

**आयकर अपीलीय अधिकरण, इंदौर न्यायपीठ, इंदौर**  
**IN THE INCOME TAX APPELLATE TRIBUNAL**  
**INDORE BENCH, INDORE**  
**BEFORE SHRI VIJAY PAL RAO, JUDICIAL MEMBER**  
**AND**  
**SHRI B.M. BIYANI, ACCOUNTANT MEMBER**

ITA No. 415/Ind/2014 (AY: 2010-11)

M/s Vodafone Idea Ltd. (Formerly M/s Idea Cellular Ltd.), 139-140, Electronics Complex, Pardeshipura, Indore (Assessee/Appellant)	<b>बनाम/</b> Vs.	CIT (TDS), Bhopal  (Revenue/Respondent)
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ITA No. 265/Ind/2018 (AY: 2010-11)

M/s Vodafone Idea Ltd. (Formerly M/s Idea Cellular Ltd.), 139-140, Electronics Complex, Pardeshipura, Indore (Assessee/Appellant)	<b>बनाम/</b> Vs.	DCIT/JCIT (TDS), Indore  (Revenue/Respondent)
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**PAN: AAACB2100P / TAN: BPLI00953B**

Assessee by	Shri Sumit Nema, Sr. Advocate with Shri Gagan Tiwari & Shri Arun Dwivedi, ARs
Revenue by	Shri Harshit Bari, Sr. DR / Shri R.K. Yadav, CIT-DR

Date of Hearing	19.03.2024 / 10.04.2024
Date of Pronouncement	23.04.2024

**आदेश / O R D E R**

**Per B.M. Biyani, AM:**

These are the two appeals filed by assessee for Financial Year 2009-10 relevant to Assessment-Year 2010-11. The first appeal being *ITA No.*

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415/Ind/2014 is directed against revision-order dated 27.03.2014 passed by CIT (TDS), Bhopal u/s 263 of the Income-tax Act, 1961 ["Act"] which in turn arises out of order dated 30.03.2012 passed by ITO (TDS)-II, Indore ["AO"] u/s 201(1)/(1A). The second appeal being *ITA No. 265/Ind/2018* is directed against appeal-order dated 01.02.2018 passed u/s 250 by CIT(Appeal)-II, Indore ["CIT(A)"] which in turn arises out of order dated 28.07.2014 passed by DCIT (TDS), Indore ["AO"] u/s 201(1)/(1A) pursuant to the aforesaid revision-order dated 27.03.2014 passed by CIT (TDS), Bhopal u/s 263.

2. The background facts leading to these appeals are summed up as under:

- (i) ITA No. 415/Ind/2014 – The assessee-company is engaged in the business of providing telecom services through pre-paid and post-paid connections. In order to provide such services, the assessee allowed certain amounts to distributors/dealers of pre-paid vouchers. Further, the assessee also took services from Other Telecom Operators ["OTOs"] and paid 'roaming charges' to those OTOs. For the Financial Year 2009-10 relevant to Assessment-Year 2010-11, the AO passed an order dated 30.03.2012 u/s 201(1)/(1A) treating the assessee as defaulter for non-deduction of tax at source (TDS) u/s 194H out of amounts allowed to distributors/dealers of pre-paid vouchers and created demand of TDS plus interest. Subsequently, the CIT (TDS), Bhopal passed revision-order dated 27.03.2014 terming the aforesaid

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order dated 30.03.2012 passed by AO as erroneous-cum-prejudicial to the interest of revenue on the ground that the AO had not examined the applicability of TDS u/s 194J out of roaming charges paid to OTOs. Accordingly, the CIT (TDS), Bhopal set aside the order of AO and directed the AO to re-frame order. Aggrieved by revision-order dated 27.03.2014 so passed by CIT (TDS), Bhopal, the assessee has filed ITA No. 415/Ind/2014.

- (ii) ITA No. 265/Ind/2018 - In the meantime, pursuant to aforesaid revision-order dated 27.03.2014, the AO also passed newer order dated 28.07.2014 u/s 201(1)/(1A) r.w.s. 263 wherein he created demand of TDS u/s 194H out of certain amounts allowed to distributors/dealers of pre-paid vouchers as well as u/s 194J out of roaming charges paid to OTOs plus interest. Aggrieved by such order, the assessee filed first-appeal to CIT(A) but did not get any success. The assessee filed next appeal ITA No. 265/Ind/2018 to ITAT, Indore. This appeal was decided by ITAT, Indore vide order dated 25.05.2023. Subsequently, the assessee filed a Misc. Application registered as MA No. 19/Ind/2024 u/s 254(2) of the Act on the ground that the order dated 25.05.2023 passed by ITAT was suffering from an apparent mistake in as much as the Ground No. 4, 5 & 7 of assessee's appeal relating to TDS u/s 194J out of roaming charges paid to OTOs

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remained unadjudicated. The ITAT decided Misc. Application vide order dated 23.02.2024 allowing assessee's prayer as under:

*"8. We have considered the rival submission as well as relevant material on record. For A.Y.2010-11 the assessee has raised two issues i.e. non-deduction of TDS u/s 194H and 194J. The first issue of non-deduction of TDS u/s 194H was common for all other years and has been adjudicated by the Tribunal while passing composite order dated 25.05.2023 however, the second issue raised by the assessee for this assessment year is regarding non-deduction of TDS u/s 194J and consequential order passed u/s 201 & 201(1) of the Income Tax and the same has not been adjudicated. Therefore, there is an apparent mistake from record of the impugned order to the extent of non-adjudication of ground no.4, 5 & 7 invoking issue of TDS u/s 194J.*

*9. Accordingly we recall the impugned order for A.Y. 2010-11 to the extent of non-adjudication of ground nos.4, 5 & 7 and the appeal of the assessee is directed to fix for fresh hearing and adjudication of ground nos.4,5 & 7 of the assessee's appeal on 13.03.2024. The date of hearing of the appeal is announced in open court and noted by the both parties and therefore, no notice is required to be issued in this respect."*

Accordingly, the ITA No. 265/Ind/2018 has again come up before us for the limited purpose to adjudication of Ground No. 4, 5 & 7 relating to TDS u/s 194J out of roaming charges paid to OTOs.

3. Since both appeals are inter-linked, they were heard together and are being disposed of by this consolidated order for the sake of convenience and clarity.

4. At the start of hearing, Ld. AR for assessee prayed to hear and adjudicate the second appeal being ITA No. 265/Ind/2018. He submitted that if this appeal is decided in favour of assessee, the first appeal being ITA No. 415/Ind/2014 would become infructuous as the assessee's grievance would come to an end. Ld. DR for revenue agreed to this prayer. We proceed accordingly.

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**ITA No. 265/Ind/2018:**

5. As noted earlier, this appeal has come up before us for adjudication of Ground No. 4, 5 & 7 (i.e. IV, V & VII) raised by assessee. We take up these grounds.

Ground No. IV & V:

6. These grounds read as under:

**"Ground No. IV:**

**NON DEDUCTION OF TDS U/S 194J OF THE ACT ON PAYMENT OF ROAMING CHARGES TO THE OTHER TELECOM OPERATORS ("OTO"):**

1. *On the facts and in the circumstances of the case and in law, the Hon'ble CIT(A) erred in holding that the process of roaming charges involve human intervention and further treating the Appellant as 'assessee-in-default' u/s 201(1) of the Act for non-deduction of tax u/s 194J of the Act on roaming charges paid to OTO's.*

2. *The Ld. CIT(A) failed to appreciate and ought to have held that:*

- i. In absence of human intervention during the actual roaming process as evidenced by the expert opinion amount paid cannot constitute 'fees for technical service' u/s 9(1)(vii) of the Act.*
- ii. Without Prejudice, payment for the use of standard facility does not amount to 'fees for technical service' u/s 9(1)(vii) r.w.s. 194J of the Act.*
- iii. Without prejudice, in a case of pure revenue sharing, question of withholding tax u/s 194J of the Act does not arise.*

3. *The appellant prays that it be held that no tax is deductible u/s 194J of the Act and hence, Appellant cannot be held as an 'assessee-in-default' u/s 201(1) of the Act."*

**"Ground No. V:**

1. *On the facts and in the circumstances of the case and in law, the Hon'ble CIT(A) erred in holding that payment of roaming charges to other telecom operators amounts to "royalty" and is subject to TDS u/s 194J of the Act and accordingly treating the Appellant as 'assessee in default' u/s 201 r.w.s. section 194J of the Act.*

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2. *He failed to appreciate and ought to have held that payment of roaming charges does not amount to royalty u/s 9(1)(vi) read with Explanation 6;*

3. *Without prejudice, retrospective amendment under the Act cannot fasten a TDS liability on the appellant.*

4. *The Appellant prays that the order passed u/s 201 r.w.s. 194J treating Appellant as an assessee in default u/s 194J on roaming charges paid by set-aside as being bad in law."*

7. Ld. AR for assessee carried us to above grounds and submitted that the lower-authorities have treated the roaming charges paid by assessee to OTOs as falling within the expression "fee for technical services (FTS)" in terms of Explanation 2 to section 9(1)(vii) or alternatively as "royalty" in terms of Explanation 2 & 6 to section 9(1)(vi) and accordingly held assessee as liable for TDS u/s 194J. However, it is the submission of assessee that the impugned payment is covered by none. Therefore, the assessee has raised two separate grounds, namely Ground No. IV and Ground No. V to deal both points respectively.

