IN THE INCOME TAX APPELLATE TRIBUNAL
"B" BENCH : BANGALORE

BEFORE SHRI GEORGE GEORGE K, VICE PRESIDENT AND
SHRI LAXMI PRASAD SAHU, ACCOUNTANT MEMBER

Appeal No.	Appellant	Respondent
IT(IT)A No.89/Bang/2019 **Assessment Year :** 2009-10	M/s. Communications Global Network Services Limited, 81, Newgate Street, London, EC1A 7AJ, United Kingdom. **PAN : AAGCC 9220 K**	The Deputy Commissioner of Income Tax (International Taxation), Circle – 2(1), Bengaluru.
IT(IT)A Nos.2218/Bang/2019, 32/Bang/2021, 709/Bang/2022, 165 to 167/Bang/2023 **Assessment Years :** 2010-11 to 2015-16	-do	The Deputy Commissioner of Income Tax (International Taxation), Circle – 2(2), Bengaluru.

Assessee by	:	Shri. T. Suryanarayana, Smt. Tanmayee Rajkumar, Advocates
Revenue by	:	Shri. Aseem Sharma, CIT(DR), ITAT, Bengaluru.

Date of hearing	:	28.08.2023
Date of Pronouncement	:	29.08.2023

O R D E R

Per Bench :

These appeals at the instance of the assessee are directed against seven Final Assessment Orders passed under section 143(3) r.w.s. 147 r.w.s. 144C(13) of the Income Tax Act, 1961 (hereinafter called 'the Act'). The relevant Assessment Years are 2009-10 to 2015-16.

2. Common issues are raised in these appeals; hence, they were heard together and are being disposed off by this consolidated order.

3. Brief facts of the case are as follows:

Assessee is a foreign company managed and controlled from London, UK. It is engaged in the business of providing international telecommunications services, providing delivery of traffic to destinations outside India on behalf of its Indian customers. The assessee enters into agreement with Indian telecom operators for provision of telecom services comprising of interconnectivity services ("IC services") and international private leased circuit services ("IPLC services"). One such agreement was entered into by the assessee with M/s. Vodafone South Limited ("VSL"). The assessee was in receipt of certain amounts from VSL for the Assessment Years 2009-10 to 2015-16. Proceedings under sections 201 of the Act, was initiated in the case of VSL in respect of non-deduction of tax at source on payments made to the non-resident telecom operators for provision of bandwidth capacity and for provision of IC services. The said charges were considered as royalty/Fees for Technical Services ("FTS") both as per the Act and the respective Double Taxation Avoidance Agreements ("DTAA"). Since VSL was made an assessee in default and consequently made liable under section 201 and 201(1A) of the Act, proceedings against the assessee were initiated under section 147 of the Act for Assessment Years 2009-10 to 2015-16. Initially the AO passed Draft Assessment Orders for each of the Assessment Years proposing to bring to tax the receipts for rendering telecommunication services (the amounts received from VSL).

4. Aggrieved by the Draft Assessment Orders passed for Assessment Years 2009-10 to 2015-16, assessee filed objections before the DRP. The DRP rejected the objections of the assessee for all the Assessment Years. Consequent to the directions of the DRP, the impugned Final Assessment Orders were passed bringing to tax the receipts from rendering telecommunication services as

"Royalty" under the Act as well as the India-UK DTAA for Assessment Years 2009-10 to 2015-16 and alternatively as FTS for Assessment Years 2009-10 and 2010-11 and alternatively under section 5(2) of the Act without any reference to the DTAA for Assessment Years 2009-10 to 2015-16 (except for Assessment Year 2011-12).

5. Aggrieved by the Final Assessment Orders passed for Assessment Years 2009-10 to 2015-16, assessee filed these appeals before the Tribunal. The assessee has filed Paper Book enclosing therein the case laws relied on. The assessee, by placing reliance on the latest order of the Tribunal submitted that the entire issues decided in the Final Assessment Orders for Assessment Years 2009-10 to 2015-16 has been decided against the Revenue in the case of Telefonica De Espana S. A, Vs. DCIT (IT(IT)A No.215 and 216/Bang/2023, order dated 17.08.2023). The learned AR stated that the Tribunal in the case of Telefonica De Espana S. A, (supra) had followed the earlier orders of the Tribunal as well as the judgment of the Hon'ble jurisdictional High Court in the case of Vodafone South Ltd., (2016) 72 taxmann.com 347 (which was the entity which had made payments to the assessee and proceedings under sections 201 and 201(1A) of the Act were completed). The assessee has also filed a written submission. The content of the same reads as follows:

