

**IN THE INCOME TAX APPELLATE TRIBUNAL
'A' BENCH : BANGALORE**

**BEFORE SMT. BEENA PILLAI, JUDICIAL MEMBER
AND
MS. PADMAVATHY S, ACCOUNTANT MEMBER**

IT(IT)A Nos. 1344 & 1345/Bang/2019
Assessment Years : 2016-17 & 2017-18

M/s. Madura Coats Pvt. Ltd., 7 th Floor, Jupiter Prestige Technology Park, Outer Ring Road, Bangalore – 560 103. PAN: AABCM8297K	Vs.	The Deputy Commissioner of Income Tax (International Taxation), Circle – 1(2), Bangalore.
APPELLANT		RESPONDENT

Assessee by	:	Shri Ajay Rotti, CA
Revenue by	:	Shri Shehnawaz ul Rahaman, Addl. CIT (DR)

Date of Hearing	:	13-04-2022
Date of Pronouncement	:	31-05-2022

ORDER

PER BEENA PILLAI, JUDICIAL MEMBER

Present appeals are filed by assessee against order dated 30.03.2019 passed by Ld.CIT(A)-12, Bangalore for A.Ys. 2016-17 & 2017-18. It is submitted that the issues alleged by assessee in both these years are identical and on similar facts.

2. Brief facts of the case are as under:

2.1 Madura Coats Pvt Ltd (MCPL) is an Indian company carrying on the business as manufacturer and merchant of sewing threads and other goods, possesses the requisite expertise and experience by virtue of having several qualified personnel in its employment. During the course of verification conducted us

133A(2A) in the business premises of the assessee company, it was noticed that the Company has paid amounts to J and P coats Limited, an associate enterprise, towards Bandwidth charges.

2.2 From the records, the Ld.AO observed that assessee remitted following amounts to J&P Coats Ltd. towards bandwidth charges.

F.Y	Amount Paid
2015-16	Rs. 6,05,47,045.78
2016-17	Rs. 4,60,99,541.75

2.3 The Ld.AO noticed that assessee had not deducted TDS as per the provisions of section 195 of the Act and therefore proceedings u/s. 201(1) was initiated by issuing notice dated 31.01.2018 calling upon assessee to show cause as to why it should not be treated as an assessee in default in respect of tax not deducted at source in respect of the payments in question.

In support, the representative of assessee furnished explanation vide letter dated 09.02.2018 wherein various agreements were filed.

2.4 An agreement dated 01/01/2008, was entered into between the assessee and J&P Coats, titled "Applications Support and Wide Area Network Support Services Agreement. Under this agreement, the J&P Coats Ltd.,(hereinafter referred to as J&P Coats), agreed to provide to the assessee, following services:

- (i) *Application support services, i.e., As per the agreement, J& P Coats with IBM, UK and SAP (UK) Ltd., had right to make available to its own subsidiary companies/associate enterprises certain customised systems and application. The said software is installed on computer systems operated by the users and J&P Coats developed the capability to provide application support for users of the said software.*

The J&P coats agreed to provide application support to the assessee.

- (ii) *Wide Area Network Services: J&P Coats had agreement with British Telecom Plc., UK (BT) whereby BT provides wide area network services to subsidiary companies and associated enterprises of the J&P Coats. J&P Coats with a view to formalise the arrangement with provision of wide area network services entered into the agreement with the assessee. The support services covered under the ambit of Wide Area Network Support services are described in Schedule-II to the Agreement.*

2.5 Clause-5 of the agreement provides as follows:

5. Wide Area Network Support Services

5.1. During the Term 1.11(1) as from the Effective Date the Service Provider shall make Wide Area Network Support Services available to the User in accordance with the User's reasonable requirements. These requirements shall include, inter alias,

5.1.1 setting up a global wide area network capable of supporting transaction processing;

5.1.2 providing global wide area network access to sites of India business operations that meet required service levels for transaction processing and messaging;

5.1.3 carrying out periodic inspection and maintenance activities on the network hardware and communication links to ensure continued provision of assured service levels to the User.

5.1.4 supporting addition, relocation, bandwidth change and termination of network sites as and when necessary to meet the User's changing requirements and business growth.”

2.6 The consideration payable for providing the aforesaid services is found in Clause 6.6 and 6.7 and the same reads thus:

“Wide Area Network Support Service Fees

6.6. The Service Provider shall recharge the User the fee charged by BT based on the User network nodes in the global WAN.

6.7. The Service Provider shall provide the following documentation for the fees charged for Application Support, Services and Wide Area Network' Support Services:

- Details of services rendered and*

- *Documents explaining the basis of charge and supporting the cos calculations,*

2.7 The assessee submitted that, in order to render Wide Area Network Support Service to the assessee and other group entities across the globe, an agreement was entered by J&P Coats, with British Telecom Plc., UK (hereinafter referred to as BT) dated 11.04.2006, called the *Master Global Framework Agreement* (hereinafter referred to as MGFA) whereby, BT agreed to provide services to the J&P Coats. It further submitted that, Schedule 18 to the MGFA gives list of sites, at which BT was to provide its services. The list includes India and includes sites used by the assessee in India.

2.8 The MGFA defines “services” and “sites” as follows:

"Services" means the services to be provided by BT to Coats at any given time during the Term and as described under Schedule 1 (Services) and any other services agreed by the Parties to be provided by BT to Coats Group under this Agreement;

"Sites" means the Sites which are used by Coats Group and to which BT has agreed to provide the Services as such Sites are listed in Schedule 18 (Coats Site List) and may be added to or removed in accordance with Schedule 9 (Change Control Procedure);

2.9 Persons to whom services are to be rendered is set out in clause 3 of MGFA as follows:

3.1 Coats is entering into this Agreement for the benefit of each member of Coats Group and agrees to procure the performance of the members of Coats Group to the terms of this Agreement.

3.2 BT shall provide the Services, from the Effective Date in accordance with this Agreement and the Local Agreements.

2.10 “Local Agreement” has been defined under the MGFA to mean:

“Local Agreement” means an agreement entered into between the relevant member of BT Group and the relevant member of Coats Group in relation to one or more countries based on this Agreement substantially in accordance with the example set out within Schedule 8 (Pro-Forma Local Agreement)”

2.11 Schedule I to the MGFA details the services and the relevant clauses in so far as the issue to be decided in this appeal is concerned reads as follows:

**“SCHEDULE 1
SERVICES**

1. Purpose of Schedule

This Schedule describes the scope of the Services to be provided to the Sites by BT to Coats under this Agreement.

2. Scope of Services

The scope of Services are defined as a BT Global WAN with BT's end to end Managed Services including all network elements as set out in Schedule 18 (Coats Site List) and management of those services where the service boundary is the Ethernet Port on the router (CPE) presented to the customer LAN, inclusive of the private WAN connections detailed in this Schedule.

3. Sites

BT will provide the Services described in this Agreement to the Sites as set out in Schedule 18. This list provides the detailed Site addresses (including postcode) for each Site where Services are to be provided and it describes which Services are provided to which Sites. This list shall be amended from time to time as part of the Change Control Procedure and in accordance with this Agreement.

4. Service Commencement - Transition

As agreed in the Transition Plan, BT will deliver a Global WAN network as more fully described in Schedule 15 (Transition).

5. Services

This Section contains a detailed description of the Services BT will provide to the Sites.

5.1 Network Connectivity

BT will provide network connectivity to the Sites based on a BT MPLS (Multi-protocol Label Switching) Class of Service 6 (CoS) model. With the exception of the data centres all site connectivity will be via a single access link and a router with ISDN capability (ISDN to be supplied by Coats) for the purpose of resilient backup. The data centres at Ipiranga (Brazil), Guangzhou (China), Charlotte (USA) and Vienna (Austria) are to be provided with dual access links, in all cases routed diversely (subject to Coats Site infrastructure

providing for such diverse routing) and dual MPLS Ports each supporting Class of Service 2.

A number of Sites will be connected via a private WAN connection to an existing Coats Site for onward connectivity to the BT MPLS network. These are detailed as follows:

<i>Site</i>	Connected to MPLS network via:
<i>Mauritius</i>	<i>Long line to Stockley Park site, UK</i>
<i>Madagascar</i>	<i>Long line to Hammarsdale site, South Africa</i>
<i>Zimbabwe</i>	<i>Long line to Hammarsdale site, SA</i>
<i>Bangladesh (Dhaka)</i>	<i>Long line to Bangalore HQ site, India</i>
<i>Bangladesh (Chittagong)</i>	<i>Local connection to Dhaka site, India, then via long line to Bangalore (as above)</i>
<i>Pakistan (Karachi)</i>	<i>Long line to Stockley Park site, UK</i>
<i>Pakistan (Lahore)</i>	<i>Local connection to Karachi site, Pakistan, then long line to Stockley Park (as above)</i>
<i>Sri Lanka (Colombo)</i>	<i>Long line to Bangalore HQ site, India</i>
<i>Sri Lanka (Horana)</i>	<i>Local connection to Colombo site, Sri Lanka, then long line to Bangalore (as above)</i>
<i>Sri Lanka (Kelaniya)</i>	<i>Local connection to Colombo site, Sri Lanka, then long line to Bangalore (as above)+</i>
<i>Morocco (Casablanca)</i>	<i>Long line to Stockley Park site, UK</i>
<i>Tunisia (Tunis)</i>	<i>Long line to Stockley Park site, UK</i>

5.2 Network Equipment

The routers provided will be Cisco, as defined in Schedule 18 (Coats Site List), with standard Interface Operating System (IOS) software.

2.12 The assessee further submitted that, Schedule I also refers to management services (i.e., help desk for user), service desk, fault management, etc. These are incidental to use of WAN by

the user.” It is thus submitted that, the agreement by which J&P Coats agreed to provide WAN services to the assessee referred to herein above is covered under the definition of “Local Agreement” under the MGFA.

2.13 The assessee submitted that, the sum of Rs. 6,05,47,045.78/- paid towards Bandwidth Charges to the J&P Coats was not subjected to TDS. The Ld.AO called upon the assessee to explain as to why of Bandwidth Charges of Rs.6,05,47,045.78/- was not offered to tax. The Ld.AO was of the opinion that the Bandwidth charges are chargeable to tax in India in the hands of the non-resident(J&P Coats). The Ld.AO thus called upon assessee to furnish details as to why the assessee should not be treated as ‘assessee in default’ for non deduction of TDS on the payment made to J&P Coats.

2.14 The Assessee submitted as under;

(i) The amount paid by the assessee was nothing but reimbursement of cost, which J&P Coats paid to BT and such reimbursements cannot be characterized as income. The assessee filed invoices in support before the Ld.AO. The assessee placed reliance on the following decisions, which held that, reimbursement based on cost sharing agreement is not liable to tax in India:

- a) *Decision of Hon’ble Delhi High Court in case of CIT v. Expeditors International (India) (P) Ltd reported in 24 Taxmann 76;*
- b) *Decision of Hon’ble AAR in case of ABB Limited - AAR No 834 of 2009;*
- c) *Decision of Hon’ble AAR in case of Decta v. CIT — 103 Taxman 525;*
- d) *Decision of Hon’ble Delhi High Court in case of DIT v Krupp UDHE GMBH ITA No. 2626 of 2009*

- e) *Decision of Hon'ble Kolkotta High Court in case of CIT v. Dunlop Rubber Co. Ltd. (Now Dunlop Holdings Ltd) reported in 142 ITR 493*
- f) *Decision of Hon'ble Supreme Court in case of CIT v. Tejaji Farasram Kharawalla Ltd. Reported in 67 ITR 95*
- g) *Decision of Hon'ble Delhi High Court in case of CIT v. Industrial Engineering Projects (P) Ltd reported in 202 ITR 1014*
- g) *Owen v. Pook (Inspector of Taxes) 74 ITR 147 (HL)*
- h) *Decision of Hon'ble Delhi High Court in case of ACIT vs Modicon Network (P) Ltd reported in 14 SOT 204*

2.15 The Ld.AO examined the nature of payment in the light of the definition of "Royalty" under the Act and as per the India UK DTAA.