8. The expression "fee for technical services" is defined in Explanation 2 to section 9(1)(vii) as under:

*"Explanation 2. - For the purposes of this clause, "fees for technical services" means 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".*

Further, the expression 'royalty' is defined in Explanation 2 & 6 to section 9(1)(vi) as under:

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*“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 ;*
- (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; or*
- (vi) the rendering of any services in connection with the activities referred to in sub-clauses (i) to <sup>1</sup>(iv), (iva) and (v).*

*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.”*

9. Ld. AR submitted that these issues have already come up for before different appellate forums and squarely covered by decisions. Therefore, we only need to refer those decisions. So far as the first issue whether the payment of roaming charges falls within the meaning of “FTS”, Ld. AR submitted that the Hon'ble Delhi High Court decided in **CIT Vs. Bharti Cellular Ltd. 319 ITR 139 (Del)** that roaming service not involving human interference is not a technical service as contemplated under Explanation 2 to section 9(1)(vii) and therefore not liable for TDS u/s 194J. Against

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decision of Hon'ble Delhi High Court, the department filed appeal to Hon'ble Supreme Court whereupon the Hon'ble Supreme Court remanded matter to department for ascertaining with technical assistance as to whether there was involvement of human intervention or not? The issue again came up before Hon'ble Karnataka High Court in ***CIT Vs. Vodafone South Ltd. (2016) 72 taxmann.com 347 (Karnataka) dated 28.07.2016.*** The Hon'ble Karnataka High Court has, in following paras of judgement, noted the entire background, the remand direction of Hon'ble Supreme Court, the subsequent exercise done by department and taking into consideration all these aspects, finally upheld ITAT's order holding that roaming service does not involve any human invention and therefore outside the ambit of FTS:

*"4. The assessee, in all the appeals, is a mobile service provider Company. As per the assessee, whenever any roaming facilities is provided to the customer and subscriber, it is taking connectivity of that with another mobile service provider Company. As per the assessee, the payment made to the another mobile service provider Company is by way of revenue sharing contract and no technical services are involved nor any payment is made for technical services. However, as per the appellants - Revenue, the payment made by the assessee to the another mobile service provider Company for utilization of the roaming mobile data and the connectivity would fall in the arena of "technical services" and, therefore, TDS was required to be deducted under Section 194H read with Section 194 J of the Income Tax Act, 1961 ('the Act' for short).*

*6. The assessee Company carried the matter in appeal before CIT (Appeals) and the Commissioner, CIT (Appeals) confirmed the view of the Assessing Officer and the appeals to that extent were dismissed. But other part of the allowing of the appeals was of the verification in the reduction of the liability under Section 201(1) read with Section 201(1A) of the Act and the directions were given by the Appellate Authority. But it was found in the appeal that the TDS was deductible. The matter was carried further in appeal before the Tribunal. The Tribunal recorded the reasons from paragraphs 13 to 15, which reads thus;*

*"13. We have perused the orders and heard the rival contentions. Question before us is whether roaming charges paid by assessee to other service providers for using their services by assessee's customers*

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could be treated as technical services falling u/s.194J of the Act. We find that similar issue had come up before the Jaipur bench of the Tribunal in the case of Bharti Hexacom Ltd. (supra). It was held as under at paras 7 to 12 of the order:

*"9.....The revenue filed appeal against the order of Hon'ble Delhi High Court in the case of Bharti Cellular Ltd. before the Hon'ble Supreme Court. The Hon'ble Supreme Court has held as under:-*

*"In cases requiring examination by technical experts, the Department ought not to proceed only by the contracts placed before the officers. With the emergence of our country as one of the BRIC countries and with, technological advancement, the Department ought to examine technical experts so that the matters could be disposed of expeditiously. Further, this would enable the appellate forum, including the Supreme Court, to decide the legal issues based on the factual foundation. Held accordingly, remanding the matters for determination with technical assistance, that in these cases, in which a cellular provider under an agreement pays interconnect/access/port charges to BSNL/MTNL, the question whether the cellular provider has rendered technical services and has to deduct tax at source, depended on whether the charges were for technical services, and this involved determination of whether any human intervention was involved, which could not be determined without technical assistance.*

*Decision of the Delhi High Court in CIT v. BHARTI CELLULAR LTD. 319 ITR 139 (Del) set aside and matter remanded to the Assessing Officer with directions."*

*After this decision, the Ld. Assessing Officer examined the technical expert of the C-DOT on 29.09.2010 in respect of IUC and which were cross examined on 04.10.2010 by M/s. Bharti Cellular Limited, Delhi. The technical experts re-examined on 04.10.2010 on this issue and admitted that roaming services does not require any human intervention, it operates automatically. The Ld. AR also drawn our attention on independent opinion taken from Director CMAI, Ex-Director (C&M), BSNL, Ex-Member Telecom Commission on 24.12.2010 and admitted that whole interconnected uses process, no manual intervention is required. He further drawn our attention on page No.651 to 652 for post-paid as well as prepaid roaming charges charged between the operators from Mr. Kapoor Singh Guliani. The appellant also taken opinion from Former Chief Justice of India Mr. Kapadia on IUC post technical examination, cross-examined and re-examination who also opined that Hon'ble Supreme Court decision dated 12.08.2010 is an order not judgment as the principle of law was not res-integra. The word technical services have got to be read in narrow since as held by the various Hon'ble High Courts and the Tribunal by applying principles of "Nositur a sociis" particular because the*

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*word technical service in Section 9(1)(vii) read with Explanation-2 in-between word managerial and consultancy services. Finally he opined that such setting up/installation, repairing, servicing, maintenance are separate activities, they are back office functions and are require human intervention. But the roaming process between participating entities is fully automatic and does not require any human intervention. Accordingly, the interconnected uses charge will not attract the provisions of Section 194J read with Section 9(1)(vii) read with Explanation-2 thereto. Therefore, he prayed to delete the addition.*

10. At the outset, the Id Sr. DR vehemently supported the order of the Ld. CIT(A).

11. We have heard the rival contentions of both the parties and perused the material available on record. After going through the order of the Assessing Officer, Id CIT(A); submissions of the assessee as well as going through the process of providing roaming services; examination of technical experts by the ACIT TDS, New Delhi in the case of Bharti Cellular Ltd.; thereafter cross examination made by M/s. Bharti Cellular Ltd.; also opinion of Hon'ble the then Chief Justice of India Mr. S.H. Kapadia dated 03.09.2013 and also various judgments given by the ITAT Ahmedabad Bench in the case of Canara Bank on MICR and Pune Bench decision on Data Link Services. We find that for installation/setting up/repairing/servicing/maintenance capacity augmentation are require human intervention but after completing this process mere interconnection between the operators is automatic and does not require any human intervention. The term Inter Connecting User Charges (IUC) also signifies charges for connecting two entities. The Coordinate Bench also considered the Hon'ble Supreme Court decision in the case of Bharti Cellular Ltd. in the case of in iGATE Computer System Ltd. and held that Data Link transfer does not require any human intervention and charges received or paid on account of this is not fees for technical services as envisaged in Section 194J read with Section 9(1)(vii) read with Explanation-2 of the Act. In case before us, the assessee has paid roaming charges i.e. IUC Charges to various operators at Rs. 10,18,92,350/-. Respectfully following above judicial precedents, we hold that these charges are not fees for rendering any technical services as envisaged in Section 194J of the Act. Therefore, we reverse the order of the Id CIT(A) and assessee's appeal is allowed on this ground also."

14. Reading of the above order clearly show that fact - situation was essentially similar to the one here in the case of the assessee. Assessee was also treated as one in default for failure to deduct tax at source on roaming charges paid to other distributors. Therefore the coordinate bench of the Tribunal in the case of Bharti Hexacom Ltd. (supra) would squarely apply. We also find that the said decision has been followed by Ahmedabad bench in the case of Vodafone Essar Gujarat Ltd. v. ACIT (TDS) (ITA NO.386/Add/2011, dt.07.07.2015). Following these, we are of the opinion that assessee could not have been deemed as one in default for non-deduction of tax at source on roaming charges paid by it to other service providers. Ground 3 is allowed."

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7. The aforesaid shows that the Tribunal by relying upon the decision of the Delhi High Court found that the fact situation are also the same and the payment made for roaming connectivity cannot be termed as "technical services" and, ultimately, it was found that the assessee could not be said as in default for non-deduction of TDS at source on the roaming charges paid by it to the other service provider and the appeals are allowed to that extent. Under the circumstances, the present appeals before this Court.

8. We have heard Mr. K.V. Aravind, learned counsel appearing for the appellants - Revenue in all the appeals. The learned Counsel relied upon two decisions of the Apex Court for canvassing the contention that the roaming charges paid by the assessee to the other service provider can be said as 'technical services'; one was the decision of the Apex Court in the case of CIT v. Bharti Cellular Ltd. [2010] 193 Taxman 97/[2011] 330 ITR 239 (SC); and the another was the decision of the Apex Court in the case of CIT v. Kotak Securities Ltd. [2016] 67 taxmann.com 356/239 Taxman 139/383 ITR 1 (SC) and it was submitted that if the observations made by the Apex Court in the above referred decisions are considered, the decision of the Tribunal would be unsustainable and consequently, the questions may arise for consideration before this Court in the present appeals.

9. We may record that in the decision of the Apex Court in the case of Bharti Cellular Ltd. (supra) the Apex Court after having found that whether human intervention is required in utilizing roaming services by one telecom mobile service provider Company from another mobile service provider Company, is an aspect which may require further examination of the evidence and therefore, the matter was remanded back to the Assessing Officer. Further, in the impugned order of the Tribunal, after considering the above referred decision of Bharti Cellular. Limited, the Tribunal has further not only considered the opinion, but found that as per the said opinion the roaming process between participating entities is fully automatic and does not require any human intervention. Therefore, we do not find that the aforesaid decision in the case of Bharti Cellular Ltd. would be of any help to the appellants - Revenue.

10. In the another decision of the Apex Court, in the case of Kotak Securities Ltd. the matter was pertaining to the charges of the Stock Exchange and the Apex Court, ultimately, found that no TDS on such payment was deductible under Section 194J of the Act. But the learned Counsel for the appellants - Revenue attempted to contend that in paragraphs 7 and 8 of the above referred decision of the Apex Court, it has been observed that if a distinguishable and identifiable service is provided, then it can be said as a "technical services". Therefore, he submitted that in the present case, roaming services to be provided to a particular mobile subscriber by a mobile Company is a customize based service and therefore, distinguishable and separately identifiable and hence, it can be termed as "technical services".

11. In our view, the contention is not only misconceived, but is on non-existent premise., because the subject matter of the present appeals is not roaming

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services provided by mobile service provider to its subscriber or customer, but the subject matter is utilization of the roaming facility by payment of roaming charges by one mobile service provider Company to another mobile service provider Company. Hence, we do not find that the observations made are of any help to the Revenue.

12. As such, even if we consider the observations made by the Apex Court in the case of *Bharti Cellular Ltd.* supra, whether use of roaming service by one mobile service provider Company from another mobile service provider Company, can be termed as "technical services" or not, is essentially a question of fact. The Tribunal, after considering all the material produced before it, has found that roaming process between participating entities is fully automatic and does not require any human intervention. Coupled with the aspect that the Tribunal has relied upon the decision of the Delhi High Court for taking support of its view.

13. In our view, the Tribunal is ultimately fact finding authority and has held that the roaming process between participating company cannot be termed as technical services and, therefore, no TDS was deductible. We do not find that any error has been committed by the Tribunal in reaching to the aforesaid conclusion. Apart from the above, the questions are already-covered by the above referred decision of the Delhi High Court, which has been considered by the Tribunal in the impugned decision.