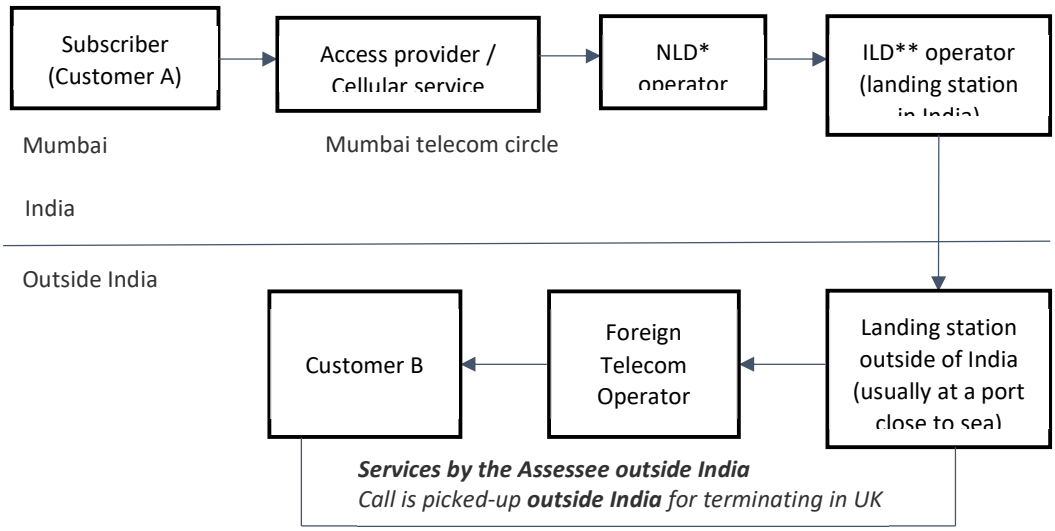
Submissions Re. Taxability of the receipts as "Royalty':

- *It is submitted that provision of IC services and IPLC services involves provision of standard telecom services outside of India and does not involve transfer of any rights in any equipment or process, nor actual usage of any equipment or process by the service recipient. The services are standard services and no active human intervention is involved. Therefore, they are also not technical in nature.*

- *It is submitted that telecom services are licensed / regulated services and therefore, if any telecom service provider (operating in any*

country) has to terminate call(s) originating in its country to a subscriber in other country, the telecom service provider in the country has to have an agreement for terminating calls to subscriber in other country.

- *A simplified model depicting the mechanism of a call from India terminated on the domestic network of a Foreign Telecom Operator ('FTO') in the UK is diagrammatically represented as under:*



**NLD - National Long Distance Operator for carriage of calls within boundaries of India*
***ILD - International Long Distance Operator for carriage of calls from a point in India to a point outside of India*

- *The IPLC services rendered also are similar in nature and pertain to automatic transmission of data.*

- *It is submitted that the intention of entering into the agreements is for provision of voice/data transmission and not allowing use of any particular equipment or network or process or part thereof. The customers in India (including VSL) do not have any control whatsoever on the assets deployed by the Assessee in provision of the service, nor is any equipment of the Assessee located at the premises of customers in India.*

- *It is submitted that telecom services are licensed / regulated services and therefore, granting any rights in or possession and control of, any*

equipment and / or process, to the service recipient is impermissible. Further, the fact that possession and control of the equipment / process continue with the Assessee and are not transmitted to the service recipients, is undisputed.