2.16 The Ld.AO referred to clause (via) of Explanation-2 to Sec.9(1)(vi) of the Act, which provides that, consideration for "the use or right to use any industrial, commercial or scientific equipment" is regarded as Royalty. He also referred to the definition of 'Royalty' as given in Article 13(3)(b) of the India UK DTAA, which has similar clause "payments of any kind received as consideration for the use of, or the right to use, any industrial, commercial or scientific equipment". According to the Ld.AO, the consideration paid to J&P Coats by the assessee was for "use" or "right to use" towards dedicated bandwidth and the equipment associated with the network, and therefore, the payment was in the nature of 'Royalty'.

2.17 The Ld.AO, based on the above, rejected the theory of cost to cost reimbursement on the ground that, what is to be seen is whether the payment is for services rendered then whether the charge for the services is equivalent to the cost or not becomes immaterial. He observed that, once the income falls under the category mentioned in Sec.9(1)(vi) of the Act i.e., royalty, then it

is taxable, irrespective of whether it is equivalent to the cost of the service provider.

2.18 The Ld.AO also held the amount to be in the nature of FTS.

2.19 Aggrieved by the order passed by the Ld.AO, the assessee filed objections before the Ld.CIT(A).

2.20 Before the Ld.CIT(A), the assessee raised various objections alleging that, the amount paid by the assessee cannot be considered neither to be 'royalty' under section 9(1)(vi) r.w. Expl. 5 & 6, nor Fee for technical services under section 9(1)(vii) or the Act. The assessee submitted on following prepositions in respect of the payments made to J& P Coats:

- The payment made by assessee to J&P Coats does not constitute Royalty;
- There is no 'use of ' or 'right to use' of equipment and thereby, the payment cannot be constituted to be royalty;
- That secret does not qualify process and is restricted only to formula for the purpose of Article 13(3) of India UK DTAA
- That the payment made by the assessee to J&P coats are not for the licenses to use BT Software, and also cannot be considered as bandwidth charges

2.21 The Ld.CIT(A) after considering various submissions by the assessee on the above propositions as well as the agreement between the assessee and J& P Coats, vide impugned order, upheld the sums paid by the assessee to J&P Coats Ltd., towards bandwidth charges, as 'royalty' and taxable in India, u/s.9(1)(vi) of the Act, as well as, under Article 12 of the India UK DTAA relying on Explanation 5 and 6 to section 9(1)(vi) of the Act which has retrospective effect.

2.22 The Ld.CIT(A) also held that, in case the claim of assessee is considered that it is providing service, the same will become taxable under the head 'Fees for technical serviced'.

2.23 The Ld.CIT(A) relied on the decision of *Hon'ble Madras High Court* in case of *Verizon Communications Singapore Pte.Ltd. vs. ITO* reported in (2014) 361 ITR 575. He thus held that, the assessee should have deducted TDS under section 195 of the Act.

2.24 Aggrieved by the order Ld.CIT(A), the assessee is in appeal before the this *Tribunal*.

3. It is submitted by both sides that the grounds raised on the above facts are identical for both the years under consideration.

For the sake of convenience, we reproduce herewith the grounds for A.Y. 2016-17 in IT(IT)A No. 1344/Bang/2019 as under:

"The grounds stated hereunder are independent of and without prejudice to one another. The Appellant submits as under:

General

1. *The order passed by the learned Commissioner of Income Tax (Appeals) [Ld. CIT (A)] is bad under the law and on facts.*

2. *The Ld. CIT(A) has erred in upholding the action of the Learned Deputy Commissioner of income Tax (International Taxation) Circle — 1(2) ('Ld. DCIT') in treating the Appellant as an 'assessee in default' within the meaning of section 201(1) / 201(1A) of the Income-tax Act, 1961 ('the Act').*

Cost to cost reimbursement

3. *The CIT(A) has erred in law and in facts by not appreciating that the amount paid by the Appellant to JPCL is in the nature of cost to cost reimbursement and had no element of income accruing or arising to JPCL in India and hence tax need not be withheld on the same under section 195 of the Act.*

4. *The Ld. CIT(A) has also erred in law and in facts by holding that in a cost to cost reimbursement arrangement the nature of income has to be determined based on the contract, agreement, risks taken, and functions performed,*

which is irrelevant in the absence of any element of income.

Taxability as Royalty income

5. The Ld. CIT(A) has erred in law and on facts in holding that the Appellant has a constructive possession over the equipment, and therefore, the payment made by the Appellant to J&P Coats Limited ('JPCL') would amount to Royalty. While doing so, the Ld. CIT(A) has failed to appreciate that the Appellant has no possession (whether physical or constructive) over the equipment whatsoever.

6. The Ld. CIT(A) has erred in law and facts concluding that the payments made by the Appellant to JPCL constitute charges for the use of or right to use of equipment and process and thereby constitute royalty as defined under explanation 2 to section 9(1)(vi) of the Act and Article 13(3) of the India-UK DTAA.

7. The Ld. CIT(A) has erred in law and on fact by holding that bandwidth service is a secret process and thereby qualifies as Royalty under Article 13(3) of the India-United Kingdom Double Tax Avoidance Agreement (India-UK DTAA). The Ld. CIT(A) while coming to such a conclusion has failed to appreciate that bandwidth services can be provided by any service provider and thereby cannot be construed as a secret process.

Taxability as Fee for Technical Services (FTS)

8. The Ld. CIT(A) has erred in not adjudicating that the payment made by the Appellant to JPCL is not in the nature of FTS under explanation 2 to section 9(1)(vii) of the Act.

9. The Ld. CIT(A) has erred in holding that payments made by the Appellant to JPCL is for providing services which are ancillary and subsidiary to the application or enjoyment of right. property or information in connection with and for processes and software, and thereby taxable under Article 13(4)(a) and Article 13(4)(b) of the India-UK DTAA.

10. The Ld. CIT(A) has erred in holding that JPCL makes available technical knowledge. experience, skill, know-how or processes to the Appellant, therefore. the payment is in the nature of FTS under Article 13(4)(c) of the India-UK DTAA.

The Appellant craves leave to add to or alter, by deletion, substitution or otherwise, any or all of the above grounds of appeal, at any time before or during the hearing of the appeal."

4. The Ld.AR submitted that the question whether a payment to a non-resident is in the nature of royalty or not has to be tested in the light of the relevant provisions of DTAA between India and the country of which the non-resident payee is a tax resident. The Ld.AR submitted that, J&P coats is a tax resident UK, and therefore, income of a non-resident in India on the income that is received or is deemed to be received in India; or accrues or arises, or is deemed to accrue or arise to it in India, is taxable in India, only if, the payment in question can be characterized as "Royalty" under the provisions of Indo-UK DTAA.

5. He submitted that the term "Royalty" has been defined in Explanation 2 to section 9(l)(vi) of the Act as follows:

"Explanation 2.—For the purposes of this clause, "royalty" means consideration (including any lump sum consideration but excluding any consideration which would be the income of the recipient chargeable under the head "Capital gains") for—

- (i) the transfer of all or any rights (including the granting of a license) in respect of a patent, invention, model, design, secret formula or process or trade mark or similar property ;*
- (ii) the imparting of any information concerning the working of, or the use of, a patent, invention, model, design, secret formula or process or trade mark or similar property ;*
- (iii) the use of any patent, invention, model, design, secret formula or process or trade mark or similar property ;*
- (iv) the imparting of any information concerning technical, industrial, commercial or scientific knowledge, experience or skill;*
- (iva) the use or right to use any industrial, commercial or scientific equipment but not including the amounts referred to in section 44BB;*
- (v) the transfer of all or any rights (including the granting of a licence) in respect of any copyright, literary, artistic or scientific work including films or video tapes for use in connection with television or tapes for use in connection with radio broadcasting, but not including consideration for the sale, distribution or exhibition of cinematographic films ; or*
- (vi) the rendering of any services in connection with the activities referred to in sub-clauses (i) to (iv), (iva) and (v)."*

6. He further submitted that under Article 13 of Indo-UK DTAA, paragraph 3(a) and 3(b) defines the term 'royalties' as under:

"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."*

7. It is submitted by the Ld.AR that, payment made by assessee to J&P Coats towards reimbursement of connectivity charges do not fall within the definition of "royalties" under the Act and Indo-UK DTAA. In support, he relied on the decision of coordinate bench of this *Tribunal* in assessee's case of *ITO v M/s. Madura Coats (P) Ltd.(supra)*, wherein, very same payment in the context of tax deduction obligation was held the telecom bandwidth facility would not be characterised as 'royalty', under the Act and the DTAA.

8. Ld.AR submitted that, the Authority for Advance Rulings (AAR) in the following decisions, held that, connectivity charges paid for use of telecom bandwidth would not be characterized as 'royalty' under the Act and the DTAA—

- *Decision of AAR in case of Dell International Services India - 305 ITR 37*
- *Decision of AAR in case of ISRO Satellite Centre vs DIT - 307 1TR 59*
- *Decision of AAR in case of Cable and Wireless Networks India (P) Ltd vs DIT - 315 1TR 72*

9. It was submitted that, the AAR in *Dell International Services (supra)* propounded the following principles in this regard-

- The provision of telecom bandwidth facility by means of dedicated circuits and other network installed and maintained by the service provider does not amount to a lease of equipment.
- The service provider utilises its own network and provides a facility that enables the service recipient to transmit voice and data through the media of telecom bandwidth and accordingly there is no use or right to use equipment within the meaning of clause (via) of Explanation 2 to section 9(1)(vi) of the Act.
- Provision of bandwidth facility does not tantamount to use of or right to use any secret process. The AAR mentioned that similar bandwidth services through private circuits are being provided by many other telecom operators and hence the royalty definition relating to secret process is not attracted while providing telecom bandwidth facility.

10. Reliance was also placed on the following judicial precedents in support of assessee's contention that, provision of telecom bandwidth facility would not be characterised as 'royalty' under the Act and the DTAA—

- *Hon'ble High Court of Delhi in the case of CIT Vs. Expeditors International (India) Pvt.Ltd., ITA No.1088 of 2011, by Judgment dated 16/12/2011 it has been held that amount paid to its parent company on account of, communication uplink charges and other reimbursement of expenses incurred by parent company will not be chargeable to tax and no TDS obligation arises for the same.*
- *Decision of Hon'ble Supreme Court in case of Bharat Sanchar Nigam Ltd.& Ors. v UOI reported in (2006) 3 SCC 1*
- *Decision of Hon'ble Bombay High Court in case of DIT(IT) vs. WNS Global Services (UK) Ltd reported in (2013) 32 taxmann.com 54;*

- *Decision of Hon'ble Delhi High Court Asia Satellite Telecommunication Co. Ltd. vs. DIT reported in 197 Taxmann 263,*
- *Decision of Hon'ble Bangalore Tribunal in assessee's own case in ITO v M/s. Madura Coats (P) Ltd. In ITA No. 1711 & 1712/Bang /2005 for assessment years 2005-06 & 2006-07 by order dated 28.09.2006;*
- *Decision of Hon'ble Delhi Tribunal in case of Convergys Customer Management Group Inc v ADIT reported in (2013) 58 SOT 69;*
- *Decision of Hon'ble Mumbai Tribunal in case of WNS North America Inc. v. ADIT reported in (2012) 152 TTJ 145;*
- *Decision of Hon'ble Mumbai Tribunal in case of Wipro Ltd. v ITO reported in 133 Taxman 149;*

11. The Ld.AR then submitted that, the payment in question also cannot be taxed as Fees for Technical Services (FTS). He placed reliance on Explanation 2 to clause (vii), to submit that under the Act, FTS is been defined in to mean any consideration (including any lump sum consideration) for the rendering of any managerial, technical or consultancy services (including the provision of services of technical or other personnel) but does not include consideration for any construction, assembly, mining or like project undertaken by the recipient or consideration which would be income of the recipient chargeable under the head "Salaries".