14. In view of the above, we do not find that any substantial question of law would arise for consideration."

*[Emphasis supplied]*

10. Ld. AR then relied upon a recent decision of Hon'ble Delhi High Court in *CIT (TDS) Vs. Tata Teleservices Ltd. (2022) 142 taxmann.com 51 (Delhi) dated 30.05.2022* taking the same view. We re-produce below the order in entirety:

*"Manmohan, J. - Present appeal has been filed raising the following question of law:-*

*"Whether the ITAT was correct in holding that no TDS under section 194J of the Income-tax Act was required to be deducted by the assessee on payment of interconnect user charges as it could not be categorized as fee for technical services?"*

2. Admittedly the Karnataka High Court in *CIT, TDS v. Vodafone South Ltd.* [2016] 72 *taxmann.com* 347/241 *Taxman* 497 has decided the

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aforesaid issue in favour of the respondent-assessee. However, learned counsel for the appellant-revenue states that the Bombay High Court has admitted the similar question of law for consideration.

3. Learned predecessor Division Bench vide order dated 22nd March, 2021 had opined that as no Special Leave Petition has been filed against the judgment of the Karnataka High Court, the said view would be binding on the appellant-revenue. Learned predecessor Division Bench had directed the counsel for the appellant-revenue to obtain necessary instructions from the CBDT as to the way forward.

4. Mr. Zoheb Hossain, learned standing counsel for the revenue has handed over a letter dated 21st April, 2022 written by JDIT(OSD)(L&R), New Delhi addressed to the Commissioner of the Income Tax, High Court Cell (Judicial), New Delhi. The said letter is taken on record. The said letter reads as under :-

'To,  
The Commissioner of Income-tax (Judicial),  
High Court Cell, Delhi  
Respected Sir,

Sub: Urgent Instructions required in the case of Commissioner of Income-tax (TDS-2) v. M/s Tata Teleservices Ltd. [ITA No. 1417/2018]- regarding.

Kindly refer to your e-mail dated 11th April 2022 on the above-mentioned subject.

In this regard, I am directed to convey that SLP in the case of CIT (TDS), Bangalore v. Vodafone South Ltd. (2016) 72 Taxmann.com 347 (Kar) has not been approved by Board for the following reason:

"As it has been repeatedly established in various cases, involving the issue of liability of deduction of TDS us 194J for payments to other telecom companies for interconnect charges/access/port charges for reaming and data link that no human intervention was involved in the interconnect whether it was for data link or roaming, the charges paid could not be held to be in the nature of fees for technical services for the purposes of section 9(1) and section 194J of the Act."

In view of above, SLP in the case of CIT (TDS), Bangalore v. Vodafone South Ltd. (2016) was not filed. This is for your kind information and the needful.'

5. Learned counsel for the respondent emphasises that JDIT(OSD)(L&R) functions under the Directorate, L&R, CBDT. Therefore, he contends that the decision to accept the decision of the Karnataka High court in Vodafone South Ltd. (supra) was taken at the highest level of the appellant-revenue. He further states that the Bombay High Court was not aware of the aforesaid judgment of the Karnataka High court when it admitted the questions of law as alleged by learned counsel for the appellant.

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6. Learned counsel for the respondent further contends that the appellant-revenue having taken a conscious decision to accept the judgment of the Karnataka High Court cannot be permitted to take the opposite stand in the present case. In support of his submission, he relies upon the following judgments:—

A. Birla Corporation [Ltd.](#) v. CCE 2005 [taxmann.com](#) 1293 (SC)

"5. In the instant case the same question arises for consideration and the facts are almost identical. We cannot permit the Revenue to take a different stand in this case. The earlier appeal involving identical issue was not pressed and was therefore, dismissed. The respondent having taken a conscious decision to accept the principles laid down in Pepsico India Holdings [Ltd.](#) (supra) cannot be permitted to take the opposite stand in this case. If we were to permit them to do so, the law will be in a state of confusion and will place the authorities as well as the assesseees in a quandary."

B. CCE v. Amar Bitumen & Allied Products (P.) [Ltd.](#) 2006 [taxmann.com](#) 752 (SC)

"5. This Court in a catena of cases has consistently taken the view that if an earlier order is not appealed against by the Revenue and the same has attained finality, then it is not open to the Revenue to accept the judgment/order on the same question in the case of one assessee and question its correctness in the case of some other assessee. Revenue cannot pick and choose....."

7. Admittedly, the Karnataka High Court and various Tax Tribunals have taken the view that there is no human intervention involved in providing the interconnect services whether it be for data link or roaming.

8. The Supreme Court in Berger Paints India [Ltd.](#) v. CIT [2004] 135 Taxman 586/266 ITR 99 has held that if the revenue has not challenged the correctness of the law laid down by the High Court and has accepted it in the case of one assessee, then it is not open to the revenue to challenge its correctness in the case of other assessee without just cause.

9. Keeping in view the aforesaid mandate of law and the letter dated 21st April, 2022, this Court is of the view that the appellant-revenue has consciously elected not to challenge the aforesaid judgment of the Karnataka High Court, which hold that no TDS is required to be deducted by the assessee on payment of interconnect user charges as it cannot be categorized as fee for technical services.

10. Consequently, this Court is of the view that it is not open to the revenue to challenge the correctness of the finding rendered by the Karnataka High Court in Vodafone South [Ltd.](#) (supra) in the case of other assesseees without just cause. Accordingly, no substantial question of law arises for consideration in the present appeal and the same is dismissed."

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Thus, the decision given by **Hon'ble Karnataka High Court in Vodafone South Ltd. (supra)** that roaming charges do not constitute FTS has been accepted by revenue; this fact is categorically noted by Hon'ble Delhi High Court in **CIT vs. Tata Teleservices Ltd.**

11. Additionally, Ld. AR also relied upon an earlier order of ITAT, Bangalore in **M/s Idea Cellular Ltd. Vs. ACIT(TDS), Bangalore ITA No. 648 to 651/Bang/2014 dated 06.11.2015** authored by Judicial Member forming part of this Bench which also held the same view. The relevant paras of order are re-produced below:

*"12. Ground No. V regarding non-deduction of tax at source u/s 194J on roaming charges paid to other telecom operators by treating the same as fee for technical services. We have heard the learned AR of the assessee as well as the learned departmental representative and considered the relevant material on record. The learned AR of the assessee submitted that these charges paid for roaming connectivity by the other operators to the assessee's subscriber cannot be treated as fee for technical services as there is no human intervention in providing such roaming services by the telecom operators. In support of his contention, he has relied upon the following judgments:*

*i) Bharti Hexacom Ltd. vs. ITO(TDS-II) - ITA No.656/JP/2010 dt.12/06/2015 - Trib. Jaipur*

*ii) M/s. Dishent Wireless Ltd. vs. DCIT - ITA Nos.320 to 329/MDS/2014 dt.20/07/2015 - Trib. Chennai*

*iii) Idea Cellular Ltd. vs. ITO (TDS) - ITA Nos.94- 96/JP/2013 and 917/JP/2012 dt.24/07/2015 - Trib. Jaipur)*

*On the other hand, learned departmental representative has submitted that the AO has considered the statement of the expert in respect of the nature of services provided by the operator for roaming facility to the roaming subscriber of the other service provider. He has relied upon the orders of the authorities below.*

*13. We have considered the rival submissions as well as the relevant material on record. It is pertinent to note that the issue was initially decided by the Hon'ble Delhi High Court in the case of CIT vs. Bharti cellular Ltd. (175*

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*Taxman 573) whereby the Hon'ble High Court held that the roaming charges paid by the operator to other operator is not in the nature of fee for technical services (FTS). The revenue carried the matter to the Hon'ble Supreme Court. The Hon'ble Supreme Court in the case of CIT vs. Bharati Cellular Ltd.(193 Taxman 97) has observed that the issue can be decided after the expert's opinion on the point whether any human intervention is required for providing interconnected roaming services by other cellular operators. The relevant observations of the Hon'ble Supreme Court in para.7 to 10 are as under:*

*"7. The problem which arises in these cases is that there is no expert evidence from the side of the Department to show how human intervention takes place, particularly, during the process when calls take place, let us say, from Delhi to Nainital and vice versa. If, let us say, BSNL has no network in Nainital whereas it has a network in Delhi, the interconnect agreement enables M/s Bharti Cellular Ltd. to access the network of BSNL in Nainital and the same situation can arise vice versa in a given case. During the traffic of such calls whether there is any manual intervention, is one of the points which requires expert evidence. Similarly, on what basis is the "capacity" of each service provider fixed when interconnect agreements are arrived at ? For example, we are informed that each service provider is allotted a certain "capacity". On what basis such "capacity" is allotted and what happens if a situation arises where a service provider's "allotted capacity" gets exhausted and it wants, on an urgent basis, "additional capacity" ? Whether at that stage, any human intervention is involved is required to be examined, which again needs a technical data. We are only highlighting these facts to emphasize that these types of matters cannot be decided without any technical assistance available on record.*

*8. There is one more aspect that requires to be gone into. It is the contention of respondent No. 1 herein that interconnect agreement between, let us say, M/s Bharti Cellular Ltd. and BSNL in these cases is based on obligations and counter obligations, which is called a "revenue sharing contract". According to respondent No. 1, s. 194J of the Act is not attracted in the case of "revenue sharing contract". According to respondent No. 1, in such contracts there is only sharing of revenue and, therefore, payments by revenue sharing cannot constitute "fees" under s. 194J of the Act. This submission is not accepted by the Department. We leave it there because this submission has not been examined by the Tribunal.*

*9. In short, the above aspects need reconsideration by the AO. We make it clear that the assessee(s) is not at fault in these cases for the simple reason that the question of human intervention was never raised by the Department before the CIT. It was not raised even before the Tribunal; it is not raised even in these civil appeals. However, keeping in mind the larger interest and the ramification of the issues, which is likely to recur, particularly, in matters of contracts between Indian companies and multinational corporations, we are of the view that the cases herein are required to be remitted to the AO(TDS).*

*10. Accordingly, we are directing the AO(TDS) in each of these cases to examine a technical expert from the side of the Department and to decide the matter within a period of four months. Such expert(s) will be examined (including cross-examined) within a period of four weeks from the date of*

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*receipt of the order of this Court. Liberty is also given to respondent No. 1 to examine its expert and to adduce any other evidence."*

*Thus, the Hon'ble Supreme Court directed the AO in each of the cases to examine the technical expert from the side of the department and to decide the matter. Though the AO, while deciding the issue has considered the statement of the expert who was examined in the case of Bharti Cellular, however, we note that in the case of Bharti Hexacom Ltd. (supra), Jaipur Bench of this Tribunal has decided this issue by giving a finding that no intervention is required for providing the roaming facility to the other operators/subscribers. We further note that in the case of Idea Cellular Ltd. vs. ITO (supra) Jaipur bench of the Tribunal again considered an identical issue in paras 2 to 4 as under:*