- *In view of the above, it is submitted that the provision of services do not tantamount to the grant of right to use equipment/process or the actual use of equipment by the service recipient/process. Accordingly, the receipts from rendering the services would not constitute "royalty" under the provisions of the Act and the DTAA.*

- *The Assessing Officer as well as the DRP held that the telecom operators have the right to use the transmission facilities and the process, and thus the consideration paid by the telecom operators is for grant for access and use of process, network and transmission facilities. On this basis, the AO and the DRP held that the receipts are chargeable to tax under Section 9(1)(vi) of the Act, read with clauses (i), (iii) and (iva) to Explanation 2 and Explanations 5 and 6 thereto, and Article 13 of the DTAA.*

Taxability under the Act:

- *It is submitted that explanation 2 to Section 9(1)(vi) defines 'royalty' to inter alia mean any consideration received 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*** *(clause (i))****; (ii) the use of any patent, invention, model, design, secret formula or process or trade mark or similar property*** *(clause (iii))****; (iii) the use or right to use any industrial, commercial or scientific equipment but not including the amounts referred to in section 44BB*** *(clause (iva))****.***

- *As stated above, the Assessee merely rendered telecom services, without transfer of any rights in the process. Therefore, in the present case, clause (i) to explanation 2 is not satisfied.*

- *In order for clauses (iii) and (iva) to be invoked, the threshold requirement is the "use of" the process/equipment or "right to use" the equipment by the service recipient.*

- *It is submitted that, for a receipt or payment to qualify as 'royalty' with reference to* ***use of a process****, the payer must obtain some control*

or rights in the 'process' that may lead to the transaction being classified as Royalty under Explanation 2 to Section 9(1)(vi). It is submitted that, the Assessee's receipts from customers in India including VSL are for provision of telecom services and not for the use of the Assessee's process.

- *It is submitted that in order to constitute '**use' or right to use' equipment**, the agreement between the parties must identify the relevant equipment and the equipment must be under some control and possession of the payer. Further, the payer must bear the risks and rewards associated with the use of such equipment. In the present case, the customers in India (including VSL) do not have any control whatsoever on the assets deployed by the Assessee in provision of the service, nor is any equipment of the Assessee located at the premises of customers in India (including VSL). Further, neither is the equipment identified or known nor does the payer bear the risk in relation to the use of any equipment. The agreements entered between the Assessee and customers in India are one for provision of services, and customers in India make payment for telecom services to the Assessee based on duration of calls terminated and capacity provided for data transmitted.*

- *Therefore, it is submitted that the conditions of "use of" or "right to use" as provided in explanation 2 to Section 9(1)(vi) of the Act are not satisfied in the present case. Consequently, the receipts cannot be classified as 'royalty' under the Act.*

Reliance in this regard for meaning of the terms "use of" and "right to use" is placed on the following decisions (amongst others):

- ***Dell International Services India Pvt. Ltd*** (reported in [2008] 172 Taxman 418 (AAR));
- ***DDIT (IT) v. Savvis Communication Corporation*** (reported in [2016] 69 taxmann.com 106 (Mum. Trib);
- ***DCIT v. Pugmarks Interweb Ltd*** (Order dated 27.04.2016 passed by the Chandigarh Bench of the Hon'ble Tribunal in ITA Nos. 769 to 772/Chd/2013));
- ***Bharat Sanchar Nigam Limited v. UOI*** (reported in [2006] 282 ITR 273 (SC)); and
- ***Cable & Wireless Networks India Private Limited*** (reported in [2009] 315 ITR 72 (Del. AAR))

- *It is submitted that Explanations 5 and 6 to Section 9(1)(vi) of the Act does not in any manner alter the taxability of the receipts in the Assessee's hands. It is submitted that once the conditions of 'use of' or 'right to use' are not satisfied, Explanations 5 and 6 cannot be pressed into service.*
- *In any event, Explanation 5 has no application in the present case. It is submitted that Explanation 5 applies to consideration in respect of "any right, property or information". Whereas in the present case, the consideration received by the Assessee is in respect of provision of telecom services, without transfer of any right in the process, or granting any right to use the equipment.*
- *Similarly, Explanation 6, which expands the scope of the term "process" is relevant only in a case where there is a transfer of any right in the process/ use of the process by the payer. However, as mentioned above, telecom services do not involve transfer of any right in relation to or imparting of any information concerning the working of or use of such process by the Assessee. Accordingly, the Assessee's receipts cannot be said to be for 'use' of process by customers in India (including VSL), and therefore Explanation 6 has no relevance.*

Taxability under the DTAA:

- *It is submitted that under Article 13 of the DTAA, the term "royalty" is defined to mean (i) 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 (ii) 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.*