12. It was submitted that data connectivity is primarily provided by BT & J&P Coats merely recoups portion of the costs from assessee, based on usage by assessee. The Ld.AR thus submitted that, the payment made by assessee to JP Coats would not fall within the ambit of the term 'fees for technical services' under the Act, in the absence of any services being rendered by J&P Coats to assessee. The Ld.AR placed reliance on:

- Decision of the *Hon'ble Madras High Court* in case of *Skycell Communications Ltd v DCIT* reported in (2001) 251 ITR 53 (Mad) and;
- decision of *Hon'ble Delhi High Court* in *CIT &Ors. vs Bharti Cellular And Others* reported in (2008) 175 Taxman 573

13. He submitted that, in these decisions it was held that, provision of cellular services cannot be treated as technical services.

Without prejudice, to the above, the Ld.AR placed reliance on *Article 13 of Indo UK DTAA*, wherein, *Paragraph 4* defines the term 'fees for technical services' that reads as under:

"(4) For the purposes of paragraph 2 of this Article, and subject to paragraph 5, of this Article, the term "fees for technical services" means payments of any kind of any person in consideration for the rendering of any technical or consultancy services (including the provision of services of a technical or other personnel) which:

(a) any ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 3(a) of this article is received ; or

(b) any ancillary and subsidiary to the enjoyment of the property for which a payment described in paragraph 3(b) of this Article is received ; or

(c) make available technical knowledge, experience, skill know-how or processes, or consist of the development and transfer of a technical plan or technical design.

14. It was submitted that, in terms of paragraph 4(c) of Article 13 of DTAA, payments of any kind in consideration for the rendering of any technical or consultancy services (including the provision of services of a technical or other personnel) would be regarded as fees for technical services' if it 'makes available' technical knowledge, experience, skill know-how or processes, or consist of the development and transfer of a

technical plan or technical design. It was submitted that the India-UK DTAA does not define the term "make available". Further, the Ld.AR submitted that, there is no 'protocol' to the DTAA, from where, one could determine the meaning of the term, as used in the DTAA.

15. The Ld.AR placed reliance on *Indo-US DTAA*, which has similar definition for the term "*fees for technical services*". The Indo-US DTAA also contains a Memorandum of Understanding (MOU) explaining the meaning of the term '*fees for included services*' as appearing in *Article 12* of the *Indo-US DTAA*. The MOU describes the category of services which is defined in Para 4 of Article 12 of the Indo-US DTAA. The MOU also provides example of services intended to be covered within the definition of included services, and those intended to be excluded. The Ld.AR submitted that, Indian courts have held that where the DTAA with one country is not clear about the definition of any particular term, the explanatory clauses in another DTAA with similar wordings can be used. In this regard, reliance was placed on the following judicial precedents:

- *Decision of the AAR in case of Intertek Testing Services India (P) Ltd reported in 175 Taxman 375 The AAR relied upon the Memorandum of Understanding, examples and explanatory appended to the DTAA between India and United States of America in order to arrive at a better understanding of the treaty law between India and United Kingdom.*
- *Decision of Hon'ble Karnataka High Court in A.E.G Telefunken v. CIT reported in 233 ITR 129, wherein Hon'ble Court compared the DTAA entered with German Democratic Republic with the DTAA entered with Finland for achieving a better understanding of the term fees for technical services.*
- *Decision of Hon'ble Mumbai Bench in case of Raymond Ltd vs. DCIT, reported in 86 ITD 791 relied on the Memorandum of Understanding, examples and explanation appended to the DTAA between India and*

US, in order to arrive at a better understanding of the treaty law between India and UK.

16. The Assessee submitted that the MOU under the Indo-US DTAA can be used to explain the concept of 'make available' under the Indo- UK DTAA. Under Para 4(b) of Article 12 of the Indo-US DTAA, technical and consultancy services are considered as included services only if they make available technical knowledge, expertise, skill, knowhow or processes or consists of the development and transfer of a technical plant or technical design to such person. The MOU explains that the category of services included in para 4(b) of Article 12, is narrow, because it excludes any service, that does not make technology available to the person acquiring the service. The MOU further states that the technology will be considered "made available" when the person acquiring the service is enabled to apply the technology. The fact that the provision of the service may require technical input by the person providing the service, does not per se mean that technical knowledge, skills, etc. are made available to the person purchasing the service within the meaning of paragraph 4(b). Similarly, the use of a product which embodies technology shall not per se be considered to make technology available. Reliance was placed on the following judicial precedents wherein it was held that the fact that the provision of the service may require technical input by the person providing the service does not per se mean that technical knowledge, skills, etc. are made available to the person purchasing the service. He placed reliance on the decision of coordinate bench of this *Tribunal* in case of *De Beers India Pvt.Ltd* reported in (2012) 21 *taxmann.com* 214.

17. The Ld.AR submitted that, that in the instant case, the entire work of providing connectivity is carried out by BT using its own technology and agents. It was submitted that, there is no transfer of technology at any point of time when connectivity is provided by BT to J&P Coats or by J&P Coats to the assessee. Further, the provision of connectivity is not possible without having recourse to BT and hence the definition of 'fees for technical services' is not attracted. The Ld.AR thus submitted that, even if it is presumed that services have been rendered, the amounts received by JPCL would not fall within the definition of 'fees for technical services' under the Indo-UK DTAA. Therefore, the Payment made to J&P Coats would not be subject to tax in India.

18. The Ld.AR submitted that, business profits of a non-resident are taxable in India only if the non-resident has:

- Business Connection in India under the Act or
- Permanent Establishment ("PE") in India under the relevant DTAA (in the present case, under the Indo-UK DTAA).

19. It was submitted that J&P COats does not have a Business Connection in India under the Act or a Permanent Establishment ("PE") in India as per the provisions of Indo-UK DTAA. In the absence of a PE or a business connection in India, it was submitted that the receipts pertaining to the recoveries of data connectivity charges would not be taxable as business profits in India.

It was held that, the assessee is thus an 'assessee in default' under section 201(1) of the Act, for non deduction of TDS under section 195 of the Act on the amount aid to J&P Coats Ltd.

20. Aggrieved by the order passed by the Ld.CIT(A), the assessee is in appeal before this *Tribunal*.

21. Before us, the Ld.AR submitted that, the view taken by authorities below is based on the amendment made to section 9(1)(vi) of the Act, by introduction of *Explanation 5 and Explanation 6 by 2012*. He submitted that prior to 2012, the *Delhi High Court in Asia Telecommunications Co. Ltd. vs. DIT* reported in (2011) 332 ITR 340 held that, for a payment to be regarded as 'royalty' under the Act or under the DTAA, there has to "use" of the intellectual property by the payer. It is submitted that, the *Explanation 5* seeks to treat any payment as royalty, whether or not the payer uses the 'process'.

22. The Ld.AR submitted that prior to 2012, the *Delhi Tribunal in Asia Satellite Telecommunications Co. Ltd. vs. DCIT* reported in (2003) 85 ITD 478 held that, the word "secret" does not qualify the word "process" in the Act. He submitted that, subsequently, in *DCIT vs. PanAmSat International Systems Inc.* reported in (2006) 9 SOT 100, the *Delhi Tribunal* held that, 'process' should be a 'secret process', for the payment thereof to constitute 'royalty' under the DTAA. He submitted that, the issue was then referred to *Special Bench of the Tribunal in New Skies Satellite NV vs. ACIT* reported in (2009) 121 ITD 1 and *Hon'ble Special Bench* held that, the term 'secret' appearing in phrase 'secret formula or process' in Explanation 2 to Section 9(1)(vi), and in relevant article of DTAA would not qualify word 'process'. It was submitted that, *Hon'ble Delhi High Court in Asia Satellite Telecommunications Co. Ltd. (supra)* decided otherwise. This part of the judgment was sought to be overcome, by introduction of

Explanation 6 to Section 9(1)(vi) of the IT Act. He submitted that *Explanation 6* seeks to say that, consideration for use of a 'non secret process' would not be regarded as 'royalty'. It is undisputed that the definition of 'royalty' in the DTAA has not been amended. The Ld.AR submitted that, the revenue proceeded on the premise that, the *Explanation 2* would automatically apply to the DTAA as well. It is submitted that, the DTAA between India and UK has not been amended.

23. He thus submitted that in the present facts, the provisions of the DTAA are clearly more favourable to the assessee for following reasons:

- Firstly, the definition of 'royalty' under the DTAA covers within its ambit consideration paid for "use" of a process alone, while the amended definition of IT Act includes within the meaning of royalty, any consideration paid by a payer "whether or not there is use of any process, by the payer;
- Secondly, under the DTAA, to be 'royalty', the 'process' has to be a 'secret process'. Whereas, under the domestic law, consideration for payment of 'any process', whether secret or not, would be regarded as 'royalty'; and
- Thirdly, the definition of 'royalty' under the DTAA does not cover consideration for use of Industrial, Commercial or Scientific ('ICS') Equipment, while the definition under the IT Act cover such consideration for use of ICS equipment.

24. He placed reliance on the principles laid down by the *Hon'ble Supreme Court* in case of *Engineering for Analysis Centre of Excellence (P) Ltd* reported in (2021) 125 *Taxmann.com* 42. On the question whether the provisions of the Act can override the

provisions of the DTAA, the *Hon'ble Court* held that, *Explanation 4* was inserted in section 9(1)(vi) of the Act in 2012, to clarify that, the "*transfer of all or any rights*" in respect of any right, property, or information included and had always included the "transfer of all or any right for use or right to use a computer software". The *Hon'ble Court* held that, *Explanation 4 to section 9(1)(vi)* expanded the scope of 'royalty' under *Explanation 2 to section 9(1)(vi)*. Prior to the amendment, payment could be treated as 'royalty' only if, it involved a transfer of all or any rights in copyright by way of license or other similar arrangements under the Copyright Act. *Hon'ble Court* thus held that, once DTAA applies, the provisions of the Act can only apply to the extent they are more beneficial to the assessee, and therefore, the definition of 'royalty' will have the meaning assigned to it, by the DTAA, which was more beneficial.

25. On the contrary, the Ld.CIT.DR relied on the analysis by the Ld.CIT(A) on the issue.

26. We are of the view that the payments made by assessee to J&P Coats needs to be analysed under following categories:

A. Whether payment received by assessee could be considered as Royalty as per section 9(1)(vi) read with Explanation 2, 5 & 6 of the Act ?

27. The Ld.AO and CIT(A) held the payment received to be 'Royalty', as they are of the view that, there is use of process by the assessee in terms of Section 9(1)(vi) of the Act, r.w.Expl. 5 & 6.

On perusal of the observation by the Ld.CIT(A) we note that the payment made by the assessee to J&P Coats have been upheld to be 'royalty' on the premise that assessee has used the 'process'.

The term "Process" occurs under clause (i), (ii) and (iii) to Explanation 2 to Section 9(vi). It reads as under:—

'Explanation 2.: For the purposes of this clause, "royalty" means consideration (including any lump sum consideration but excluding any consideration which would be the income of the recipient chargeable under the head "Capital gains") for—

- (i) the transfer of all or any rights (including the granting of a licence) in respect of a patent, invention, model, design, secret formula or process or trade mark or similar property;*
- (ii) the imparting of any information concerning the working of, or the use of, a patent, invention, model, design, secret formula or process or trade mark or similar property;*
- (iii) the use of any patent, invention, model, design, secret formula or process or trade mark or similar property;'*

28. The term "process" used under Explanation 2 to section 9(1)(vi) in the definition of 'royalty' does not imply any 'process' which is publicly available. The term "process" occurring under clauses (i), (ii) and (iii) of Explanation 2 to section 9(1)(vi) means a "process" which is an item of intellectual property. Clause (iii) of the said Explanation reads as follows:

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

Clauses (i) & (ii) of the said explanation also use identical terms. The words which surround the word 'process' in clauses (i) to (iii) of Explanation 2 to section 9(1)(vi), refer to various species of intellectual properties such as patent, invention, model, design, formula, trade mark etc. The expression 'similar property' used at the end of the list, further fortifies the stand that the terms 'patent, invention, model, design, secret formula or process or

trade mark' are to be understood as belonging to the same class of properties viz. intellectual property.