*"2. The Id. Counsel for the assessee at the outset contends that the issues in question is squarely covered by the Hon'ble ITAT, Jaipur Bench decision in the case of M/s Bharti Hexacom Limited Vs. ITO (TDS)-II, Jaipur in ITA No. 656/JP/2010 order dated 12/06/2015, which 3 ITA 94 to 96/JP/2013 & 917/JP/2012 - Idea Cellular Ltd. Vs. ITO(TDS) has considered the issue about the payment of roaming charges to telecom operators in great details and held that such payment does not amount to fee for technical services and not liable for TDS u/s 194J. The Hon'ble ITAT has held as under:-*

*"We have heard the rival contentions of both the parties and perused the material available on the record. After going through the order of the Assessing Officer, Id CIT(A); submissions of the assessee as well as going through the process of providing roaming services; examination of technical experts by the ACIT TDS, New Delhi in the case of Bharti Cellular Ltd.; thereafter cross examination made by M/s Bharti Cellular Ltd.; also opinion of Hon'ble the then Chief Justice of India Mr. S.H. Kapadia dated 03/09/2013 and also various judgments given by the ITAT Ahmadabad Bench in the case of Canara Bank on MICR and Pune Bench decision on Data Link Services. We find that for installation/setting up/repairing/servicing/maintenance capacity augmentation are require human intervention but after completing this process mere interconnection between the operators is automatic and does not require any human intervention. The term Inter Connecting User Charges (IUC) also signifies charges for connecting two entities. The Coordinate Bench also considered the Hon'ble Supreme Court decision in the case of Bharti Cellular Ltd. in the case of i-GATE Computer System Ltd. and held that Data Link transfer does not require any human intervention and charges received or paid on account 4 ITA 94 to 96/JP/2013 & 917/JP/2012\_ Idea Cellular Ltd. Vs. ITO(TDS) of this is not fees for technical services as envisaged in Section 194J read with Section 9(1)(vii) read with Explanation 2 of the Act. In case before us, the assessee has paid roaming charges i.e. IUC charges to various operators at Rs. 10,18,92,350/-. Respectfully following above judicial precedents, we hold that these charges are not fees for rendering any technical services as envisaged in Section 194J of the Act. Therefore, we reverse the order of the Id CIT(A) and assessee's appeal is allowed on this ground also.*

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*It is contended that the facts, circumstances and issues of appeals in question are similar to M/s Bharti Hexacom Limited judgment (supra).*

3. *The Id DR is heard, who supported the order of the Assessing Officer.*

4. *We have heard the rival contentions of both the parties and perused the material available on the record. The issue about levy of TDS U/s 194J on the roaming charges paid by the telecom operators to service providers and applicability of Section 194J has been considered in detail by this very Bench in the case of M/s Bharti Hexacom Limited (supra). After considering the issues in detail, it has been held that there is no human intervention involved in providing these services, therefore, roaming charges paid by the assessee do not amount to fee for technical services U/s 194J of the Act read with Section 91(vii). Following our own judgment, we are upholding the order of the Id CIT(A) holding that the assessee is not liable for TDS u/s 194J, interest thereon and consequently not being the assessee in default. The orders of Id. CIT(A) are uphold."*

***Thus it is clear that the Jaipur bench has given a finding of fact that no intervention is required for providing roaming facility and consequently the roaming charges paid by the assessee to other service providers cannot be treated as fees for technical services. Accordingly, following the orders of the co-ordinate bench, we are of the view that the assessee cannot be held as the assessee In default for non-deduction of tax at source on the roaming charges paid to other service provider. This ground of the assessee is allowed."***

[Emphasis supplied]

12. Then, Ld. AR submitted that both issues, whether the payment of roaming charges constitutes FTS or Royalty, have been vehemently analysed by ITAT, Bangalore in ***M/s Telefonica Depreciation Espana SA Vs. ACIT(IT)/DCIT(IT), Bangalore, IT(TA) No. 2657/Bang/2019, 180/Bang/2021 & 817/Bang/2022 order dated 10.08.2023*** and the ITAT has categorically held that roaming charges are neither FTS or Royalty.

The relevant paras of the order are extracted below:

*"3. Aggrieved by the final assessment orders passed by the Ld.AO for the years under consideration, assessee filed appeal before this Tribunal wherein the following arguments were raised:*

*3.1 At the outset, it is submitted that DTAA will prevail over the Income-Tax Act as held by Karnataka High Court and it is further submitted that*

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*explanation 5 and 6 do not override DTAA. Hence, the subject payment received from Vodafone is not taxable as 'royalty' as per DTAA. The KHC in the aforesaid Vodafone case has reversed the ITAT judgment on this point. Substantial questions of law 2,3 and 4 in the aforesaid KHC judgment of Vodafone (as reproduced above) has answered the question that the IUC charges do not amount to 'royalty'.*

*3.2 Without prejudice to the above, it is submitted that there is No "use of process" or any "use of equipment". Hence, the entire assumption of "process royalty"/"equipment royalty" does not arise in the case of the Appellant.*

*3.3 The provision apparently reads "secret formula or process". Hence, it is submitted that the process has to be a "secret process" as held by Hon'ble Delhi Tribunal in the case of Bharti Airtel Limited [2016] 67 taxmann.com 223 (Delhi ITAT).*

*3.4 Further, it is submitted that the decision of the Madras High Court in the case of Verizon Communications has been dissented by the Delhi HC in the case of New Skies and Bombay HC in the case of Neo Sports. It is also submitted that when there exists two conflicting judgments - the one favouring the assessee should prevail - J&P Coats. Nonetheless, the recent jurisdictional High Court decision of Vodafone South would have binding effect on the Bangalore Tribunal.*

*3.5 Reliance is also placed on the following decisions:*

- 1. Bharat Sanchar Nigam Ltd. [2017] 87 taxmann.com 152 (Delhi - Trib.)*
- 2. Pan AmSat International Systems Inc. [2006] 9 SOT 100 (DELHI ITAT)*
- 3. Asia Satellite Telecommunications Co Ltd [2011] 197 Taxman 263 (Delhi)*
- 4. New Skies Satellite BV [2016] 68 Taxmann.com 8 (Delhi)*
- 5. Neo Sport Broadcast (P.) Ltd. [2019] 107 Taxmann.com 17 (Bombay)*
- 6. Viacom18 Media (P.) Ltd. [2022] 134 taxmann.com 243 (Mumbai - Trib.) - Para 9 page 656 of PB which has followed Bom HC decision in Neo Sports as opposed to earlier ITAT adverse view in own case*
- 7. J&P Coats Ltd. No.11/Bang/2014, ITA 382 & 1493/Bang/2015, 2135/Bang/2016 and 1365- 1367/Bang/2019*
- 8. Engineering Analysis Centre of Excellence (P.) Ltd . [2021] 125 taxmann.com 42 (SC)*

*3.6 It is submitted by the Ld. AR that the services rendered by the assessee are standard telecom services which are automated, requiring no human intervention. Hence, it is submitted that the same cannot be considered as "FTS". Reliance is placed on the decision of Hon'ble Delhi Tribunal in the case of Bharat Sanchar Nigam Ltd. reported in [2017] 87 taxmann.com 152.*

*3.7 The Ld.AR further submitted that, the issue of taxability of interconnectivity charges as FTS has been decided by Hon'ble Karnataka High Court in case of Vodafone South Ltd. reported in (2016) 72 taxmann.com 347 and that the revenue has accepted the said decision by Hon'ble Karnataka*

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*High Court which has been categorically noted by Hon'ble Delhi High Court in case of CIT vs. Tata Teleservices Ltd. in ITA No. 1417/2018 by order dated 30.05.2022. It is thus submitted by the Ld.AR that the payment received by assessee towards interconnectivity utility charges cannot be treated as FTS.*

*3.8 It is submitted that in respect of the treatment of the interconnectivity utility charges as 'Royalty', has been considered in a recent decision by Hon'ble Karnataka High Court in a group of cases between M/s. Vodafone Idea Ltd. (Formerly known as M/s. Vodafone Mobile Services Ltd. vs. DDIT(IT) & Ors. in ITA Nos. 160-164/2015 & ITA Nos. 64-66/2020 for A.Ys. 2008-09 to 2015- 16 vide order dated 14.07.2023.*

*3.9 He thus submitted that the issues pertaining to the present appeals regarding taxing the interconnectivity utility charges (IUC) received by the assessee as Royalty / FTS in India stands squarely covered in favour of assessee.*

*4. On the contrary, the Ld.DR relying on the orders passed by the authorities below vehemently argued the observations as recorded by the revenue in their orders.*

*5. We have perused the submissions advanced by both sides in the light of records placed before us.*

*5.1 We note that the revenue characterised the payments received by assessee towards interconnectivity utility charges as Royalty since the payment is made to "use the process" or "an equipment".*

*5.2 It is an admitted fact that various service providers in India entered into agreement with assessee for international carriage and connectivity services against which an interconnectivity charges are received by the assessee. We refer to 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 (ii) 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.'*

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5.2.1 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. 5.2.2 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.

5.2.3 We also note that '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.

5.2.4 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."*

5.2.5 Thus the word "process" thus 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.

5.2.6 We refer to the decision of Hon'ble Madras High Court in case of CIT vs. Neyveli Lignite Corpn. Ltd. reported in (2000) 243 ITR 459 wherein Hon'ble High Court observed as under:

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*"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".*

5.2.7 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.

5.2.8 Further we note that 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."*

5.2.9 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 include, transmission by satellite (including uplinking, 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 such right in respect of such process being with the person claiming 'royalty' for granting its usage to a third party.

5.2.10 We may also refer to the following decisions of AAR wherein meaning of the phrase "use" or "right to use" has been explained. The meaning attached to phrase "use" or "right to use" has been explained in following decisions:

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- 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.

5.2.11 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.

5.2.12 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.

5.2.13 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 invokable. 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

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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

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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.

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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

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*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.*

*We also refer to the commentary relied by the Ld. Counsel from 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.*

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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

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*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*

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*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.*

*5.2.14 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 the assessee cannot fall within the ambit of 'Royalty' under section 9(1)(vi) Explanation 5 & 6.*

*5.2.15 We also note that the Explanations 5 and 6 to section 9(1)(vi) are not found in the definition of "Royalty" under IndiaSpain DTAA. The definition of "Royalty" under the DTAA is much more narrower in its scope and coverage, than the definition of "Royalty" contained in section 9(1)(vi) r.w. Explanations 2, 5 and 6 of the act.*

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5.2.16 On perusal of the agreement between the assessee and the end users placed at pages 35 to 80 of paper book Vol. 1, it is noted that the installation and operation of sophisticated equipments are with the view to earn income by allowing the users to avail the benefits of such equipments or facility and does not tantamount to granting the use or the right to use the equipment or process so as to be considered as royalty within the definition of "royalty" as contained in clause 3 of Article 13 of India-Spain DTAA.