- *It is submitted that the definition of "royalty" in the DTAA, to the above extent is pari materia to the definition thereof under the Act. Therefore, it submitted that under the DTAA as well, the receipts are not taxable in India since the payment is not for the "use of" or "right to use" the process/equipment.*

- *Without prejudice to the submission that Explanations 5 and 6 of the Act have no application to the present case, it is submitted that the said explanations, enlarging the scope of the term "royalty" have no bearing on the term as defined in the DTAA. It is submitted that there is no similar amendment to the DTAA and therefore the said explanations have no bearing while interpreting DTAA. It is no longer a dispute that these Explanations expand the definition of the term "royalty" and do not have a bearing on the DTAA where corresponding amendments have not been made –* ***DIT v. New Skies Satellite B.V.*** *(reported in [2016] 68 taxmann.com 8 (Delhi)), approved in* ***Engineering Analysis Centre of Excellence (P.) Ltd. v. CIT*** *(reported in [2021] 125 taxmann.com 42 (SC)).*

- *In addition, it is submitted that under the DTAA, unless the payment is towards use of or right to use a "secret process", the payment cannot be regarded as "royalty". In the present case, there is no "secret process" and the process with the Assessee is available in the public domain. Reliance in this regard is placed on the decision of the Hon'ble Delhi High Court in the case of* ***Pan AmSat International Systems Inc*** *(reported in [2006] 9 SOT 100).*

- *Therefore, it is submitted that since the definition of "royalty" is narrower in the DTAA, the same being more beneficial to the Assessee, ought to be applied over the provisions of the Act.*

  Reliance in this regard is placed on the following decisions:

  - ***Engineering Analysis Centre of Excellence (P.) Ltd. v. CIT*** (supra);
  - ***J&P Coats Ltd v. CIT*** (Order dated 29.11.2021 passed by this Hon'ble Tribunal in IT(IT)A No.11/Bang/2014);
  - ***Bharat Sanchar Nigam Limited v. UOI*** (reported in [2006] 282 ITR 273 (SC));
  - ***Bharti Airtel Ltd. v. ITO (TDS)*** (reported in [2016] 67 taxmann.com 223 (Delhi – Trib.));
  - ***DDIT (IT) v. Savvis Communication Corporation*** (reported in [2016] 69 taxmann.com 106 (Mumbai - Trib.)); and
  - ***DIT v. New Skies Satellite B.V*** (supra).

Legal position as regards taxability of similar receipts / payments:

- *It is submitted that the order passed by this Hon'ble Tribunal in the case of VSL, affirming the order passed under Section 201 of the Act is now reversed by the Hon'ble High Court of Karnataka in* ***Vodafone Idea Limited v. Deputy Director of Income Tax (Intl Taxn)*** *(reported in [2023] 152 taxmann.com 575 (Karnataka)).*

Therefore, it is submitted that since the receipts / payments are not chargeable to tax in India, the order of the AO should be set aside in its entirety.

- *It is submitted that the Hon'ble Tribunal, has consistently held that consideration received towards rendering interconnect / WAN / Bandwidth/ data link services, services are not in the nature of "royalty".*

Reliance in this regard is placed on the following decisions:

- ***Wipro Ltd. v. ITO*** *(reported in [2004] 1 SOT 758 (Bang.));*
- ***J&P Coats Ltd v. CIT*** *(supra);*
- ***Madura Coats Pvt Ltd v. DCIT*** *(reported in [2022] 142 taxmann.com 356 (Bangalore - Trib.));*
- ***Telefonica Depreciation Espana SA v. ACIT*** *(Order dated 10.08.2023 passed by this Hon'ble Tribunal in IT(IT)A No. 2657/Bang/2019);*
- ***Telefonica De Espana S. A v. DCIT*** *(Order dated 17.08.2023 passed by this Hon'ble Tribunal in IT(IT)A Nos. 215 and 216/Bang/2023);*
- ***Honeywell Technology Solutions Pvt. Ltd. v. JCIT*** *(Order dated 30.05.2022 passed by this Hon'ble Tribunal in ITA No. 2890/Bang/2018)*
- ***Netcracker Technology Solutions LLC*** *(reported in [2020] 116 Taxmann.com 243 (Mumbai – Trib.).*

SUBMISSIONS RE. TAXABILITY OF THE RECEIPTS AS FTS:

Taxability under the Act:

