

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

**BEFORE SH. N. K. BILLAIYA, ACCOUNTANT MEMBER
AND
SH. N.K. CHOUDHRY, JUDICIAL MEMBER**

ITA No.5880 /Del/2018 & 5479/Del/2019
Assessment Year: 2015-16 & 2016-17

Telstra Singapore 8, Cross Street, 20-00 Manulife Towers, Singapore -048424	Vs	DCIT (International Taxation) New Delhi
(APPELLANT)		(RESPONDENT)

Appellant	Sh. S. K. Aggarwal, CA
Respondent	Ms. Sapna Bhatia, CIT DR

Date of hearing:	13/07/2022
Date of Pronouncement:	13/07/2022

ORDER

PER N.K. BILLAIYA, AM:

ITA No.5880/Del/2018 and 5479/Del/2019 are two separate orders of the AO dated 06.07.2018 and 03.04.2019 respectively for A.Y.2015-16 and 2016-17 framed u/s.143 (3) r.w.s. 144C (1) of the Act.

2. Since the grievance is common in both these appeals they

were heard together and are being disposed of by this common order for the sake of convenience and brevity.

3. The substantive common grievance which was argued before us on both these appeals relate to the taxability of the money received by the assessee from Indian customers for provision of Telecommunication connectivity services which included international private leased circuits, Multiprotocol Label Switching IP/VPN etc. taxable as Royalty as under section 9(1) (vi) of the IT Act and under Article 12(3) of the India Singapore Tax Treaty. At the very outset the Counsel for the assessee stated that the impugned quarrel has been considered and decided by this Tribunal in assessee's own case in A.Y.2011-12 and 2012-13.

4. The DR could not bring any distinguishing decision in favour of the revenue.

5. We have carefully considered the orders of the authorities below. The undisputed fact is that the assessee is a company incorporated in Singapore and is a tax resident of Singapore. It is engaged in the business of providing digital transmission of data through international private line or multi-protocol label switching etc. to facilitate high speed data connectivity.

6. The assessee provides bandwidth services outside India to

its customers. It has entered into Global Business Services Agreement with various customers. As per global business services agreement between the assessee and the customer, the customer, enjoys an uninterrupted 24 x 7 services and such services would be 99.60% of the time.

7. The returns for the impugned assessment years were selected for scrutiny assessment wherein the AO has considered the amount received from Indian customers for the provision of bandwidth services outside India as equipment/ process royalty u/s. 9 (1) (vi) of the Act r.w. Article 12 (3) of the India- Singapore tax treaty. The action of the AO was upheld by the DRP.

8. We find that the impugned quarrel was considered by this Tribunal in assessee's own case in ITA No.1548/Del/2015 and 286/Del/2016 for A.Y. 2011-12 and 2012-13. The relevant findings of this Tribunal read as under :-

✓ 15. We find that the similar issue arose before the Hon'ble Delhi High Court in Asia Satellite Telecommunications Co. Ltd. vs. Director of IT (2011) 232 ITR 340 (Del), which in turn has been followed in DIT Vs. (1) New Skies Satellite BV (2) Shin Satellite Public Co. Ltd. (2016) 382 ITR 114 (Del). The assessee therein was engaged in the business of lease of transponder or allocation of transponder capacity on satellite for digital transmission services. The issue before the Hon'ble High Court (supra) was whether the amounts received from

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customers for availing the transponder capacity was chargeable to tax in India as 'Royalty'. The Hon'ble Delhi High Court in the case of Asia Satellite Telecommunication Co.Ltd.(supra) held that the transaction does not result in 'Royalty' (equipment or process) under section 9(1)(vi) of the Act (prior to amendment by Finance Act, 2012). It was further held by the Hon'ble Delhi High Court in New Skies Satellite (supra) that the transaction does not result in 'Royalty' (equipment or process) as Section 9(1)(vi) of the Act, prior to amendment by Finance Act, 2012, was *pari-materia* with the definition of 'Royalty' as per the Tax Treaty and hence, the decision in the case of Asia Satellite (supra) was binding and required to be followed.

16. The Hon'ble Delhi High Court in New Skies Satellite (supra) held as under:-

"..... the first determinative interpretation given to the word "royalty" in Asia Satellite, when the definitions were in fact pari materia (in the absence of any contouring explanations), will continue to hold the field for the purpose of assessment years preceding the Finance Act, 2012 and in all cases which involve a Double Tax Avoidance Agreement .. [vide para 60]

..... In Asia Satellite Telecommunications Co. Ltd. 's case (supra) this Court held that income from data transmission services would not qualify as royalty in order for it to be taxable under the Act. The Court first recognized that the definition of royalty in the section is with respect to permission granted to use the right in respect of the patent, invention, process, etc., all essentially forms of intellectual property. This permission restricts itself merely to the letting of the licensed asset. The permission does not go so far as to allow alienation of the asset itself. That being said, it is not so restricted as to qualify as a case where the licensor uses the asset himself albeit for the purposes of his customers. Essentially therefore, Asia Satellite Telecommunications Co. Ltd. 's case (supra) held that the presence of control was a critical factor in adjudging whether there was "use" of a particular process [vide para 28]."

9. This view of the coordinate Bench find support from the decision of the Hon'ble High Court of Delhi in the case of New Skies Satellite BV in ITA No. 473, 474 and 500/2014 and 244/2014 order dated 08.02.2016. The relevant findings of the Hon'ble High Court read as under :-

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

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

10. This controversy is now well settled by the Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence Private Limited in 432 ITR 471.

11. Respectfully following the findings of the coordinate Bench, in the light of the decision of Hon'ble Jurisdictional High Court of Delhi (*supra*) and the Hon'ble Supreme Court (*supra*) we direct the AO to delete the impugned additions from both the assessment years.

12. In the result, both the appeals by the assessee are allowed.

13. Decision announced in the open court on 13.07.2022.

Sd/-
(N.K. CHOUDHRY)
JUDICIAL MEMBER

NEHA, Sr. Private Secretary

Date:- 13.07.2022

Copy forwarded to:

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

Sd/-
(N. K. BILLAIYA)
ACCOUNTANT MEMBER

ASSISTANT REGISTRAR
 ITAT NEW DELHI

Date of dictation	13.07.2022
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for Pronouncement	
Date on which the fair order comes back to the Sr. PS/ PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which file goes to the Head Clerk.	
The date on which file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	