5.2.17 We also note that in the present facts of the case, at no point of time, any possession or physical custody, control or management over any equipment is received by the end users / customers. It is also noted that the process involved in providing the services to the end users / customers is not "secret" but a standard commercial process followed by the industry players. Therefore the said process also cannot be classified as a "secret process", as is required by the definition of "royalty" mentioned in clause 3 of Article 13 of India-Spain DTAA.

We are therefore of the opinion that the receipt of IUC charges cannot be taxed as Royalty under Article 13 in India of IndiaSpain DTAA.

5.2.18 The above observations are supported by the view expressed by Hon'ble High Court. Hon'ble High Court in the group of cases had considered following questions of law which are as under:

"1. Whether the Income-Tax Appellate Tribunal (ITAT) was correct in holding that the application of the Double Taxation Avoidance Agreement (DTAA) cannot be considered in proceedings under Section 201 of the Act and that it is not open to the payer to take benefit of the DTAA when he is making payment to a non- resident?

2. Whether the ITAT was correct in holding that amendment to provisions of royalty under Section 9(1)(vi) by inserting Explanation 5 and 6 under the Income-tax Act (hereinafter referred to as the 'Act') will also result in amendment of the DTAAS?

3. Whether ITAT was correct in holding that payments made to non-resident telecom operators for providing interconnect services and transfer of capacity in foreign countries is chargeable to tax as royalty in view of the inclusion of the terms "right" & "process" in the clarificatory Explanation 2, 5 and 6 of Section 9(1)(vi) of the Act, and consequently, appellant was bound to deduct tax at source thereon under Section 195 of the Act?

4. Whether the income tax authorities in India have jurisdiction to bring to tax income arising from extraterritorial source, that is outside India, in respect of business carried on by foreign companies outside India just because Indian residents use and pay for the facilities provided by these foreign companies contrary to the Constitution of India, International Law and Treaties and law declared by the Apex Court?

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5. Whether the first respondent was correct in holding that for the current assessment year the withholding tax liability should be levied at a higher rate at 20% in accordance with section 206AA of the Act?

6. Whether the Hon'ble Tribunal was right in repelling the contention of the Appellant to the effect that, as a deductor, it cannot be held liable for non-reduction of tax at source for payments made for the Assessment Year 2008-09 to Assessment Year 2012-13 on the basis of a subsequent amendment to Section 9(1)(vi) whereby Explanation 5 and 6 were introduced?"

Hon'ble High Court for considering the above questions had looked into the agreement between Vodafone Idea Ltd. and the various service providers from whom Vodafone Idea Ltd. had received the IUC services. Hon'ble High Court also considered the various decisions by other High Courts referred to hereinabove vis-a-vis the arguments advanced by the Ld. Counsel.

5.2.19 In case of Vodafone Idea Ltd. (supra), Hon'ble Court also observed that the equipments and submarine cables are situated overseas and that Vodafone Idea Ltd. had availed certain services from the non-resident telecom operators and that such agreements would not create a permanent establishment of such non-resident telecom operators in India. Thereafter Hon'ble High Court after verifying the facts of the case having regards to the decision of Hon'ble Supreme Court in case of Engineering Analysis Centre of Excellence Pvt. Ltd. vs. CIT reported in (2021) 432 ITR 471 observed and held as under:

"12. We have carefully considered the rival contentions and perused the records.

13. Undisputed fact of the case are, Assessee is an ILD license holder and responsible for providing connectivity to calls originating/terminating outside India. Assessee has entered into an agreement with NTOs for international carriage and connectivity services. According to the assessee, payment made to NTOs is towards interconnectivity charges.

14. Assessee has also entered into a CTA with a Belgium entity Belgacom. Belgacom had certain arrangement with the Omantel for utilisation of bandwidth. Omantel transferred certain portion of its capacity to Belgacom and Page 24 of 28 IT(IT)A Nos. 2657/Bang/2019, 180/Bang/2021 & 817/Bang/2022 Belgacom had in turn transferred a portion of its capacity to the assessee.

15. Admittedly the equipments and the submarine cables are situated overseas. To provide ILD calls, assessee had availed certain services from NTOs. It is also not in dispute that Belgacom, a Belgium entity with

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whom assessee has entered into an agreement does not have any 'permanent establishment' in India.

16. Shri. Pardiwala contended that the payments made by assessee cannot be treated as either Royalty or FTS34 or business profits as no part of the activity was carried out in India. Revenue's reply to his contention is that, the income belongs to the payee. If, in the opinion of assessee, tax was not deductible, he ought to have approached the AO for the nil deduction certificate. It is also the further case of the Revenue that the agreement between assessee and the payee did not specify that income was not taxable.

17. The first question is whether the ITAT was correct in holding that DTAA cannot be considered under Section 201 of the Act. It was argued by Shri. Percy Pardiwala that this issue is covered by the decision in GE Technology. We may record that a DTAA is a sovereign document between two countries. In GE Technology, the Apex Court has held as follows:

"7. ...While deciding the scope of Section 195(2) it is important to note that the tax which is required to be deducted at source is deductible only out of the chargeable sum. This is the underlying principle of Section 195. Hence, apart from Section 9(1), Sections 4, 5, 9, 90, 91 as well as the provisions of DTAA are also relevant, while applying tax deduction at source provisions."

(Emphasis supplied)

18. The above passage has been noted and extracted in Engineering Analysis. Thus it is clear that an assessee is entitled to take the benefit under a DTAA between two countries. Hence, the ITAT's view that DTAA cannot be considered in proceedings under Section 201 of the Act is tenable.

19. The second question for consideration is whether the ITAT was correct in holding that the amendment to provisions of Section 9(1)(vi) inserting the Explanations will result in amendment of DTAA. The answer to this question must be in the negative because in Engineering Analysis, the Apex Court has held that Explanation 4 to Section 9(1)(vi) of the Act is not clarificatory of the position as on 01.06.1976 and in fact expands that position to include what is stated therein vide Finance Act, 2012.

20. The Explanation 5 and 6 to Section 9(1)(vi) of the Act has been inserted with effect from 01.06.1976. This aspect has also been considered in Engineering Analysis holding that the question has been answered by two Latin Maxims, *lex no cogit ad impossibilia* i.e. the law does not demand the impossible, and *impotentia excusat legem* i.e. when there is disability that makes it impossible to obey the law, the alleged disobedience of law is excused and it is held in Engineering Analysis as follows:

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*"85. It is thus clear that the "person" mentioned in section 195 of the income Tax Act cannot be expected to do the impossible, namely, to apply the expanded definition of "royalty" inserted by explanation 4 to section 9(1)(vi) of the Income Tax Act, for the assessment years in question, at a time when such explanation was not actually and factually in the statute."*

*"100. Also, any ruling on the more expansive language contained in the explanations to section 9(1)(vi) of the Income Tax Act would have to be ignored if it is wider and less beneficial to the assessee than the definition contained in the DTAA, as per section 90(2) of the Income Tax Act read with explanation 4 thereof, and Article 3(2) of the DTAA....."*

21. The third question is, whether the payments made to NTOS for providing interconnect services and transfer of capacity in foreign countries is chargeable to tax as royalty. It was argued by Shri. Pardiwala, that for subsequent years in assessee's own case, the ITAT has held that tax is not deductible when payment is made to non-resident telecom operator. This factual aspect is not refuted. Thus the Revenue has reviewed its earlier stand for the subsequent assessment years placing reliance on Viacom etc<sup>35</sup>, rendered by the ITAT. In that view of the matter this question also needs to be answered against the Revenue.

22. The fourth question is whether the Income Tax Authorities have jurisdiction to bring to tax income arising from extra-territorial source. Admittedly, the NTOs have no presence in India. Assessee's contract is with Belgacom, a Belgium entity which had made certain arrangement with Omantel for utilisation of bandwidth. In substance, Belgacom has permitted utilisation of a portion of the bandwidth which it has acquired from Omantel. It is also not in dispute that the facilities are situated outside India and the agreement is with a Belgium entity which does not have any presence in India. Therefore, the Tax authorities in India shall have no jurisdiction to bring to tax the income arising from extra-territorial source.

23. The fifth question is whether the Revenue is right in holding that withholding tax liability should be levied at a higher rate. It was contended by Shri. Pardiwala that this issue is covered in assessee's favour in CIT Vs. M/s. Wipro<sup>36</sup> and the same is not disputed. Hence, this question also needs to be answered against the Revenue.

24. The sixth question is whether assessee can be held liable for non-reduction of tax at source for payments made for the A.Ys. on the basis of amendment to Section 9(1)(vi) of the Act. This aspect has been considered by us while answering question No.2. It is held in Engineering Analysis that an assessee is not obliged to do the

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*impossible. Admittedly, the A.Y.s under consideration are 2008-09 to 2012-13 and the Explanation has been inserted by Finance Act, 2012. In addition, we have also held that assessee is entitled for the benefits under DTAA."*

**5.2.20 Respectfully following the above view, in case of Vodafone Idea Ltd. (supra) and Vodafone South Ltd. (supra), and the discussions hereinabove, 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."**

[Emphasis supplied]

13. Lastly, Ld. AR also relied upon the decision of ITAT, Delhi in **Bharti Airtel Limited Vs. ITO(TDS), New Delhi, ITA No. 3593 to 3596/Del/2012 order dated 17.03.2016** holding that roaming charges neither constituted FTS nor Royalty, as under:

**"25. Issue No. 1**

**WHETHER THE PAYMENT OF IUC BY ASSESSEE TO FTOS ARE TAXABLE AS FEE FOR TECHNICAL SERVICES U/S. 9(1)(vii) OF THE ACT.**  
(As the [Section 9\(1\)\(vii\)](#) has already been extracted in the earlier paragraphs, we do not repeat the same.)