- *It is submitted that the FTS is defined under Explanation 2 to section 9(1)(vii) of the Act to mean any consideration for rendering any managerial, technical or consultancy services.*

- *The term 'managerial' or 'technical' or 'consultancy services' has not been defined under the Act. Therefore, the said terms need to be understood in common parlance.*

- *Consultancy services generally involve providing expert advice in a particular field. In the present case, the Assessee is not providing any advice to customers in India while rendering telecom services. Therefore, the Assessee submits that telecom services do not qualify as consultancy services.*

- *Managerial services refer to services related to management of the business of the service recipient. In the present case, the Assessee is not providing services in relation to management of the business of customers in India (including VSL) in any way. Accordingly, the Assessee submits that telecom services do not qualify as managerial services.*

- *Technical services involve use of specialized skills or services driven by technology. Mere rendering of services using technology is not sufficient for a service to qualify as technical service. Moreover, technical services involve active human interaction in their rendition.*

- *In the present case, IC and IPLC services do not involve any active human intervention in rendition of services. The Assessee has provided connectivity services to customers in India (including VSL) in order to carry telecommunication traffic during the relevant year. The fact that technical expertise may be required to ensure quality connectivity would not make it a provision of technical service. These are standardized services without any customer specific customization. Thus, the Assessee's receipts from customers in India (including VSL) for provision of standard telecom services do not qualify as FTS under section 9(1)(vii) of the Act.*

- *Reliance in this regard is placed on the decision of the Hon'ble Madras High Court in the case* ***of Skycell Communications Ltd. v. DCIT*** *(reported in [2001] 119 Taxman 496 (Mad.)), the decision of the Hon'ble High Court of Karnataka in the case of* ***CIT v. Vodafone South Ltd****. (reported in [2016] 72 taxmann.com 347 (Kar. HC)), and the decision of the Hon'ble Supreme Court in the case of* ***CIT v. Kotak Securities Ltd.*** *(reported in [2016] 383 ITR 1 (SC)).*

- *In addition, the tax officer himself has not considered these services as FTS in the orders for assessment years 2011-12 to 2015-16.*

Taxability under the DTAA

- Under Article 13(4) of the DTAA, the term FTS has been defined to mean, inter alia, payment of any kind in consideration for rendering of any technical or consultancy services, ***if such services*** *inter alia* ***make available technical knowledge, experience, skill, knowhow, or processes***.
- *Without prejudice to the submission that the services are not technical in nature, it is submitted that the service do not satisfy the "make available" clause, and therefore, the consideration received is not in the nature of FTS under the Act.*

- *In the present case, the Assessee has provided telecom services to customers in India (including VSL). Customers in India (including VSL) merely obtains a service for carrying telecom traffic for serving their customers and do not receive any technical or consultancy services. The Assessee does not make available to customers in India (including VSL) any technical knowledge, experience, skill, knowhow, or processes.*

- *It is submitted that 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 receiving the services. In the present case, the customers of the Assessee are not enabled to apply the technology on their own. Pertinently, the fact that the payments are made by the customers year on year demonstrates that the services do not make available any technology.*

Reliance in this regard is placed on the following decisions

- ***CIT v. De Beers India Minerals Private Limited*** (reported in [2012] 346 ITR 467 (Kar. HC));
- ***CIT v. ISRO Satellite Centre*** (reported in [2013] 35 taxman.com 352 (Kar. HC));
- ***Bharat Sanchar Nigam Ltd. v. ACIT*** (reported in [2017] 87 taxmann.com 152 (Delhi - Trib.)); and

- **Bharti Airtel Ltd. v. ITO (TDS) (supra).**

Therefore, it is submitted that the consideration received cannot be termed as FTS.

SUBMISSIONS RE. TAXABILITY OF THE RECEIPTS UNDER SECTION 5(2) OF THE ACT:

Taxability under the Act

- *As stated above, all services are rendered by the Assessee outside India. Accordingly, the income does not accrue or arise in India.*

- *Reliance is placed on the decisions of the Hon'ble Supreme Court in the cases of **CIT v. Toshoku Limited** (reported in [1980] 125 ITR 525 (SC)) and the Hon'ble Madras High court in the case of **CIT v. Anamallais Timber Trust Ltd.** (reported in [1950] 18 ITR 333 (Mad. HC)), wherein it has been conclusively held that if services are provided outside India, no part of the income can be said to accrue or arises in India.*

Taxability under the DTAA

Without prejudice, the provisions of the DTAA, being more beneficial to the Assessee, ought to be applied over the provisions of the Act.