29. 'Intellectual property' as understood in common parlance means, Knowledge, creative ideas, or expressions of human mind that have commercial value and are protectable under copyright, patent, service mark, trademark, or trade secret laws from imitation, infringement, and dilution. Intellectual property includes brand names, discoveries, formulas, inventions, knowledge, registered designs, software, and works of artistic, literary, or musical nature.

30. We refer to the commentary in Prof.Klaus Vogel's Commentary on Double Taxation Convention, wherein, the term 'Royalty' is defined as under:

"Paragraph 2 contains definition of the term 'royalties'. These relate, in general, to rights or property constituting different forms of literary and artistic property, the elements of intellectual property specified in the text and information concerning industrial, commercial or scientific experience. The definition applies to payments for the use of, or the entitlement to use, rights of the kind mentioned, whether or not they have been, or are required, registered in a public register. The definition covers both payments made under a license and compensation which a person would be obliged to pay for fraudulently copying or infringing the right."

31. Thus the word "process" must also refer to specie of intellectual property, applying the rule of, *ejusdem generis* or *noscitur a sociis*, as held by *Hon'ble Supreme Court* in case of *CIT vs. Bharti Cellular* reported in (2011) 330 ITR 239.

32. As we are analyzing the applicability of section 9(1)(vi), observation by *Hon'ble Madras High Court* in case of *CIT vs. Neyveli Lignite Corpn. Ltd. (supra)*, would be relevant. The *Hon'ble High Court* held that,

"10.The term (royalty' normally connotes the payment made to a person who has exclusive right over a thing for allowing another to make use of that thing which may be either physical or intellectual property or thing. The exclusivity of the right in relation to the thing for which royalty is paid should be with the grantor of that right. Mere passing of information concerning the design of machine which is tailor-made to meet the requirement of a buyer does not by itself amount to transfer of any right of exclusive user, so as to render the payment made therefor being regarded as royalty".

33. In the present facts of the case the agreement between assessee and J&P Coats is clear of the fact that there is no transfer of any intellectual property, or any exclusive right has been granted to the assessee for using such intellectual property. Rather, the payment is made by the assessee to J&P Coats, based on the agreement between BT to J&P Coats. The assessee has made the payment based on coast allocation towards the band width services provided by J&P Coats as per agreement between BT to J&P Coats.

Therefore in our opinion, the payment made by assessee to J&P Coats cannot fall within the ambit of 'Royalty' under section 9(1)(vi) by virtue of Explanation 2.

34. Now, by Finance Act, 2012, *Explanation 5 & 6* were added with retrospective effect from 1.6.1976 which reads as under:—

"Explanation 5: For the removal of doubts, it is hereby clarified that the royalty includes and has always included consideration in respect of any right, property or information, whether or not -

(a) The possession or control of such right, property or information is with the payer;

(b) Such right, property or information is used directly by the payer;

(c) The location of such right, property or information is in India.

Explanation 6: For the removal of doubts, it is hereby clarified that the expression "process" includes and shall be deemed to have always included transmission by satellite (including up-linking, amplification, conversion for down-linking of any signal), cable,

optic fibre or by any other similar technology, whether or not such process is secret."

35. By insertion of *Explanation 5 & 6*, meaning of word 'Process' has been widened. As per these explanations, the word 'Process' need not be 'secret', and situs of control & possession of right, property or information has been rendered to be irrelevant. However, in our opinion, all these changes in the Act, do not affect the definition of 'Royalty' as per DTAA. The word employed in DTAA is 'use or right to use', in contradistinction to, "transfer of all or any rights" or 'use of', in the domestic law. As per *Explanation 5 & 6*, the word 'process' includes and shall be deemed to included, transmission by satellite (including up-linking, amplification, conversion for down-linking of any signal), cable, optic fibre or by any other similar technology, whether or not such process is secret. However, the *Explanation* does not do away with the requirement of successful exclusivity of the right in respect of such process being with the person claiming 'royalty' for granting its usage to a third party.

36. The Ld.AR submitted that, reliance placed by the authorities below on decision in case of *Verizon Communications Singapore Pvt. Ltd. v. ITO(supra)* is misplaced. We have gone through facts of *Verizon Communications Singapore Pvt. Ltd. v. ITO(supra)*. In that case, the Indian payer company obtained 'leased lines' on hire basis under a contract from non-resident Verizon Communication. This is a vital fact which makes it factually different with that of assessee before us. When an Indian company takes leased line on hire, then it can be said that it had 'used' it as observed by *Hon'ble Madras High Court* therein. In

present facts of the case, the J&P Coats has neither leased nor has given on hire any network to the assessee. Instead the assessee reimbursed the cost incurred by J&P Coats towards the bandwidth charges provided by BT to all the Coats group companies world wide.

37. Therefore it cannot be said that the assessee has 'used' the network belonging to J&P coats. Therefore, reliance of the revenue on the said case law is of no assistance.

38. On perusal of the agreement, between assessee and J&P Coats we note that, the assessee do not have any ownership or rights in respect of such 'process', and hence in our view the payment in question cannot be considered as 'royalty'. J&P Coats is rendering telecommunications services to all its Group concerns, with the aid of BT.

39. The meaning attached to phrase 'use or right to use' has been explained in following decisions:

- *Decision of Authority For Advance Ruling(hereinafter referred to as AAR), in case of Cable & Wireless Networks India(P.)Ltd., In re, reported in (2009) 182 Taxman 76*
- *Decision of AAR in case of ISRO Satellite Centre reported in [2008\) 307 ITR 59](#)*
- *Decision of AAR in case of Dell International Services (India) P. Ltd.In.re. reported in (2008) 172 Taxman 418.*

The above decisions, lay down that, in order to satisfy 'use or right to use', the control and possession of right, property or information should be with payer.

40. In the decision of *Authority For Advance Ruling, in case of Cable & Wireless Networks India(P.)Ltd., In re(supra)*, a similar issue was considered wherein Cable & Wireless Networks India(P.)Ltd was a company incorporated in India part of Cable &

Wireless Group of companies. Cable & Wireless Networks India(P.)Ltd., was engaged in providing international long distance and domestic long distance telecommunication services in India. As per the agreement Cable & Wireless Networks India(P.)Ltd., would provide the Indian leg of service of using its own network and equipments and network of other domestic operators. Similarly, the international leg of services would be provided by the UK group company using its international infrastructure and equipments. The Cable & Wireless Networks India(P.)Ltd., sought for advance ruling in respect of nature of payments made by Cable & Wireless Networks India(P.)Ltd., to the UK Group company, whether the payment is taxable as 'royalty' or 'FTS' under section 9(1)(vi)/(vii). The AAR relied on following decisions:

- *Decision of Hon'ble Supreme Court in case of BSNL vs. UOI reported in (2006) 3 STT 245*
- *Decision of AAR in case of Dell International Services India Ltd. In.re reported in (supra)*
- *Decision of Hon'ble Madras High Court in case of CIT vs. Neyveli Lignite Corpn. Ltd. reported in (2000) 243 ITR 459*
- *Decision of coordinate bench of this Tribunal in case of WIPRO Ltd. Vs. ITO reported in (2003) 86 ITD 407.*

41. The AAR relying on its view in case of *Dell International Services India Ltd. In.*, held as under:

12.5 *It seems to us that the two expressions 'use' and 'right to use' are employed to bring within the net of taxation the consideration paid not merely for the usage of equipment in praesenti but also for the right given to make use of the equipment at future point of time. There may not be actual use of equipment in prasenti but under a contract the right is derived to use the equipment in future. In both the situations, the royalty clause is invocable. The learned senior counsel for the applicant sought to contend, relying on the decision of Andhra Pradesh High Court in the case of Rashtriya Ispat Nigam Ltd. v. CTO [1990] 77*

STC 182 which was affirmed by the Supreme Court, that mere custody or possession of equipment without effective control can only result in use of the equipment whereas a right to use the equipment implies control over the equipment. We do not think that such distinction has any legal basis. In the case of Rashtriya Ispat Nigam Ltd. (supra), what fell for consideration was the expression "transfer of right to use any goods" occurring in a sales-tax enactment. Obviously, where there is a transfer, all the possessory rights including control over the goods delivered will pass on to the transferee. It was in that context, emphasis was laid on 'control'. The Supreme Court affirmed the conclusion of the High Court that the effective control of machinery even while the machinery was in use of the contractor remained with RIN Ltd. which lent the machinery. The distinction between physical use of machinery (which was with the contractor) and control of the machinery was highlighted. The ratio of that decision cannot be pressed into service to conclude that the right of usage of equipment does not carry with it the right of control and direction whereas the phrase 'right to use' implies the existence of such control. Even in a case where the customer is authorized to use the equipment of which he is put in possession, it cannot be said that such right is bereft of the element of control. We may clarify here that notwithstanding the above submission, it is the case of applicant that, it has neither possession nor control of any equipment of BTA.

12.6 *The other case cited by the learned counsel for applicant to explain the meaning of expressions 'use' and 'right to use' is that of BSNL v. UOI (2006) 3 STT 245 (SC). Even that case turned on the interpretation of the words "transfer of right to use the goods" in the context of sales-tax Acts and the expanded definition of sale contained in clause (29A) of section 366 of the Constitution. The question arose whether a transaction of providing mobile phone service or telephone connection amounted to sale of goods in the special sense of transfer of right to use the goods. It was answered in the negative. The underlying basis of the decision is that there was no delivery of goods and the subscriber to a telephone service could not have intended to purchase or obtain any right to use electro-magnetic waves. At the most, the concept of sale in any subscriber's mind would be limited to the handset that might have been purchased at the time of getting the telephone connection. It was clarified that a telephone service is nothing but a service and there was no sale element apart from the obvious one relating to the handset, if any. This judgment, in our view, does not have much of bearing on the issue that arises in the present application. However, it is worthy of note that the*

conclusion was reached on the application of the well-known test of dominant intention of the parties and the essence of the transaction.

The word 'use' - what it means:

12.7 Let us now explore the meaning of the key word 'use'. The expression 'use' has a variety of meanings and is often employed in a very wide sense, but the particular meaning appropriate to the context should be chosen. In *S.M. Ram Lal & Co. v. Secretary to Government of Punjab* [1998] 5 SCC 574, the Supreme Court noted that 'in its ordinary meaning', "the word 'use' as a noun, is the act of employing a thing; putting into action or service, employing for or applying to a given purpose". In the *New Shorter Oxford Dictionary*, more or less the same meaning is given. The very first meaning noted there is: "the action of using something; the fact or state of being used; application or conversion to some purpose". Another meaning given is "Make use of (a thing), especially for a particular end or purpose; utilize, turn to account... cause (an implement, instrument etc.) to work especially for a particular purpose; manipulate, operate". The various shades of meanings given in the decided cases in America are referred to in *Words and Phrases, Permanent Edition Vol. 43A*. Some of them are quoted below :

"The word 'use' means to make use of; convert to one's service; to avail oneself of; to employ". (*Miller v. Franklin County*)

"The word 'use' means the purpose served, a purpose, object or end for useful or advantageous nature". (*Brown v. Kennedy*)

"'Use' means to employ for any purpose, to employ for attainment of some purpose or end, to convert to one's service or to put to one's use or benefit. (*Beach v. Liningston*)

"'Use', as a noun, is synonymous with benefit and employment and as a verb has meaning to employ for any purpose, to employ for attainment of some purpose or end, to avail one's self, to convert to one's service or to put to one's use or benefit". (*Esfeld Trucking Inc. v. Metropolitan Insurance Co.*)

12.8 The word 'use' in relation to equipment occurring in clause (iva) is not to be understood in the broad sense of availing of the benefit of an equipment. The context and collocation of the two expressions 'use' and 'right to use' followed by the words "equipment" suggests that there must be some positive act of utilization, application or employment of equipment for the desired purpose. If an advantage is taken from sophisticated equipment installed and provided by another, it is difficult to say that the recipient/customer uses the equipment as such. The customer merely makes use of the facility, though he does not himself use the equipment.