26. The Hon'ble Delhi High Court on this issue held as follows in the assessee's own case i.e. [CIT vs. Bharti Cellular Ltd.\(2009\) 319 ITR 139 \(Delhi\)](#):-

*"The expression 'fees for technical services' as appearing in [s. 194J](#) has the same meaning as given to the expression in Explan. 2 to [s. 9\(1\)\(vii\)](#). In the said Explanation. the expression 'fees for technical services' means any consideration. for rendering any (managerial, technical or consultancy services'. The word (technical' is preceded by the word (managerial' and ITA Nos. 3593 TO 3596/Del/2012 [Bharti Airtel Ltd. vs. ITO(TDS)] & ITA Nos. 4076 TO 4079/Del/2012 [[ITO\(TDS\) vs. Bharti Airtel Ltd.](#)] succeeded by the word 'consultancy'. Since the expression (technical services' is in doubt and is unclear, the rule of noscitur a sociis is clearly applicable. This would mean that the word 'technical' would take colour from the words 'managerial' and 'consultancy', between which it is sandwiched. A managerial service would be one which pertains to or has the characteristic of a manager. It is obvious that the expression (manager' and consequently (managerial service' has a definite' human element attached to it. To put it bluntly, a machine cannot be a manager. The service of consultancy also necessarily entails*

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human intervention. The consultant, who provides consultancy service, has to be a human being. A machine cannot be regarded as a consultant. From the above discussion, it is apparent that both the words 'managerial' and 'consultancy' involve a human element. And, both, managerial service and consultancy service, are provided by humans. Consequently, applying the rule of *noscitur a sociis*, the word 'technical' as appearing in Explan. 2 to [s. 9\(1\)\(vii\)](#) would also have to be construed as involving a human element. But, the facility provided by MTNL/ other companies for interconnect/ port access is one which is provided automatically by machines. It is independently provided by the use of technology and that too, sophisticated technology, but that does not mean that MTNL/ other companies which provide such facilities are rendering any technical services as contemplated in Explan. 2 to [s. 9\(1\)\(vii\)](#). This is so because the expression 'technical services' takes colour from the expressions 'managerial services' and 'consultancy services' which necessarily involve a human element or, what is nowadays fashionably called, human interface. In the facts of the present appeals, the services rendered qua interconnection port access do not involve any human interface and, therefore, the same cannot be regarded as 'technical services' as contemplated under [s. 194J](#). The interconnect/port access facility is only a facility to use the gateway and the network of MTNL/other companies. MTNL or other companies do not provide any assistance or aid or help to the respondents/assesseees in managing, operating, setting up their infrastructure and networks. No doubt, the facility of interconnection and port access provided by MTNL/other companies is 'technical' in the sense that it involves sophisticated technology. The facility may even be construed as a 'service' in the broader sense such as a 'communication service'. But, while interpreting the expression 'technical service', the individual meanings of the words 'technical' and 'service' have to be shed. And only the meaning of the whole expression 'technical services' has to be seen. Moreover, the expression 'technical service' would have reference to only technical service rendered by a human. It would not include any service provided by machines or robots.

*Thus, the interconnect charges/ port access charges cannot be regarded as fees for technical services." [emphasis supplied]*

27. The judgment of the Hon'ble Delhi High Court in the aforesaid case may thus be summarized as under:

- The rule of *noscitur a sociis* is clearly applicable and the word 'technical' would take colour from the words 'managerial' and 'consultancy', between which it is sandwiched.
- Both managerial service and consultancy service are provided by humans.

Consequently, applying the rule of *noscitur a sociis*, the word 'technical' as appearing in Explan. 2 to [s. 9\(1\)\(vii\)](#) would also have to be construed as involving a human element • The expression 'technical service' would have reference to only technical service rendered by a human.

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- MTNL or other companies do not provide any assistance to the assessee in managing, operating, setting up their infrastructure and networks.
- No doubt, such a facility is 'technical' in the sense that it involves sophisticated technology and may even be construed as 'communication service' but while interpreting the entire expression 'technical service', the individual meanings of the words 'technical' and 'service' have to be shed and only the meaning of the whole-expression 'technical services' has to be seen.
- The services rendered qua interconnection/port access do not involve any human interface and, therefore, the same cannot be regarded as 'technical services' as contemplated under [s. 194J](#)."

28. The phraseology of Fees for Technical Services covers only such technical services provided for Fees. There should be a direct co-relation between the Services which are on technical nature and the consideration received in lieu of rendering the services. The services can be said to be of technical nature is the special skills and knowledge relating to technical field which required for the provisions of such services. These are required to be rendered by humans. The services provided by machines and robust do not fall within the ambit of technical services as provided [u/s. 9\(1\)\(vii\)](#) of the Act.

29. On appeal by the Revenue, the Hon'ble Supreme Court in the case reported as [CIT vs. Bharti Cellular Ltd.](#) (2011) 330 ITR 239 upheld the proposition of law [laid down by](#) the Hon'ble Delhi High Court. The Hon'ble Supreme Court has held as under:-

"The question basically involved in the lead case is: whether TDS was deductible by M/s. Bharti Cellular Limited when it paid interconnect charges/access/port charges to BSNL? For that purpose, we are required to examine the meaning of the words "fees for technical services" under [Section 194J](#) read with clause (b) of the Explanation to [Section 194J](#) of the Income Tax Act, 1961, [Act, for short] which, inter alia, states that "fees for technical services" shall have the same meaning as contained in Explanation 2 to clause (vii) of [Section 9\(1\)](#) of the Act. Right from 1979 various judgments of the High Courts and Tribunals have taken the view that the words "technical services" have got to be read in the narrower sense by applying the rule of *Noscitur a sociis*, particularly, because the words "technical services" in [Section 9\(1\)\(vii\)](#) read with Explanation 2 comes in between the words "managerial and consultancy services".

The problem which arises in these cases is that there is no expert evidence from the side of the Department to show how human intervention takes place, particularly, during the process when calls take place, let us say, from Delhi to Nainital and vice versa. If, let us say, BSNL has no network in Nainital whereas it has a network in Delhi, the Interconnect Agreement enables M/s. Bharti Cellular Limited to access the network of BSNL in Nainital and the same situation can

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arise vice versa in a given case. During the traffic of such calls whether there is any manual intervention, is one of the points which requires expert evidence. Similarly, on what basis is the "capacity" of each service provider fixed when Interconnect Agreements are arrived at? For example, we are informed that each service provider is allotted a certain "capacity". On what basis such "capacity" is allotted and what happens if a situation arises where a service provider's "allotted capacity" gets exhausted and it wants, on an urgent basis, "additional capacity"? Whether at that stage, any human intervention is involved is required to be examined, which again needs a technical data. We are only highlighting these facts to emphasise that these types of matters cannot be decided without any technical assistance available on record. There is one more aspect that requires to be gone into. It is the contention of Respondent No.1 herein that Interconnect Agreement between, let us say, M/s. Bharti Cellular Limited and BSNL in these cases is based on obligations and counter obligations, which is called a "revenue sharing contract". According to Respondent No.1, [Section 194J](#) of the Act is not attracted in the case of "revenue sharing contract". According to Respondent No.1, in such contracts there is only sharing of revenue and, therefore, payments by revenue sharing cannot constitute "fees" under [Section 194J](#) of the Act. This submission is not accepted by the Department. We leave it there because this submission has not been examined by the Tribunal. In short, the above aspects need reconsideration by the Assessing Officer. We make it clear that the assessee(s) is not at fault in these cases for the simple reason that the question of human intervention was never raised by the Department before the CIT. It was not raised even before the Tribunal; it is not raised even in these civil appeals. However, keeping in mind the larger interest and the ramification of the issues, which is likely to recur, particularly, in matters of contracts between Indian Companies and Multinational Corporations, we are of the view that the cases herein are required to be remitted to the Assessing Officer (TDS).

Accordingly, we are directing the Assessing Officer (TDS) in each of these cases to examine a technical expert from the side of the Department and to decide the matter within a period of four months. Such expert(s) will be examined (including cross-examined) within a period of four weeks from the date of receipt of the order of this Court. Liberty is also given to Respondent No.1 to examine its expert and to adduce any other evidence. Before concluding, we are directing CBDT to issue directions to all its officers, that in such cases, the Department need not proceed only by the contracts placed before the officers." (Emphasis ours)

29.1 Thus in our view the proposition of law [laid down in](#) the judgment of the Hon'ble Delhi High Court have attained finality. The Hon'ble Supreme Court held that the issue as to whether there is involvement / presence of human element or not was a factual and technical matter and required to be examined. The other proposition have been accepted by the Hon'ble Supreme

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Court. As the Hon'ble Supreme Court was of the opinion that this factual aspect of human intervention was not examined by the AO, the matter was remanded to the AO for factual examination only. The AO in pursuance of the directions of the Hon'ble Supreme Court examined witness on oath and also gave the assessee the opportunity to cross examine them. He also re-examined the expert witness. Our decision will be based on the evidence so collected by the AO on this aspect of human intervention in the services rendered. It held that the word "technical services" have got to be read in the narrower sense by applying the rule of *noscitur a sociis*, particularly, because the words "technical services" in [Section 9\(1\)\(vii\)](#) r/w Explan. 2 comes in between the words "managerial and consultancy services". Hence, there should be involvement/ presence of human element for coming to a conclusion that "technical services" can be said to have been rendered in terms of Explanation 2 to [Section 9\(1\)\(vii\)](#) of the Act. In our view the Hon'ble Supreme Court of India has approved the proposition laid down by the Hon'ble High Court, that this is a service and that it would be FTS as defined u/s 9(1)(vii) if there is human interference in such communication service. Hence the issue to be considered is narrow and based on evidence collected by the Revenue post the Hon'ble Supreme Court judgment. All other issues are no more *res-integra*.

29.2 This aspect as to whether a human element is involved in such interconnect services or not, has been examined by different Benches of the Tribunal based on the evidence collected by the AO in the above stated set-aside proceedings. The facts that are on record are the same as the facts and evidence which have been examined by various Coordinate Benches of the Tribunal. These include the statement of experts recorded by the Assessing Officer and the cross examination done by the Representative of the Company. For the sake of brevity, we do not extract the statement and cross examination etc. of the various experts, as these were considered in detail by the Coordinate Benches and it was held as follows:

29.3 The Kolkata Bench of the Tribunal in the case of [Vodafone East Ltd. vs. Addl. CIT](#) in ITA No. 243/Kol/2014, vide order dated 15.9.2015 held as follows:-

"From the aforesaid statement recorded from technical experts pursuant to the directions of the Supreme Court in [CIT Vs. Bharti Cellular Ltd.](#) (330 ITR 239) which has been heavily relied upon by the Learned CITA, we find that human intervention is required only for installation/ setting up/ repairing/ servicing/ maintenance/capacity augmentation of the network. But after completing this process, mere interconnection between the operators while roaming, is done automatically and does not require human intervention and accordingly cannot be construed as technical services. It is common knowledge that when one of the subscribers in the assessee's circle travels to the jurisdiction of another circle, the call gets connected automatically without any human intervention and it is for this, the roaming charges is paid by the assessee to the Visiting Operator for providing this service. Hence we have no hesitation to hold that the provision of roaming services do not require any human intervention and

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accordingly we hold that the payment of roaming charges does not fall under the ambit of TDS provisions u/ s 194J of the Act."

