties are paid is effectively connected with such*

*permanent establishment or fixed base. In such case, the provisions of Article 7 or Article 15, as the case may be, shall apply.*

*5. Royalties shall be deemed to arise in a Contracting State when the payer is a resident of that State. Where, however, the person paying such royalties, whether he is a resident of a Contracting State or not, has in a Contracting State a permanent establishment or a fixed base in connection with which the obligation to pay the royalties was incurred, and such royalties are borne by such permanent establishment or fixed base, then such royalties shall be deemed to arise in the State in which the permanent establishment or fixed base is situated.*

*6. Where, by reason of a special relationship between the payer and the beneficial owner or between both of them and some other person, the amount of the royalties, having regard to the use, right or information for which they are paid, exceeds the amount which would have been agreed upon by the payer and the beneficial owner in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In such case, the excess part of the payments shall remain taxable according to the laws of each Contracting State, due regard being had to the other provisions of this Agreement.*

*The definition of royalty in all the three treaties is similar. In all the three treaties following words were used.*

*"Secret Formula or Process"*

*The Assessing Officer imported the definition of process from explanation to section 9(1)(vi).*

*The hon'ble High Court after considering the same in the case of Intelsat and case referred above has held that the income of non-resident from transponder charges is not taxable in India.*

*In view of the above detailed discussion, I am of the opinion that payment of transponder charges paid by assessee to above referred three entities was not taxable in India and, therefore the assessee cannot be asked to withhold tax on the payments of transponder charges paid to these entities."*

5. During the course of appellate proceedings before us the ld. D.R. supported the order of lower authorities.

On the other hand, the ld. Counsel has submitted that identical issue on the similar fact has been adjudicated by the coordinate bench of the ITAT in the case of the assessee itself vide ITA No. 523, 1068, 1072, 1063 & 1064/Mum/2021 for AYs. 2015-16, 2016-17 & 2020-21 vide order dated 24.01.2022 and ITA Nos. 1177 & 1178/Mum/2021 vide order dated, 28.02.2022 for A.Y.2017-18 and ITA Nos.1067,1087 to

1097/Mum/2021, 1127 to 1138/Mum/2021, 1098, 1099, 1162/Mum/2021, 1100 to 1117/Mum/2021, 1118 to 1120/Mum/2021 1121 to 1126/Mum/2021, 1151 to 1153/Mum/2021 & 1154 to 1161/Mum/2021.

6. With the assistance of Id. Representative, we have perused the decision of coordinate benches of the ITAT as referred supra. The relevant part of the decision of the ITAT vide ITA Nos. 1177 & 1178/Mum/2021 is reproduced as under:

*7. We have heard rival submission of the parties on the issue in dispute and perused the relevant materials on record. The issue in dispute in these both appeal is whether the transponder charges paid by the assessee to three entities listed above is in the nature of the 'royalty' and liable for withholding tax. In respect of the three above listed entities, the Tribunal (supra) has held as under:*

*"9. We have heard the rival submissions of the parties on the issue in dispute and perused the relevant material on record. In the appeal for assessment year 2015-16, the Ld. CIT(A) has considered the facts of one of the parties in whose case, the assessee sought determination of sum chargeable under the Act and consequential deduction of tax at source u/s 195(2) of the Act. The Ld. CIT(A) referred to master agreement between the assessee and Intelsat Corporation, USA to highlight the services of transponding facility provided by the party. The Ld. CIT(A) has noted that while passing the order dated 28/03/2014, 04/02/2015 and 10/02/2015 in assessee's own case, the Tribunal was not having any benefit of the decision of the Hon'ble Bombay High Court in the case of New Sports Broadcast Pvt. Ltd (ITA 1487 of 2018) and, therefore, transponder payments were held to be royalty, taxable under the Act / Treaty. However, subsequently, in ITA Nos. 599 to 614/Mum/2016 for assessment year 2013-14 to 2015-16 in order dated 09/07/2018 following the decision of GE Technology Centre Pvt Ltd (supra) held that since no income was chargeable in the hands of the recipient, there was no liability on the part of the assessee to deduct tax at source on the similar payments for transponder facility. Further, the Ld. CIT(A) has followed binding precedents of jurisdictional High Court in the case of New Sports Broadcast Put Ltd (supra), wherein it is held that transponder charges are not in the nature of 'Royalty income in the hands of recipients despite amendment to section 9(1) (vi) of the Act.*

*10. In view of binding precedent of the Tribunal and Hon'ble High Court followed by the Ld. CIT(A) in respective impugned orders, we do not find any error or infirmity in the impugned orders passed by the Ld. CIT(A) on the issue in dispute relevant to the orders of Assessing Officer u/s 195(2) of the Act. Accordingly, we uphold the finding of the Ld. CIT(A) in impugned orders. Grounds raised by the Revenue in these appeals are accordingly dismissed."*

*7.1 The issue being identical, respectfully following the finding of the Tribunal, the grounds raised by the Revenue are dismissed.*

The issue in all the appeals of the assessee are identical and based on similar fact, therefore, respectfully following the same finding of the Tribunal as supra, the ground of appeals raised by the revenue stand dismissed.

7. In the result, the appeals filed by the revenue are dismissed.

Order pronounced in the open court on 17.05.2022

Sd/-  
(AMIT SHUKLA)  
JUDICIAL MEMBER

Sd/-  
(AMARJIT SINGH)  
ACCOUNTANT MEMBER

Mumbai, Dated 17.05.2022

PS: Rohit

**आदेश की प्रतिलिपि ढ ग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / The CIT(A)
4. आयकर आयुक्त(अपील) / Concerned CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार / BY ORDER,  
सत्यापित प्रति // True Copy //

(Asst. Registrar)  
ITAT, Mumbai