13. *It is the contention of the revenue that dedicated private circuits have been provided by BTA through its network for the use of the applicant. The utilization of bandwidth upto the requisite capacity is assured on account of this. The electronic circuits being 'equipment' are made available for constant use by the applicant for transmission of data. The access line is installed for the benefit of the applicant. Therefore, the consideration paid is towards rent for circuits and the physical components that go into the system. It is further contended that rendition of service by way of maintenance and fault repairs is only incidental to the dominant object of renting the automated telecommunication network.*

13.1 *There is no doubt that the entire network consisting of under-sea cables, domestic access lines and the BT equipment - whichever is kept at the connecting point, is for providing a service to facilitate the transmission of voice and data across the globe. One of the many circuits forming part of the network is devoted and earmarked to the applicant. Part of the bandwidth capacity is utilised by the applicant. From that, it does not follow that the entire equipment and components constituting the network is rented out to the applicant or that the consideration in the form of monthly charges is intended for the use of equipment owned and installed by BTA. The questions to be asked and answered are: Does the availment of service involve user of equipment belonging to BT or its agent by the applicant ? Is the applicant required to do some positive act in relation to the equipment such as operation and control of the same in order to utilize the service or facility ? Does the applicant deal with any BT equipment for adapting it to its use ? Unless the answer is 'yes', the payment made by the applicant to BTA cannot be brought within the royalty clause (iva). In our view, the answer cannot be in the affirmative. Assuming that circuit is equipment, it cannot be said that the applicant uses that equipment in any real sense. By availing of the facility provided by BTA through its network/circuits, there is no usage of equipment by the applicant except in a very loose sense such as using a road bridge or a telephone connection. The user of BT's equipment as such would not have figured in the minds of parties. As stated earlier, the expression 'use' occurring in the relevant provision does not simply mean taking advantage of something or utilizing a facility provided by another through its own network. What is contemplated by the word 'use' in clause (iva) is that the customer comes face to face with the equipment, operates it or controls its functioning in some manner, but, if it does nothing to or with the equipment (in this case, it is circuit, according to the revenue) and does not exercise any possessory rights in relation*

thereto, it only makes use of the facility created by the service provider who is the owner of entire network and related equipment. There is no scope to invoke clause (iva) in such a case because the element of service predominates.

13.2 Usage of equipment connotes that the grantee of right has possession and control over the equipment and the equipment is virtually at his disposal. But, there is nothing in any part of the agreement which could lead to a reasonable inference that the possession or control or both has been given to the applicant under the terms of the agreement in the course of offering the facility. The applicant is not concerned with the infrastructure or the access line installed by BTA or its agent or the components embedded in it. The operation, control and maintenance of the so-called equipment, solely rests with BTA or its agent being the domestic service provider. The applicant does not in any sense possess nor does it have access to the equipment belonging to BTA. No right to modify or deal with the equipment vests with the applicant. In sum and substance, it is a case of BTA utilizing its own network and providing a service that enables the applicant to transmit voice and data through the media of telecom bandwidth. The predominant features and underlying object of the entire agreement unerringly emphasize the concept of service. The consideration paid is relatable to the upkeep and maintenance of specific facility offered to the applicant through the BTA's network and infrastructure so that the required bandwidth is always available to the applicant. The fact that the international circuit as well as the access line is not meant to offer the facility to the applicant alone but it enures to the benefit of various other customers is another pointer that the applicant cannot be said to be the user of equipment or the grantee of any right to use it. May be, a fraction of the equipment in visible form may find its place at the applicant's premises for the purpose of establishing connectivity or otherwise. But, it cannot be inferred from this fact alone that the bulk of consideration paid is for the use of that item of equipment.

13.3 In cases where the customers make use of standard facility like telephone connection offered by the service provider, it does not admit of any doubt that the customer does not use the network or equipment of the service provider. But, where the service provider, for the purpose of affording the facility, has provided special infrastructure/network such as a dedicated circuit (as in the instant case), controversies may arise as to the nature of payment received by the service provider because it may not stand on the same footing as standard facility. However, even where an earmarked circuit is provided for offering the facility,

unless there is material to establish that the circuit/equipment could be accessed and put to use by the customer by means of positive acts, it does not fall under the category of 'royalty' in clause (iva) of Explanation 2.

42. We also refer to the commentary relied by the Ld.Counsel form *Prof. Klaus Vogel's Commentary on Double Taxation Convention*, wherein 'Secrete formulae or process' is defined as under:

Secret formulae or processes: *This covers Know-how in the narrower sense of the term viz., all business, secrets of a commercial or industrial nature. In most of the countries, they enjoy at least relative protection or are capable of being protected. That is why Article 12(2) very properly use, in connection with such formulae, etc., the criterion 'right to use', which is pertinent to them (letting) as it is in the case of absolute proprietary rights. As a rule, the 'right to use' already come into existence in these instance by authorized information (legitimate disclosure of secrets) . It may be restricted in the point of time in respect of the period following the expiry of the license. On the difference between a product with relatively simple technology, and a business secret.*

43. We note that, in case of *DCIT v. PanAmSat International Systems Inc.*, reported in (2006) 9 SOT 100 , Hon'ble Delhi High Court distinguished the decision of *Asia Satellite Telecommunication Co. Ltd. v. Dy. CIT* reported in (2003) 85 ITD 478 and held as under:—

19. *The question that first comes up for consideration is whether section 9(1)(vi) of the Income-tax Act, read with the Explanation 2 below thereto, is applicable. This also involves the subsidiary question whether the issue is covered by the order of the Delhi Bench of the Tribunal in the case of Asia Satellite Telecommunication Co. Ltd. (supra) which is also a case of a non-resident company based in Hongkong which owned a transponder and allowed it to be used by broadcasters. Both issues are interlinked in the sense that in the above order the Tribunal has held in the context of the provisions of clause (iii) of Explanation 2 below section 9(1)(vi), that a "process" is involved when the signals that are uplinked through the earth stations to the transponder get converted into different frequencies and fit for being down-linked via earth stations over the footprint*

area. It was therefore held that the payment was for the use of a "process" and hence royalty within the meaning of the aforesaid clause. The clause reads as follows :

"(iii) the use of any patent, invention, model, design, secret formula or process or trademark or similar property;"

It was not disputed before us on behalf of the assessee that the nature of the activity carried on by it is the same as in the case of Asia Satellite Telecommunication Co. Ltd. (supra). If that is so, we have to hold, respectfully following the order of the co-ordinate Bench, that there is a "process" involved in the activity carried on by the assessee before us. In Asia Satellite Telecommunication Co. Ltd.'s case (supra) it was further held that the word "secret" appearing in clause (iii) above qualifies only the word "formula" but not the word "process" and therefore even if the process involved in the operation of the transponder is in the public domain and no longer a secret known only to a few, the payment for the process would still be taxable as royalty. The reason or logic given in paragraph 6.18 of the order by the Tribunal to hold that the word "secret" does not qualify the word "process" is that "there is no comma after the use of the word 'secret' till the end of clause (iii) and if the intention has been to apply the word 'secret' before the word 'process' also, then a comma would have been used after the word 'formula'" and further that the word "secret" cannot also be applied to the word "trademark" because once registered there is nothing secret about the trademark and the impossibility of reading the word "secret" before the word "trademark" further strengthens the view that the word "secret" cannot be read before the word "process" also. This naturally takes us to the question whether there is anything in article 12.3(a) of the DTAA between India and USA which militates against such a view. It must be remembered that India had no DTAA with Hongkong and hence the view taken by the Tribunal (supra) with regard to the clause (iii) of Explanation 2 below section 9(1)(vi) would apply if we were to also interpret the same provision. But article 12.3(a) is worded as below :

"The term 'royalties' as used in this article means :

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

In Asia Satellite Telecommunication Co. Ltd.'s case (supra) the Tribunal pointed out, while repelling the argument that the word "secret" also qualifies the word "process" appearing in clause (iii) of Explanation 2, that there is no comma after the word "secret" till the end of the clause and had the intention been to qualify the word "process" also with the word "secret" there would have been a comma after the word "process" (by mistake mentioned in the order as "formula"). The Tribunal was thus prepared, with respect, to accept the argument that both the words "formula" and "process" can be said to be qualified by the word "secret" had the clause been drafted as under :

"the use of any patent, invention, model, design, secret formula or process, or trademark or similar property"

What the Tribunal has pointed out stands fulfilled in article 12.3(a) of the treaty with USA. From the article quoted above, it may be seen that there is a comma after the words "secret formula or process" which indicates that both the words "formula" and "process" are qualified by the word "secret". The requirement thus under the treaty is that both the formula and the process, for which the payment is made, should be a secret formula or a secret process in order that the consideration may be characterised as royalty. We do agree with the argument of the Special Counsel for the Department, on the strength of the several authorities cited by him, that normally punctuation by itself cannot control the interpretation of a statutory provision and in fact the learned counsel for the assessee did not seriously dispute the proposition. However, the punctuation the use of the comma coupled with the setting and words surrounding the words under consideration, do persuade us to hold that under the treaty even the process should be a secret process so that the payment therefore, if any, may be assessed in India as royalty. The Tribunal in Asia Satellite Telecommunication Co. Ltd.'s case (supra) have recognized that all the items referred to in clause (iii) of Explanation 2 such as patent, invention, model, formula and process etc. are intellectual properties. Similarly, the words which surround the words "secret formula or process," in article 12.3(a) of the treaty refer to various species of intellectual properties such as patent, trademark, design or model, plan, etc. Thus the words "secret formula or process" must also refer to a specie of intellectual property applying the rule of ejusdem generis or noscitur a socii.

20. *That takes us to a consideration of the question whether the process carried on by the assessee is a secret process. On this question, we have weighed the elaborate arguments advanced by both the sides carefully and hold that so far as the transponder technology is concerned there appears to be no "secret technology", known only to a few. There is evidence adduced before us to show*

that the technology is even available in the form of published literature/book from which a person interested in it can obtain knowledge relating thereto. There is no evidence led from the side of the Department to show that the transponder technology is secret, known only to a few, and is either protected by law or is capable of being protected by law. This aspect of the matter was not required to be considered by the Tribunal in the case of Asia Satellite Telecommunication Co. Ltd. (supra) because the view taken by the Tribunal was that there was no requirement in clause (iii) of Explanation 2 below section 9(1)(vi) of the Act that the process involved, for which the payment is being made, should be a secret process. But in the view we have taken on the language employed by article 12.3(a) of the treaty coupled with the punctuation and the setting and surrounding words, the payment would be considered as royalty only if it is made for the use of a secret process. Since there is nothing secret about the process involved in the operation of a transponder, the payment for the use of the process assuming it to be so does not amount to royalty.

44. Similar issue came up before *Hon'ble Delhi Tribunal* in case of *Bharti Airtel vs. ITO (TDS)* reported in (2016) 67 taxmann.com 223. The issue considered therein was in respect of payment towards call interconnectivity charged for call transmission on foreign network. The *Tribunal* therein, on applying ratios pronounced in the above referred decisions, held it not as 'Royalty'.