- *Under Article 7 of the DTAA, profits of an enterprise (tax resident) of UK cannot be taxed in India unless such enterprise carries on business in India through a Permanent Establishment. As stated above, the Assessee provides all its services from outside India and has no presence in India whatsoever. This position is undisputed. Accordingly, the Assessee's receipts cannot be brought to tax in India. Reliance is placed on the decision of the Hon'ble High Court of Karnataka in **Vodafone Idea Limited v. Deputy Director of Income Tax (Intl Taxn)** [Order dated 14.07.2023 in ITA No. 160/2015 etc.].*

6. The learned DR was unable to controvert the submissions of the assessee.

7. We have heard the rival submission and perused the material on record. The Bangalore Bench of the Tribunal in the case of Telefonica De Espana S. A, (supra) had decided all the issues raised on merits in favour of the assessee i.e., with regard to taxability as royalty/FTS and alternatively under section 5(2) of the Act. The Bangalore Bench of the Tribunal had followed its earlier order in the case of Telefonica De Espana S. A, as well as the judgment of the Hon'ble jurisdictional High Court in the case of VSL. The relevant finding of the Bangalore Bench of the Tribunal reads as follows:

> *"10. We have heard the rival submission and perused the material on record. At the outset, we notice that Assessment Year 2010-11 has been considered by the AO as the base year and has been followed in the subsequent Assessment Years. The Tribunal in ITA Nos. 2657/Bang/2019, 180/Bang/2021 and 817/Bang/2022 for Assessment Years 2010-11 to 2012-13 has decided the issue in favour of the assessee vide order dated 10 August 2023. The Tribunal has passed a detailed order after considering several judicial precedents including the Hon'ble Karnataka High Court judgments in the case of Vodafone in ITA No. 161/2015 and Vodafone South Ltd. (2016) 72 taxmann.com 347 which have held that interconnectivity charges are not taxable as royalty and FTS respectively. The relevant portion of the Tribunal order is extracted before ready reference:*

Tribunal Findings / Observations	***Page no. / Para***
It is an admitted fact that there is no transfer of any intellectual property rights or any exclusive rights that has been granted by the assessee to the service recipients for using such intellectual property. Therefore Explanation 2 to section 9(1)(vi) cannot be invoked.	*Page 10 Para 5.2.7*
All these changes in Act (insertion of Explanation 5 & 6) do not affect the definition of Royalty as per DTAA	*Page 10 Para 5.2.9*
On perusal of agreement, it is noted that installation and operation of sophisticated equipment are with the view to earn income by allowing the users to avail the benefits of such equipment or facility and does not tantamount to granting the "use or right to use" the equipment or process so as to be considered as royalty	*Page 21 Para 5.2.16*
At no point of time, any possession or physical custody, control or management over any equipment is received by the end users/customers.	*Page 21 Para 5.2.17*

Process involved in providing the services to the end users/customers is not "secret" but a standard commercial process followed by the industry players. Hence, same cannot be classified as "secret process" as per clause 3 o Article 13 of India-Spain DTAA	*Page 21 Para 5.2.17*
We hold that payments received by assessee towards interconnectivity utility charges from Indian customers / end users cannot be considered as Royalty / FTS to be brought to tax in India under section 9(1)(vi)/(vii) of the Act and also as per DTAA	*Page 26 Para 5.2.20*
The payment received by the non-resident assessee amounts to be the business profits of the assessee which is taxable in the resident country and is not taxable in India under Article 5 of the DTAA as there is no case of permanent establishment of the assessee that has been made out by the revenue in India.	*Page 26-27 Para 5.2.21*

11. The learned DR's alternative argument that the payment received by the assessee is covered under section 5 of the Act as the income arises or accrues in India and accordingly deeming section 9 of the Act is not warranted also deserves to be rejected due to the following reasons:

i. The accrual of the income happens where the rendition of service takes place. In the instant case, the actual rendition of service of interconnect facility is provided by the taxpayer outside India i.e., in Spain. The taxpayer does not have any presence in India. Hence, the income does not accrue in India as argued by the learned DR.