30. The Jaipur Bench of the Tribunal in the case of [Bharti Hexacom Ltd. vs. ITO \(TDS\)](#) in ITA 656/JP/2010 dated 12.6.2015 held as follows:

"11. We have heard the rival contentions of both the parties and perused the material available on the record. After going through the order of the Assessing Officer, Id CIT(A); submissions of the assessee as well as going through the process of providing roaming services; examination of technical experts by the ACIT TDS, New Delhi in the case of Bharti Cellular Ltd.; thereafter examination made by M/s Bharti Cellular Ltd.; also opinion of Hon'ble the then Chief Justice of India Mr. S.H. Kapadia dated 03/09/2013 and also various judgments given by the ITAT Ahmadabad Bench in the case of Canara Bank on MICR and Pune Bench decision on Data Link Services. We find that for installation/ setting up/ repairing/ servicing/ maintenance capacity augmentation are require human intervention but after completing this process mere interconnection between the operators is automatic and does not require any human intervention. The term Inter Connecting User Charges (IUC) also signifies charges for connecting two entities. The Coordinate Bench also considered the Hon'ble Supreme Court decision in the case of Bharti Cellular Ltd. in the case of i-GATE Computer System Ltd. and held that Data Link transfer does not require any human intervention and charges received or paid on account of this is not fees for technical services as envisaged in [Section 194J](#) read with [Section 9\(1\)\(vii\)](#) read with Explanation-2 of the Act. In case before us, the assessee has paid roaming charges i.e. IUC charges to various operators at Rs. 10,18,92,350/-. Respectfully following above judicial precedents, we hold that these charges are not fees for rendering any technical services as envisaged in [Section 194J](#) of the Act. Therefore, we reverse the order of the Id CIT(A) and assessee's appeal is allowed on this ground also."

31. The AO as well as the Ld. CIT(A) has recorded that there is no human intervention when the call is successfully completed. It is also not disputed that there is no difference in the technology, system and methodology used by Telecom Companies in providing inter-connection of domestic calls or of international calls. So what decision is applicable for use of local calls also applies to "IUC" of international calls. Thus the view taken on the deductibility of TDS on IUC charges paid for local inter connectivity service would on all fours apply to charges paid for "IUC" for international inter connectivity.

32. The Chennai Bench of the ITAT in the case of M/s Dishnet Wireless Ltd. vs. DCIT in ITA No. 320 to 329/Mad/ 2014 vide order dated 20.7.2015 on the aspect of human intervention held as follows:-

"25. Now coming to roaming charges, the contention of the assessee is that human intervention is not required for providing roaming facility,

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therefore, it cannot be considered to be a technical service. We have gone through the judgment of Apex Court in [Bharti Cellular Limited](#) (supra). The Apex Court after examining the provisions of [Section 9\(1\)\(vii\)](#) of the Act, found that whenever there was a human intervention, it has to be considered as technical service. In the light to the above judgment of the Apex Court, the Department obtained an expert opinion from Sub-Divisional Engineer of BSNL. The Sub-Divisional Engineer clarified that human intervention is required for establishing the physical connectivity between two operators for doing necessary system configurations. After necessary configuration for providing roaming services, human intervention is not required. Once human intervention is not required as found by the Apex Court, the service provided by the other service provider cannot be considered to be a technical Service. It is common knowledge that, when one' of the subscribers in the assessee's circle travels to the jurisdiction of another circle, the call gets connected automatically without any human intervention. It is due to configuration of software system in the respective service provider's place. In fact, the Sub-Divisional Engineer of BSNL has explained as follows in response to Question No. 23:-

"Regarding roaming services as explained to question no. 21. Regarding interconnectivity, initial human intervention is required for establishing the physical connectivity and also for doing the required configuration. Once it is working fine, no intervention is required. In case of any faults human intervention is required for taking necessary corrective actions." In view of the above, once configuration was made, no human intervention is required for connecting roaming calls. The subscriber can make and receive calls, access and receive data and other services without human intervention. Like any other machinery, whenever the system breakdown, to set right the same, human intervention is required. However, for connecting roaming call, no human intervention is required except initial configuration in system. This Tribunal is of the considered opinion that human intervention is necessary for routine maintenance of the system and machinery. However, no human intervention is required for connecting the roaming calls. Therefore, as held by the Apex Court in [Bharti Cellular Limited](#) (supra), the roaming connections are provided without any human intervention and therefore, no technical service is availed by the assessee. Therefore, TDS is not required to be made in respect of roaming charges paid to other service providers."

33. All the Benches of the Tribunal are unanimous in their view on this issue. We see no reason whatsoever to deviate from these views. Hence consistent with the view taken in the above referred orders, we hold that the payment in question cannot be characterized as Fee for Technical Services [u/s. 9\(1\)\(vii\)](#) of the Act. There is no manual or human intervention during the process of transportation of calls between two networks. This is done automatically. Human intervention is required only for installation of the network and installation of other necessary equipments/infrastructure. Human intervention

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is also necessary for maintaining, repairing and monitoring each operator or individual network, so that they remain in a robust condition to provide faultless services to the customers. Human intervention is also required in case where the network capacity has to be enhanced by the telecom operators. Such human intervention cannot be said to be for inter-connection of a call.

34. Where routing of every call has been decided, the exhaustive standard of capacity of the transporter network will automatically re-route through another channel through another operator. Human intervention in setting up enhanced capacity has no connection or relation with the traffic of call. Thus it is clear that in the process of actual calls, no manual intervention is required. The finding of the revenue authorities that interconnection is a composite process, involving several processes which require human intervention is erroneous. The test laid down by the Hon'ble Supreme Court of India in its order when the case was remanded to the AO is to find out as to whether "during traffic of calls, is there was any manual intervention?". There is no reference to the issues of set up, installation or operation maintenance or repair of network as explained by the Ld. CIT(A). These decisions of the various Benches of the ITAT, when read with the judgment of the Hon'ble Delhi High Court as well as the Hon'ble Supreme Court, would settle this matter in favour of the assessee. But as a number of other decisions have been relied upon, we examine the same.

35. The Hon'ble Madras High Court in the case of Skycell Communications Ltd. vd. DCIT (2001) 251 ITR 53 (Mad.) has held that call charges received from telecom operators from firms and companies subscribing to cellular mobile services provided by them do not come within the definition of technical services u/s. 194J read with section 9(1)(vii) Explan. 2, as it is a mere collection of Fee for use of standard facility provided to all those willing to pay for it. Applying the proposition laid down in this case law to the facts of this case, we have to hold that inter connection facility and the service of the FTO in picking up, carrying and successful termination the call over their respective network is a standard facility and the and FTO in question does not render any technical services to the assessee under interconnect agreement.

36. The Hon'ble High Court of Delhi in the case of CIT vs. Estel Communications (P) Ltd. (2008) 217 CTR (Del) 102 held as follows:-

"Tribunal considered the agreement that had been entered into by the assessee with T and came to the conclusion that there was no privity of contract between the customers of the assessee and T. In fact, the assessee was merely paying for an internet bandwidth to T and then selling it to its customers. The use of internet facility may require sophisticated equipment but that does not mean that technical services were rendered by T to the assessee. It was a simple case of purchase of internet bandwidth by the assessee from T. Under the circumstances, the Tribunal came to the conclusion that there were no technical services provided by T to the assessee and, therefore, the provisions of s. 9(1)(vii) did not apply. Tribunal has rightly dismissed the

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*appeal after taking into consideration the agreement between the assessee and T and the nature of services provided by T to the assessee. It was a simple case of payment for the provision of a bandwidth. No technical services were rendered by T to the assessee. On a consideration of the material on record, no substantial question arises in the matter."*

37. In the case of *ACIT vs. Hughes Software Systems Ltd.* (2013) 35 CCH 416 Del. Trib, the Tribunal has held as under:-

*"Deduction of tax at source-Fees for technical services- Assessee was engaged in business of software development of products and providing software services in India and overseas-Assessee was treated as "assessee in default" u/s 201(1) on account of non-deduction of TDS u/ s 194J from payment made for use of tele-communication services i.e telephone charges, link charges and band width charges as 'fee for technical services" u/ s 9(1)(vii)-CIT(A) reversed findings of AO-Held, payments were made to MTNL & BSNL etc. for providing space for transmission of data for carriage of voice and for availing service of inter-communication, port access for which no human intervention was necessary- Payment cannot be characterized as "fee for technical services"-Thus, assessee cannot be held to be in default -for non-deduction of tax at source from payment of telecommunication. charges in terms of [section 194J](#)- Revenue's ground dismissed.*

38. The Bangalore ITAT in the case of [Wipro Ltd. vs. ITO](#) (2003) 80 TTJ (Bang) 191 held as follows:-

*"Income deemed to accrue or arise in India-Fees for technical services/ royalty-Payment for transmission of data and software through uplink and down link services- Assessee engaged, inter alia, in the business of development of software providing on line software services through customer based circuits with the help of VSNL and foreign telecom companies outside India-As per the agreements with such telecom companies assessee is to use the standard facility having standard pricing patterns-There is nothing to show that assessee was provided with any technology or technical services- Therefore, the amounts paid by assessee-company to non-resident telecom companies for downlinking and transmitting of data to the assessee's customers located outside India cannot be considered as 'fees for technical services' under [s. 9\(1\)\(vii\)](#), more so when similar services offered by VSNL is not regarded as technical services - Further, no process has been made available to the assessee - Hence, there is no question of applicability of [s. 9\(1\)\(vi\)](#) too-So long as the amount paid is not taxable under the Act, the clause in the DTAA cannot bring the charge-Hence, there was no liability to deduct tax under [s. 195](#)"*

**39. In view of the above discussions, respectfully following the binding judgment of the Hon'ble Supreme Court of India, we have no hesitation**

*in upholding the submissions of the Ld. Counsel of the Assessee that, the payment in question cannot be considered as "Fee for Technical Services" in terms of [section 9\(1\)\(vii\)](#) read with Expln. 2 of the Act.*

**45. Issue No. 2:**

**WHETHER THE PAYMENT TO FTOS FOR 'IUC'S ARE IN THE NATURE OF ROYALTY UNDER SECTION 9(1)(vi) OF THE ACT.**

46. *The specific charge of the AO is that taking up a call by the FTO from the assessee is a use of 'process' and hence the payment for the same is "Royalty" in terms of Clause (iii) of Explanation 2 to [Section 9\(1\)\(iv\)](#) of the Act.*