Therefore in our opinion, the Payments made by the assessee in lieu of services provides by J&P Coats cannot fall within the ambit of 'Royalty' under section 9(1)(vi) Explanation 5 &6.

45. **Whether the serviced rendered could be treated as Royalty under Article 13(2) of the DTAA between India and UK?**

As regards to whether the payments by the assessee to J&P coats fall within the ambit of Royalty as defined under India UK DTAA, we note that coordinate bench of this Tribunal in case of J&P Coats for assessment years 2008-09, 2010-11 to 2015-16 by a

consolidated order dated 29/11/2021 observed and held as under:

“18. The AO thereafter examined the nature of payment in the light of the definition of “Royalty” under the Act and as per the DTAA. He referred to clause (via) of explanation-2 to Sec.9(1)(vi) of the Act which provides that consideration for “the use or right to use any industrial, commercial or scientific equipment” is regarded as Royalty. He also referred to the definition of Royalty as given in Article 13(3) clause (b) of DTAA which also has a similar clause “payments of any kind received as consideration for the use of, or the right to use, any industrial, commercial or scientific equipment”. According to the AO, the consideration received by the Assessee from MCPL was a consideration received for “use” or “right to use” two way dedicated bandwidth and the equipment associated with the network and therefore the payment was in the nature of Royalty. We have already seen that the Assessee has placed reliance on decisions of AAR in the case of Dell International Services (supra), Cable & Wireless Networks (I) Pvt.Ltd., (supra) and ISRO Satellite Centre (supra) wherein it was held that providing telecom bandwidth facility by means of dedicated circuits and other network installed and maintained by the service provider does not amount to a lease of equipment. The AO distinguished those decisions by pointing out observations of the AAR in the case of Dell International Services (supra) wherein the AAR observed “May be, a fraction of the equipment in visible form may find its place at the applicant’s premises for the purpose of establishing connectivity or otherwise. But, it cannot be inferred from this fact alone that the bulk of consideration paid is for the use of that item of equipment”. According to the AO the above observations shows that what has to be seen is the importance of the equipment installed in the customer’s premises for establishing connectivity. He referred to Schedule 18 of the MGFA where importance has been assigned to the routers at various sites and the type of network connectivity and the capacity of the network. Since MCPL was aware of the two-way dedicated bandwidth and the equipments provided by BT, the payment by MCPL to the Assessee is in the nature of “Royalty”. The AO thereafter referred to a part of paragraph 13.1 of AAR’s ruling in the case of Dell (supra). We have reproduced the whole paragraph and highlighted the portion quoted by the AO in the order of assessment, so that one can understand the context in which the AAR has given it’s conclusions:

“13.1. There is no doubt that the entire network consisting of under-sea cables, domestic access lines and the BT equipment— whichever is kept at the connecting point, is for providing a service to facilitate the transmission of voice and data across the globe. One of the many circuits forming part of the network is devoted and earmarked to the applicant. Part of the bandwidth

capacity is utilised by the applicant. From that, it does not follow that the entire equipment and components constituting the network is rented out to the applicant or that the consideration in the form of monthly charges is intended for the use of equipment owned and installed by BTA. **The questions to be asked and answered are : Does the avilment of service involve user of equipment belonging to BT or its agent by the applicant ? Is the applicant required to do some positive act in relation to the equipment such as operation and control of the same in order to utilize the service or facility ? Does the applicant deal with any BT equipment for adapting it to its use? Unless the answer is 'yes', the payment made by the applicant to BTA cannot be brought within the royalty cl. (iva).** In our view, the answer cannot be in the affirmative. **Assuming that circuit is equipment, it cannot be said that the applicant uses that equipment in any real sense. By availing of the facility provided by BTA through its network/circuits, there is no usage of equipment by the applicant except in a very loose sense such as using a road bridge or a telephone connection. The user of BT's equipment as such would not have figured in the minds of parties.** As stated earlier, the expression 'use' occurring in the relevant provision does not simply mean taking advantage of something or utilizing a facility provided by another through its own network. What is contemplated by the word 'use' in cl. (iva) is that the customer comes face to face with the equipment, operates it or controls its functioning in some manner, but, if it does nothing to or with the equipment (in this case, it is circuit, according to the Revenue) and does not exercise any possessory rights in relation thereto, it only makes use of the facility created by the service provider who is the owner of entire network and related equipment. There is no scope to invoke cl. (iva) in such a case because the element of service predominates.”

19. After quoting the above highlighted portion of the ruling of AAR, the AO proceeded to hold that the services provided by BT requires use of Routers belonging to BT by MCPL and a positive act is required to be done by MCPL in relation to the router installed at its premises by BT. MCPL has to provide the necessary infrastructure in its premises to host the router and has to adapt their Local Area Network to work with the BT routers. Since the answer is yes as per the decision of the Hon'ble AAR, the payment for the use of the network amounts to Royalty.

20. The AO thereafter referred to another part of the ruling in Paragraph 13.1 (which we have quoted above in bold letters and underlined) by AAR in the case of Dell(supra) and observed that as per Schedule 17 of the MGFA wherein it is provided that the Assessee should provide reasonable location and operating environment, free of any charge for BT equipment (i.e., rack and shelf space, power

socket, ambient temperature control, customer connectivity and IP address allocation and management). The above clause in the MGFA according to the AO showed that both the Assessee and MCPL were aware of the Routers being placed in their premises and it was mind of the parties when the MGFA was entered into regarding the use of equipment.

21. The AO thereafter referred to clause 6.1 of the MGFA paragraph 4.3 of Handbook and diagram of the BT Network and was of the view that routers are very important for MCPL to receive services from the Assessee. Therefore the AO concluded that consideration paid by MCPL is for "right to use" equipment i.e., the routers. The AO has also referred to multi protocol label switching MPLS (referred to in the MGFA) and concluded that the entire system of MPLS is based on the routers. He also referred to clause 6.1 of the MGFA which provides that initial trouble shooting will be done by the Assessee wherever any problem occurs in use of Wide Area Network connectivity. According to the AO it is only if the Assessee is aware of the equipment installed in its premises can it trouble shoot. The Assessee does constant checking of the equipment installed in the premises of MCPL and therefore there was a right to use the equipment.

22. The AO thereafter made reference to the decision of the Hon'ble Madras High Court in the case of Verizon Communications Singapore Pte. Ltd v. ITO (International Taxation) [2013] 39 taxmann.com 70 wherein it was held that the consideration received by the non-resident taxpayer from the Indian customers for provision of bandwidth/telecommunications services outside India was for the 'use of, or the right to use equipment' and, therefore, royalty under section 9(1)(vi) of the Act. It was also held that alternatively, the payments can also be considered for the use of process provided by the taxpayer and therefore, royalty under the Act. The Hon'ble Court also held that even if the payment is not treated as one for the use of the equipment,, the use of the process was provided whereby through assured bandwidth the customer is guaranteed the transmission of the data and voice. The fact that the bandwidth is shared with others, however, has to be seen in the light of the technology governing the operation of the process and this by itself does not take the Assessee out of the scope of royalty. Thus the consideration being for the use and the right to use of the process, it is royalty with the meaning of clause (iii) of Explan.2 to Sec.9(1)(vii) of the Act. Clause(iii) of Explan.-2 to Sec.9(1)(vi) provides that consideration received for use of any patent, invention, model, design, secret formula or process or trade mark or similar property, would be royalty. According to the AO even though the statutory provisions use the expression secret process, even ordinary/simple process shall be covered by the definition. In coming to the above conclusion the AO relied on the decision of the Special Bench ITAT Delhi in the case of New Skies Satellites N.V. Vs. ACIT (Intl.Tax) (2009) (126 TTJ 1) has taken the view that the provision of the transponder through which the

telecasting companies are able to uplink the desired images/data and downlink the same in the desired area is a **“process”**. **To constitute “royalty”, it is not necessary that the process should be a “secret process”**. The fact there is a ‘comma’ after the words “secret formula or process” in the DTAA does not mean that a different interpretation has to be given to the DTAA as compared to the Act. The argument that there is no “use” of the satellite by the payer as it has no control or possession of the satellite is not acceptable. **To constitute “royalty”, it is not necessary that the instruments through which the “process” is carried on should be in the control or possession of the payer**. The context and factual situation has to be kept in mind to determine that whether the process was “used” by the payer. In the case of satellites physical control and possession of the process can neither be with the satellite companies nor with the telecasting companies. **The fact that the telecasting companies are enabled to telecast their programmes by uplinking and downlinking the same with the help of that process shows that they have “use” of the same**. Time of telecast and the nature of programme, all depends upon the telecasting companies and, thus, they are using that process. The consideration paid by telecasting companies to satellite companies is for the purpose of providing “use of the process” and consequently assessable as “royalty” under the Act and the DTAA. This decision has been reversed by the Hon’ble Delhi High Court in the decision of *New Skies Satellites N.V.* 68 taxmann.com 8. The AO also took recourse to the provisions of Explan. 5 & 6 to Sec.9(1)(vi) of the Act in support of his conclusions as above, though these provisions are not found in the definition of Royalty under the DTAA.

23. For all the above reasons the AO brought to tax, the BT charges received by the Assessee from MCPL in his draft assessment order. The Assessee filed objections before the Dispute Resolution Panel (DRP) against the conclusions of the AO in the draft assessment order. The DRP upheld the order of the AO. The AO passed the final order of assessment in which he brought to tax BT charges as royalty. Aggrieved by the aforesaid addition, the Assessee is in appeal before the Tribunal.

24. The arguments advanced by the parties are almost identical to the arguments advanced before the AO. The Ld.AR for the Assessee brought our notice the terms of the Application support and Wide Area Network support services between the Assessee and MCPL and submitted that the Wide Area Network support services provided were merely connectivity services and are not for use of any equipment or process as understood by the revenue and therefore cannot be characterized as “Royalty” either under the Act or under the DTAA. It was submitted that the Assessing Officer’s reliance on the decision of Hon’ble Madras High Court in *Verizon Singapore Pte. Ltd. vs ITO* (supra) and decision of Special Bench of ITAT, Delhi, in *New Skies Satellite* (supra) was misplaced. It was submitted that the Hon’ble Delhi High

Court has reversed the decision of Special bench in *New Skies Satellite BV* which is reported in 68 taxmann.com 8, and the issue stands covered by *Asia Satellite Telecommunications Co. Ltd. vs DCIT [2011] 332 ITR 340 (Del.)*. It was submitted that the consideration amount received for providing bandwidth services would not be taxable as equipment royalty or process royalty under the Tax Treaty. The transaction does not result in equipment royalty under the Tax Treaty as there is no use or right to use any industrial, commercial or scientific equipment by the customer' availing the bandwidth services. The transaction does not result in process royalty under the Tax Treaty as there is no use of any process by the customer availing the bandwidth services. Hence, does not fall in the definition of royalty as per Tax Treaty. Explanations 5 and 6 to section 9(1)(vi) of the Act cannot be read into the Tax Treaty for the definition of equipment and/or process royalty. Further, the Tax Treaty specifically does not include "transmission by satellite, cable, optic fiber or similar technology" in the definition of Royalty under the Tax Treaty, whereas other tax treaties (including treaties entered after insertion of Explanations 5 and 6 vide Finance Act, 2012) do specifically capture such transmissions in the royalty definition. He stressed that provision of bandwidth services for digital transmission of data by the Assessee does not result in use of any equipment or process by the customer. Hence, the consideration received for services does not fall in the definition of 'Royalty' under the Tax Treaty. It was reiterated that the Assessee and MCPL have no interest in the equipment whatsoever and did not have control over the equipment or the process and the payment was for providing standard services from BT. It was submitted that mere fact that some equipments are installed and maintained by the service provider at the sites will not amount to lease of equipment. The service provider BT utilizes its own network and provides a facility that enables Coats group to transmit voice and data through the media of telecom bandwidth and accordingly there is no use or right to use equipment. The use of the router is for the limited purpose of obtaining the services from BT. It was submitted that use of router is akin to a set top box kept at homes of the subscribers of television channels or direct to home (DTH) operators. The equipment (i.e., set top box) at the house of the subscriber belongs to the service provider. It cannot be said that the subscriber is paying for "use of equipment". The subscriber is paying for services and the equipment is required for such a purpose. Reference was made to decision of Hon'ble Supreme Court in the case of *Engineering Analysis Centre of Excellence Pvt.Ltd. Vs. CIT Civil Appeal Nos. 8733-8734 of 2018* wherein it was held that the enlarged definition of Royalty as per the Act as amended by the Finance Act, 2012 cannot be applied to India-UK DTAA.