*ii. Reliance is placed on the judgment of the Hon'ble Delhi High Court in the case of **Havells India Ltd. [2012] 21 taxmann.com 476 (Delhi)** wherein the hon'ble Court has clearly demarcated the source of income and source of receipt under section 9(1)(vii) of the Act. The High Court categorically held that the place/situs of the payer cannot be said to be the source of income.*

*iii. Reliance is also placed on the order of the Bangalore Tribunal in the case of **Vodafone South Ltd (2015) 53 taxmann.com 441 (para 13-16)** which reads as under**:***

> *16. On an analysis of the learned CIT (A)'s findings, we are of the view that there is some ambiguity or confusion in appreciating the position of law. The learned CIT (A) is right in observing to the extent that the Assessing Officer is right in articulating that where income is actually received or accrues in India, resort to deeming provision is not warranted and in such a case, provisions contained in section 5(2) is sufficient to create a charge in respect of*

non resident's income. However, while drawing inference that payments made by a resident would also indicate accrual or arising of the income in the hands of non resident in India. It is pertinent to mention that section 9 of the Act is a deeming section and it provides for taxation of specified income, received by foreign tax resident in India. It has different sub sections. Section 9(1)(i) of the Act provides for taxation of business income of non resident, whereas section 9(1)(vi) and 9(1)(vii) of the Act provides for taxation of income in the nature of "royalty" and FTS respectively. In order to assume accrual or arousal of business income in India, then section 9(1)(vi) along with its explanation would be relevant and it would come from the circumstances that non resident constitute a business connection in India. In that situation only so much income shall be taxable in India as is relatable to operations carried on in India. As discussed earlier section 5(2) of the Act provides that the total income of a non resident would include income accrues or arise, received. In order to fulfill the requirements contemplated under this provision, that same income to be taxed in the hands of a non resident under the aforesaid provisions, then such income should accrue or arose to such non resident in India. ***Both the learned Revenue authorities have construed that since the payments have been made from India, therefore, income has arisen or accrued in the hands of non resident. They lost sight to the fact that non resident has no business connection in India. The connectivity services are provided by the payee outside India and also utilized by the*** *assessee outside India. Therefore, to our mind, the learned Revenue authorities have erred in construing that the income has accrued or arisen in India.* ***The situs of the source of income in respect of payment received by a non resident i.e. NTOs would be the place where the non resident carries on its business and perform the business activities pursuant to which it received income. Once the situs is outside India, then in order to determine whether the payments made by a resident of India to a non resident involves element of income is to be examined u/s 9*** *and in the present case, the Assessing Officer has examined the applicability of section 9(1) (vi) & 9(1)(vii)i.e. the payments involve royalty as well as fee for technical services. The two*

judgments relied upon by the assessee namely decision of the Hon'ble Delhi High Court in the case of EON Technology (P.) Ltd. (supra) and the order of the ITAT in the case of Adani Enterprises Ltd. (supra) are fully applicable on the facts of the present case. ***The inference drawn by the learned Revenue authorities that income is deemed to be accrued or arisen in India or accrued or arisen or received in India merely on the basis that such payments was made from India is incorrect."'***

12. The Department / Revenue has not appealed against the above finding / observation of the Tribunal. Hence, the contention of learned DR placing reliance on the section 5 of the Act is rejected. In light of the aforesaid reasoning and judicial pronouncements cited supra, we hold that the IUC charges do not qualify as royalty or FTS and hence is not taxable in India."

8. In light of the above judicial pronouncements relied on by the Tribunal in the case of Telefonica De Espana S. A (supra), we decide the issue raised on merits in favour of the assessee.

9. Since the issues on merits are decided in favour of the assessee, grounds relating to reopening of assessment is not adjudicated and is left open.

10. In the result, appeals filed by the assessee are partly allowed.

Pronounced in the open court on the date mentioned on the caption page.

Sd/-	**Sd/-**
(LAXMI PRASAD SAHU)	**(GEORGE GEORGE K)**
Accountant Member	**Vice President**

Bangalore.
Dated: 29.08.2023.
/NS/*

Copy to:

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

By order

Assistant Registrar,
ITAT, Bangalore.