25. The learned DR primarily reiterated the stand of the revenue as contained in the order of assessment. His submission was that reimbursements to the extent it is for rendering services has to be regarded as income. In this regard he relied on the decisions which has

been cited by the AO in the order of assessment. He placed reliance on the decision of the Hon'ble Madras High Court in the case of Verizon Communications Singapore Pvt.Ltd. (supra) for the proposition that payment of use of bandwidth facility would be in the nature of royalty both under the Act and the DTAA between India and Singapore and that decision will equally apply to India-UK DTAA.

26. We have heard the rival submissions perused the material on record. The issue which arises in the present appeal filed by the Assessee for different Assessment Years is against the chargeability of amount received from MCPL by the Assessee towards BT charges for providing WAN connectivity/bandwidth services outside India as equipment/process royalty u/s 9(1)(vi) of the Act and/or Article 13(3) of the India UK DTAA. The Assessee is a tax resident of UK. The bandwidth services are provided as standard services wherein the customer enjoys an uninterrupted service to transmit voice and data at standard rate of reliability. The Assessee claims that such rendition of service using an equipment/process and the customer being only a recipient of service would not attract equipment/process royalty, as the transaction would not fall within the expression "use or right to use". Mere receipt of service using equipment under the control, possession and operation of service provider would only be transaction of a service and not to "use or right to use" an equipment, and would not attract 'Royalty' under the Act or the Tax Treaty. The Revenue authorities are of the view that the consideration received by the Assessee falls within the definition of Royalty (either as use of equipment or use of process) both u/s 9(1)(vi) of the Act and also under provisions of Tax Treaty.

27. The view canvassed by the Assessee finds support in the following decisions. Dell International Services (India) (P) Ltd. ("Dell India") parent company Dell-US entered into a master service agreement (MSA) with BT America (BTA) a non-resident company formed and registered in USA under which BTA provided the applicant with two-way transmission of voice and data through telecom bandwidth. The purpose of entering into such arrangement was to enable Dell entities in the respective countries to utilize the services of BTA. While BTA would provide the international half-circuit from the US/Ireland, the Indian half circuit is provided by Indian telecom company, namely, VSNL with whom BTA has a tie-up. The bandwidth so provided by BTA would give full country coverage in both the countries of delivery, i.e. USA and India. Under the agreement, a fixed monthly recurring charge for the circuit between America and Ireland and for the circuit between Ireland and India is payable to BTA. Installation charges as specified in the order form are also payable initially. The payment to BTA is net of any Indian taxes, including withholding taxes, as may be applicable. There was no equipment of BTA at the Dell India's premises and Dell India has no rights over any equipment held by BTA for providing the bandwidth. Dell India sought ruling that the payments made to BTA are not liable to be taxed in India either under the treaty provisions or s. 9(1) of the IT Act, 1961. The Hon'ble Authority for Advance Ruling held

that the word 'use' in relation to equipment occurring in Expln-2 (iva) to Sec.9(1)(vi) is not to be understood in the broad sense of availing of the benefit of an equipment. The context and collocation of the two expressions 'use' and 'right to use' followed by the word "equipment" suggests that there must be some positive act of utilization, application or employment of equipment for the desired purpose. If an advantage is taken from sophisticated equipment installed and provided by another, it is difficult to say that the recipient/customer uses the equipment as such. The customer merely makes use of the facility, though he does not himself use the equipment. The Hon'ble Delhi High Court in the case of *DIT v. New Skies Satellite BV* [2016] 68 taxmann.com 8/238 Taxman 577/382 ITR 114 and *CIT v. Siemens Aktiengesellschaft* [2009] 177 Taxman 8/310 ITR 320 (Bom.) have also taken similar view in the context of use of transponder facility. This view has been affirmed by the Mumbai ITAT in the case of *Dy. CIT v. Reliance Jio Infocomm Ltd.* [2019] 108 taxmann.com 325 (Mum.), wherein it has been held that u/s.9(1)(vi) of the Act, payment for 'bandwidth services' is not assessable as 'royalty' if the Assessee only has access to services and not to any equipment. The Assessee also did not have any access to any process which helped in providing of such bandwidth services. All infrastructure & process required for provision of bandwidth services was always used and under the control of the service provider and was never given either to the Assessee or to any other person availing the said services.

28. The view canvassed by the Revenue finds support from the decision of the Hon'ble Madras High court in the case of *Verizon Singapore Pte.Ltd.(supra)* The Assessee company, Verizon Communication Singapore Pte Limited originally called as MCI WorldCom Asia Pte Limited, is a non- resident company engaged in the business of providing international connectivity services. (IPLC). IPLC (International Pvt. Leased Circuit) is an end to end managed dedicated bandwidth service that provides internet service to customers for various applications. The international leg of the telecom services provided outside India is provided by the Assessee. The gateway/the landing station in India used in transmitting the traffic within India belonged to VSNL and is used by VSNL for providing Indian end services pursuant to its contract with the customer. On the above facts, the question before the Hon'ble Court was as to Whether the Tribunal was right on facts and in law in holding that the payments received by Verizon Communications Singapore Pvt.Ltd., the appellant from the Indian customers for provision of Bandwidth/Telecom Services outside India is royalty for the 'use of, the right to use equipment' u/s 9(1)(vi) of the Act? And Whether these payments received constitute royalty for the 'use of, or the right to use equipment' u/s 12(3)(b) of the Tax Treaty(DTAA between India and Singapore)? The Hon'ble Madras High Court held that the payments made to the non-resident company were for the 'use of equipment'. In addition, the Court also held that such payments may also be held to be in relation to the 'use of process' since the provision of

assured bandwidth and guaranteeing the transmission of data and voice would qualify for the same, irrespective of the fact that the bandwidth is shared with others. After the insertion of Explanation 5, possession, control of such right, property or information usage directly by the payer, location of the right are not matters of concern in deciding the character of payment as 'royalty'. The customer has a significant economic interest in the Assessee's equipment to the extent of the bandwidth hired by the customer. The bandwidth capacity made available on a dedicated basis for the entire contract period, even if it does not involve a possessory interest, the amount received by the Assessee in a way is also for the use of process. The definition of 'royalty' under DTAA and the Indian Income-tax Act are in para materia. As rightly pointed out by the revenue, Explanation 6 defines 'process' to mean and include transmission by satellite (cable, optic fibre, or by any other similar technology, whether or not such process is secret.

29. The provisions of Expln-5 and 6 referred to in the decision of the Hon'ble Madras High Court in the case of Verizon Communication (supra) reads thus:

Explanation 5.—For the removal of doubts, it is hereby clarified that the royalty includes and has always included consideration in respect of any right, property or information, whether or not— (a) the possession or control of such right, property or information is with the payer; (b) such right, property or information is used directly by the payer; (c) the location of such right, property or information is in India.

Explanation 6.—For the removal of doubts, it is hereby clarified that the expression "process" includes and shall be deemed to have always included transmission by satellite (including up-linking, amplification, conversion for down-linking of any signal), cable, optic fibre or by any other similar technology, whether or not such process is secret;"

It is pertinent to mention here that Explanations 5 and 6 have been inserted by the Finance Act 2012, with retrospective effect from 1.6.1976. The Hon'ble Madras High Court relying upon above insertions of Explanations 5 and 6 to section 9(1)(vi) of the Income Tax Act, by the Finance Act 2012, has held that payment made by Indian customers to a Singapore company for providing end-to-end internet connectivity (bandwidth services) outside India was taxable as royalty under the Income Tax Act. It is an admitted position that but the above explanation 5 and 6 are not found in the definition of Royalty under the India-UK DTAA. The Hon'ble Supreme Court in the case of "Engineering Analysis Centre of Excellence (P.) Ltd. v. CIT" [2021] 125 taxmann.com 42, has in the context of taxability or otherwise of consideration paid for use of computer software as royalty, by holding that the payments made by resident Indian end-users/distributors to nonresident computer software manufacturers/suppliers, as consideration for the resale of the computer software through End User License Agreements (EULAs)/distribution agreements, can't be considered as payment of

royalty for the use of copyright in the computer software as per provisions of Article 12(3) of the applicable DTAA and further that the provisions contained in section 9(1)(vi) of the Income Tax Act along with explanations 2 and 4 thereof, not being more beneficial to the Assessee, will not have any application. We find that the Hon'ble Delhi High Court in *New Skies Satellite (supra)* has also taken the same view and has observed in the said decision that Hon'ble High Court of Madras in *Verizon Communications Singapore Pte. Ltd. (supra)* declined to conclusively determine or record a finding as to whether amendment to section 9(i)(vi) of the Act by insertion of Expln.5 to Section 9(1)(vi) of the Act, indeed was clarificatory as the Revenue suggested or prospective and the Court was of the view that the issue of taxability of income of Assessee may be resolved without redress of above question purely because the Assessee did not press the said line of argument and had instead stated that ultimate taxability of income shall rest on the interpretation of terms of DTAA.

30. It was submitted by the learned counsel for the Assessee that internationally, it is accepted that when payments are made for such services, they are not in the nature of 'royalties'. It has been internationally accepted that payments for satellite broadcasting services, transponder services, bandwidth services etc. are not to be considered 'royalties'. It is also accepted that bandwidth fees cannot be considered as payments for the 'use of process'. In so far as use or use of equipment is concerned, as long as there is no control established over the equipment. This view has been endorsed by the OECD Model Commentaries as well. This view has specifically been upheld by the Authority for Advance Rulings in India in the case of *Dell International (supra)* and the Hon'ble Delhi High Court in the case of *Asia Satellite (supra)*. The amendment to the definition of Royalty by the Finance Act, 2012 with retrospective effect has expanded the definition of "Royalty", by laying down that consideration paid may be classified as made for the 'use of equipment' and thus, classified as 'royalties' irrespective of the possession or control of the equipment with the payer or use by the payer or the location of the equipment being in India. However, this retrospective amendment does not impact the definition of 'royalties' in the tax treaties entered into by India. India-UK DTAA defines "Royalty" to include payments for the use or the right to use of industrial, commercial or scientific equipment and the use or the right to use of a secret formula or process as 'royalties'. The definition of Royalty under the DTAA, is much narrower in its scope and coverage than the definition of 'Royalty' as contained in section 9(1)(vi) read with Explanations 2, 5 and 6 of the Act. Installation & operation of sophisticated equipments or a standard facility with a view to earn income by allowing the users to avail the benefits of such equipments or standard facility does not tantamount to granting the use or the right to use that equipment or process so as to be considered as royalty within the above definition of 'royalty' contained in clause 3(b) of Article 13 of the India-UK DTAA. At no point of time, the customer gain any

possession or physical custody, control or management over any equipment. Payment of bandwidth charges can't be considered as 'Royalty'. Also, the process involved to provide the bandwidth service is not "secret", but a standard commercial process followed by the industry players. Therefore, the said process can't be classified as a "secret process", as is required by the above-mentioned clause 3(b) of Article 13 of the DTAA.

31. The law is well settled, that in so far as provisions which impose a tax liability on the subject, if the words used are ambiguous and reasonable open to two interpretations benefit of interpretation is given to the subject. In *State of West Bengal vs. Kesoram Industries Limited*, (2004)10 SCC 201 has summed up the following principles applicable to the interpretation of a taxing statute:

“(i) In interpreting a taxing statute, equitable considerations are entirely out of place. A taxing statute cannot be interpreted on any presumption or assumption. A taxing statute has to be interpreted in the light of what is clearly expressed; it cannot imply anything which is not expressed; it cannot import provisions in the statute so as to supply any deficiency;

(ii) Before taxing any person, it must be shown that he falls within the ambit of the charging section by clear words used in the section;

and

(iii) If the words are ambiguous and open to two interpretations, the benefit of interpretation is given to the subject and there is nothing unjust in a taxpayer escaping if the letter of the law fails to catch him on account of Legislature's failure to express itself clearly”.

32. We have already seen the two divergent views one taken by the Hon'ble Delhi High Court in the case of *Asia Satellite (supra)* and Bombay High Court in the case of *Siemens Aktiengesellschaft (supra)* and the other view taken by the Hon'ble Madras High Court in the case of *Verizon Communication (supra)*. There is no decision of the Hon'ble Karnataka High Court brought to our notice, which is the jurisdictional High Court as far as this Tribunal is concerned. Applying the rule that if two interpretations are possible on tax liability benefit of interpretation is given to the subject, we follow the ruling of the Hon'ble Delhi High Court in the case of *Asia Satellite (supra)* and Bombay High Court in the case of *Siemens Aktiengesellschaft (supra)* and hold that in the case of Assessee, the consideration received for providing bandwidth facility will not be taxable as equipment royalty or process royalty. The plea of the Assessee in this regard is accepted and the relevant grounds of appeal in all the 7 appeals are allowed, as

admitted by both the parties, the facts and circumstances of the case are identical.

46. We note that, it is the same transaction that, was analysed by this *Tribunal* in case of the Payee(J&P Coats), wherein it has been held that, it would not amount to be 'Royalty' as per Article 13 of India UK DTAA.

We are therefore respectfully following the above view, hold that the payment made by the assessee to the J&P Coats(Payee), cannot be held to be as Royalty under Article 13 of India UK DTAA.

47. On applicability of FTS, we note that the Ld.AO considered the services to be FTS, whereas, the Ld.CIT(A) in para 48 observed and held as under:

"48. Without prejudice to the decision above [It is already held that the amount paid by the appellant is taxable as Royalty] I proceed to examine the claim that the AO wrongly held it as FTS also. I find that the AO has discussed these issues in the order on the page nos. 51 to 53. The AO has examined the claim of the appellant that the amount paid by the appellant is not taxable as Royalty but as FTS (also not made available). The AO has held that notwithstanding the decision that it is Royalty; it is also FTS."

48. The Ld.CIT(A) proceeds on following observation:

"50. In the present case, the J & P Coats is receiving consideration for providing services which are ancillary and subsidiary to the application or enjoyment of the right, property or information in connection with and for processes and software. So, in case the claim of the MCPL is considered that it is receiving service, the same will become taxable under the head 'fees for technical services' under Indo-UK DTAA article 13(4)(a) and 13(4) (b). For this there is no requirement of make available. Similar issue has been decided in favour of revenue by Hon. ITAT Delhi in the case of J.C. Bamford Excavators Ltd. v. DDIT, Circle (1) International Taxation, New Delhi [2019] 101 taxmann.com 492."

49. We note that the Ld.CIT(A) relied on the decision of *Hon'ble Delhi Tribunal* in case of *J.C. Bamford Excavators Ltd. vs. DDIT*

(supra) in order to conclude that the payments made by the assessee to J&P Coats is towards providing services of a technical nature that are also made available.

50. We have perused the decision of *Hon'ble Delhi Tribunal* and note that the facts there are as under:

“4. It is imperative to understand the facts of the case in hand. M/s JCB Bamford Excavators Ltd [JCBE' the appellant for short] is a company incorporated under the laws of UK. It is a non-resident company for the purposes of Indian Tax Laws and is a tax resident of UK under Article 4 of the DTAA entered into between India and UK. On 5.03.2004, JCBE entered into Technology Transfer Agreement [TTA] with JCB India to licence the know-how and related technical documents consisting of all drawings and designs with an exclusive right to manufacture and market the technology/excavator loader in the territory of India under the brand name '3DX'.”

51. The *Hon'ble Delhi Tribunal* further while addressing the issue therein observed as under:

“9. We will first address to this contention of the ld. AR. As mentioned elsewhere, in earlier years, the appellant had licence to know-how and related technical documents consisting of all drawings and designs with an exclusive right to manufacture and market the technology/excavator loader in the territory of India under the brand name 3DX to JCB India. During the year under consideration, we find that pursuant to the agreement dated 17.12.2007, which is a Tripartite Agreement between JCBE, JCB India and JCB Investments, the royalty paid by JCB India to the assessee was routed through JCB Investments. In our considered opinion, the only difference that came into the hitherto arrangement was that, whereas earlier JCB India was paying royalty directly to JCBE, now it is being routed through the assessee with the deduction of 0.05%. Except for this, all the terms and conditions of the agreement between the assessee and JCB India are same relating to TTA and IPAA which means that employees of JCBE earlier seconded to JCB India continue to render services to JCB India during the year under consideration in the same way as they were doing in the past. Our view is fortified by clause (d) of the new agreement and clause 4.2 of this agreement clarifies that the delivery of technical documentation and making available of technical personnel as set out in earlier clauses (iii) & (iv) of

the technology agreement shall remain unaffected by this agreement and shall continue as rights and obligations between JCBE and JCB India under technology agreement.

.....

13. *As mentioned elsewhere in the earlier years, this issue arose when JCB India [Service PE] used to make payment directly to assessee and the Tribunal vide its order in JC Bamford Excavators Ltd. case (supra) has held as under:*

"Insofar as the question of royalty representing consideration for the transfer of IP Rights simplicitor is concerned, it is clear that the service PE representing eight deputationists had absolutely no role to play either in creating or making it available to JCB India. It is not even the case of the A.O that these eight deputationists had anything to do in the grant of IP Rights to JCB India. The service PE, as the very name suggests and the actual position indicates, is concerned only with the activities of rendering services after the grant of IP Rights. The ld. DR was also fair enough to candidly accept this position. Thus, it follows that albeit the amount of royalty received by the assessee arises out of IP Rights which are in the nature of right or property but the same cannot be considered under para 6 of Article 13 because it is not effectively connected with the service PE of the assessee in India."

.....

25. *In the light of the above, it would be preferable to go through the contests of agreement dated 17.12.2007 [Tripartite Agreement]:*

'Page 1, Clause (C):

Under a Technology Transfer Agreement dated 5 March 2004 (the "Technology Agreement") JCB UK granted to JCB India an exclusive license under JCB UK's intellectual property to manufacture, assemble and sell licensed products (as defined in the Technology Agreement) in India and a non-exclusive licence under JCB UK's intellectual property to sell the Licensed Products outside India as determined by mutual written agreement between the parties.

(D) JCB UK now wishes for JCB investments to manage the licensing of JCB UK's intellectual property to JCB India going forward.

.... "PAYMENT TERMS

6.1 JCB Investments shall provide JCB UK on a biannual basis within 30 days of the 30th June and 31st December in each year with Royalty accounts showing the following for each preceding half year:

6.1.1 *The royalty payable by JCB India under the License (or by and other permitted sub-licensee where applicable); and*

6.1.2 *The amount of any withholding tax to be paid under Clause 6.3.*

6.2 *The Royalty shall be payable within thirty (30) days of receipt by JCB Investments of relevant royalty payments from JCB India under the License (or from any other permitted sub-licensee where applicable).*

7.3 *JCB Investment shall not:*

7.3.1 *Make any representation or do and act, save as expressly granted in this Agreement, which may be taken to indicate that it has any right, title or interest in or to any IP Rights...*

...."Schedule

THE ROYALTY

The Royalty shall be equal to the royalty received by JCB Investments from JCB India under the License (and from any other permitted sub-licensee of JCB Investments where relevant), less 0.5% (half of one per cent)."

26. *As mentioned elsewhere and as it can be seen from above, the entire royalty amount is passed on to JCBE [the appellant] through JCB Investment less 0.05%. It is has already been mentioned conclusively elsewhere that the delivery of technical documentation and making available of technical personnel as set out in clause (iii) and (iv) of the TTA dated 05.03.2004 will remain unaffected by this tripartite agreement and rights and obligations between JCB UK and JCB India will continue.*

27. *The disputed receipts are in relation to the payment received by the assessee as royalty from JCB Investments which has received it from JCB India. As it has been conclusively mentioned elsewhere that in earlier years there was a bilateral agreement and during the year under consideration, there is tripartite agreement, the contents are mutatis mutandis same. In our opinion, substance shall get precedence over the form. In our considered view, the impugned receipts are ancillary and subsidiary to the application or enjoyment of the right, property or information for which the royalty payment were received by the assessee through such receipts would fall under clause (a) of Article 13(4) and would be taxable as FTS and the services provided by the assessee are to be considered as having been made available to the recipient of the services. Substance will rule over form."*

52. From the above facts of the case that was considered by *Hon'ble Delhi Tribunal*, it is clear that there was an existence of service PE and that assessee in India and there was an admitted transfer of technology in the agreement for which the payment was rendered as observed by *Hon'ble Delhi Tribunal* as under. This itself makes the present facts distinguishable in case of assessee as the revenue has not made out a case of permanent establishment of J&P Coats in India which has been also observed by *Coordinate Bench* of this *Tribunal* in a decision passed in case of J&P Coats for various assessment years referred to hereinabove. In the order passed by the Ld.CIT(A), we note that the revenue is doubting, if the payment made could be FTS, however took the view of the payments to be FTS by relying on various decisions which are a subject matter of royalty. Thus the revenue has actually not made out a case for taxing the payments by the assessee as FTS.

53. The plea of the Assessee was in terms of paragraph 4(c) of Article 13 of DTAA, that payments of any kind in consideration for rendering of any technical or consultancy services (including the provision of services of a technical or other personnel) would be regarded as fees for technical services' if it 'makes available' technical knowledge, experience, skill know-how or processes, or consist of the development and transfer of a technical plan or technical design. In the present facts there is no such technical information, knowledge or skill, knowhow or process that is available to the assessee in order to independently use it. The Ld.CIT(A) proceeded then on attribution of income without establishing a PE J&P Coats in

India. In this regard we refer to relevant observation of *Coordinate Bench* of this *Tribunal* reproduced hereinabove to hold that J&P Coats do not have a PE in India.

54. Accordingly, we are of the view that the payments made by assessee to J&P Coats cannot be held to be taxable in India as it does not amount to income as per DTAA as well as Income tax Act.

Accordingly, the ground nos. 3 to 10 raised by assessee stands allowed for A.Y.: 2016-17.

55. The issues raised by assessee for A.Y. 2017-18 are identical and applying the above ratio *mutatis mutandis*, we allow the **ground nos. 3 to 10** raised by the assessee for A.Y. 2017-18.

56. Since it is held that the assessee was not liable to deduct TDS on the payments made to J&P Coats for A.Ys. 2016-17 & 2017-18, the assessee cannot be held to be an “assessee in default”, u/s. 201(1) of the Act. We accordingly, delete the disallowance and the interest computed u/s. 201(1A) of the Act on the payments made by assessee to J&P Coats for both years under consideration.

In the result, appeals filed by assessee for A.Ys. 2016-17 & 2017-18 stands allowed.

Order pronounced in the open court on 31st May, 2022.

Sd/-
(PADMAVATHY S)
Accountant Member

Sd/-
(BEENA PILLAI)
Judicial Member

Bangalore,
Dated, the 31st May, 2022.
/MS /

Copy to:

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

By order

Assistant Registrar,
ITAT, Bangalore