47. *We analyse the finding of the Ld. CIT(A) on this issue.*

a) *[Section 9\(1\)\(vi\)\(iii\)](#) employs the word "use of". The factum of "use of process" has to be established before the payment can be characterized as royalty. A perusal of the agreements between the parties demonstrate that it is not a case of lease or licence of network of foreign operator in favour of the assessee. The foreign operator connects his network to that of the assessee for further transmission. Hence, in this model, only the foreign operator is using his network and the assessee is not using or is not allowed to use network of foreign operator. Therefore, the definition of royalty is not attracted.*

b) *The AO has not given a finding as to whether taking up a call by the "FTO" from the Assessee is a "process". The definition of the term "process" rather the meaning of word "process" has been expanded by insertion of Explanation 6 to [Section 9\(1\)\(vi\)](#) of the Income Tax Act, introduced by the [Finance Act, 2012](#) to include transmission by optic fibre or similar technology. Thus, after the amendment, transmission of call across gateway shall be a process under the Domestic Law. Even it is considered a process, as there is no use of it by the assessee, the definition of royalty is not attracted.*

c) *The FTO provides technical services to the assessee by using its network. When the FTO is using its network, it cannot be said that assessee is using the network of the Non-Resident Operator. Hence, both the situations are mutually exclusive. As the assessee is not using the network of the FTO, the payment made is not for "use of process", hence, not in the nature of royalty.*

d) *The AO's reliance on the judgment of the Chennai Bench of the Tribunal in the case of Verizon Communications Singapore Pte. [Ltd. vs. ITO](#) (2011) 45 SOT 263 (Chennai) is misplaced, as [in that case](#) the Indian Company obtained 'Leased Lines' on hire/lease basis under the contract. The facts are different.*

e) *Explanation 5 & 6 incorporated in [Section 9\(1\)\(vi\)](#) by the [Finance Act, 2012](#) do not affect the definition of royalty, as per DTAA. The Indo UK Tax Treaty, employs the word "use or right to use" in contra distinction to the word 'use' in domestic law. As per various judicial pronouncements, in order to satisfy the word "use or right to use", the control and possession of right,*

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property or information should be with the payer. Thus under the DTAA royalty has a much restricted meaning.

f) Without prejudice to the above findings, even if the payments partake the character of royalty after retrospective amendment in the Act, the assessee cannot be held to be an assessee in default in respect of those payments made prior to the amendment, as brought out in the [Finance Act, 2012](#).

g) The obligation imposed upon the assessee [u/s. 195](#) to deduct tax specifies that it should be at the time of credited of such income to the account or at the time of payment thereof whichever is earlier and both these events had taken place much prior to the amendment brought in by the [Finance Act](#).

48. We uphold the finding of the 1st Appellate Authority for the following reasons.

The AO has taken a contradictory stand that the payments in question may be treated as "royalty" for "use of process" in terms of [Section 9\(1\)\(vi\)](#) of the Act, if in case the Appellate Authorities hold that the payment to FTOs are in the nature of "Fee for Technical Services". As the AO has held that the payment in question is royalty, as it is for the "use of process", as per clause (iii) to Explanation 2 to [Section 9\(1\)\(iv\)](#) of the Act, we restrict our finding to this issue only. 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; (emphasis ours)

49. [By the Finance Act, 2012](#), Explanation 5 & 6 are 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.

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*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."*

50. Before we deal the issue as to whether the payment is question for use of "process", we feel it relevant to extract certain clauses of the agreements (a) Agreement between Bharti Airtel Ltd. and Sunrise Communications AG, which reads as under:-

*"1. Object of the Agreement*

*1.1 Each Party agrees to provide the other Party with connecting, transit and termination services (hereinafter referred to as "the Services") allowing the conveyance of international and/ or national calls on a non-exclusive basis as defined in the Service Description(s) associated with this Agreement.*

*1.2 This Agreement shall not be construed to constitute a partnership or agency relationship between the Parties. The parties are entering into this agreement on a principal to principal basis. Each Party acts in its own name and operates for its own benefit and risk while performing its obligations under this Agreement.*

*1.3 Neither of the Parties hereto shall have any rights in the equipments or in the network of the other Party (eg. liens or pledges). Each Party is and remains responsible for its network and for the provision of services relating to it, unless specifically stated otherwise in this Agreement. "*

*3. Definition of Services*

*The Parties shall connect, and keep connected, for the duration of this agreement, their systems at Points of Interconnection (POI) in order to convey calls to and from those systems and to provide voice Services to each other in accordance with this Agreement and as specified in the Schedules hereto.*

*5. Technical Standards and Interconnection*

*5.1 .....*

*5.2 Each Party shall at its own cost, unless otherwise agreed, be responsible for providing, installing, testing, making operational and maintaining all equipment on its side of each Point of Interconnection (POI) as defined in the TFD.*

*5.3.....*

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7. Equipment 7.1 Each Party shall at its own cost, unless otherwise agreed by both Parties, be responsible for providing, installing, testing, making operational and maintaining all equipment on its side of each Point of Interconnection.

9. Charges

9.1 Each Party shall notify the other in writing of its 'per minute' rates for the Service(s) on a regular basis, as defined in the Service Description(s) (see Schedule 1). All rates shall be stated in DOLLAR (\$). Each Party shall invoice the other Party for the Service(s) provided based on actual call duration and number of calls (where applicable), which will be calculated in the relevant Service Descriptions.

(b). Agreement between Bharti Airtel Ltd. (Bharti) and Airtel Tanzania Ltd. (Airtel) (copy enclosed at pages 39 to 74 of the PB):

WHEREAS Bharti and Airtel are providers of international telecommunications services and WHEREAS, Bharti desires to procure certain telecommunications services provided by AIRTEL and AIRTEL desires to procure certain telecommunications services provided by Bharti; and WHEREAS, Parties, which are already providing carrier-to-carrier traffic, is now interested in creating a non-exclusive carrier-to-carrier relationship with Bharti; and

WHEREAS, the Parties have agreed to enter into this Agreement to set out the arrangement between the parties in respect of the exchange of international telecommunication services as also the settlement rates in respect of the Service(s) listed in relevant Annexures attached.

3. OPERATIONAL MATTERS 3.1 Each Party shall be responsible to connect to the other Party's network at one of the other Party's network interconnection locations, and the Parties shall be responsible to procure, at their own expense, the necessary facilities or equipment required to interconnect to such locations.

3.2.....

3.3.....

3.4 The Parties shall coordinate the management of their respective system facilities, with each Party being responsible for providing and operating, at its own expense, its respective network facilities. The Parties also shall interface on a 24 hours/ 7 days a week basis to assist each other with the isolation and repair of any facility fault in their respective networks."

"ANNEX 1 - [BHARTI VOICE TERMINATION SERVICES, THIS ANNEX to International Telecommunication Services is subject to the terms and

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*conditions of the RECIPROCAL TELECOMMUNICATIONS SERVICES AGREEMENT entered into between AIRTEL TANZANIA LIMITED ('AIRTEL') and BHARTI AIRTEL LTD. ('Bharti') effective as of SERVICES Bharti will terminate international telecommunications traffic (IDD type), which AIRTEL has delivered to one of Bharti's interconnection locations to those Destinations as agreed from time to time."*

*"ANNEX 3 [AIRTEL TANZANIA LIMITED, VOICE TERMINATION SERVICES, THIS ANNEX for domestic and International Telecommunication Services is subject to the terms and conditions of the RECIPROCAL TELECOMMUNICATIONS SERVICES AGREEMENT entered into between AIRTEL TANZANIA LIMITED ('AIRTEL') and BHARTI AIRTEL LTD. ('Bharti') effective as of SERVICES AIRTEL will terminate international telecommunications traffic (IDD Type), which Bharti has delivered to one of AIRTEL'S interconnection locations to those international Destinations."*

*51. A perusal of these agreements demonstrate that, each party under the agreement remains responsible for its own network and for the provision of services related to it. The Telecom Operator provide connecting, transit and termination services to each other on a reciprocal basis and neither of the parties shall have any rights in the equipments or in the network of other parties. The charges under the agreement are also levied for the services provided under the agreement, based on the actual call duration and number of calls successfully delivered to the other parties. The agreement are not for renting, hiring, letting or leasing out of any of the network elements or resources to the other parties or for rendering telecommunication services on a reciprocal basis. The assessee merely delivers the call that originates on its network to one of the inter connection locations of the FTO and FTO carries and terminates the call on its network. The Assessee is nowhere concerned with the route, equipment, process or network elements used by the FTO in the course of rendering such services.*

*52. 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 Expl 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 the same coinage of 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. Thus the word "process" must also refer to a specie of intellectual property applying the rule of ejusdem generis or noscitur a sociis as held in the case of CIT Vs. Bharti Cellular Ltd. (2011) 330 ITR 239]. The expression 'similar property' used at the end of the list further fortifies the stand that the terms*

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*'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.*

*'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. It is one of the most readily tradable properties in the digital marketplace." [as per definition provided in BusinessDictionary.com]*

*53. The term "process" is therefore to be understood as an item of intellectual property resulting from the discovery, specialized knowledge, creative ideas, or expressions of human mind having a commercial value and not widely available in public domain. It is therefore an intangible asset, the exclusive right over which normally rests with its developer / creator or with the person to whom such asset has been exclusively transferred.*

*In order to receive a 'royalty' in respect of allowing the usage or right to use any property including an intellectual property, the owner thereof must have an exclusive right over such property. As far as intellectual properties (IPs) are concerned, these have significance for the purpose of 'royalty' only till the time the ownership (as differentiated from the right to use) of such property vests exclusively with a single person and such person by virtue of its exclusive ownership allows the usage or right to use such IP to another person/ persons for a consideration in the form of 'royalty'. Payment made for anything which is widely available in the open market to all those willing to pay, cannot constitute 'royalty' and is essentially in the nature of business income.*

*The Hon'ble High Court of Madras in the case of CIT Vs. Nayveli Lignite Corporation Ltd. (2000) 243 ITR 0459 held that "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".*

*The Hon'ble High Court of Calcutta in the case of N.V. Philips Gloeilampenfabrieken Eindhoven Vs. CIT (1988) 172 ITR 0521 held as under:*

*"From the dictionary meaning of the term 'royalty', it appears that the said term connotes payments periodic or at a time for user by one person of certain exclusive rights belonging to another person. The examples of such exclusive rights are rights in the nature of a patent,*

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*mineral rights or right in respect of publications. It is possible that a person ITA Nos. 3593 TO 3596/Del/2012 [Bharti Airtel Ltd. vs. ITO(TDS)] & ITA Nos. 4076 TO 4079/Del/2012 [ITO(TDS) vs. Bharti Airtel Ltd.] 91 who invests may not take out a patent for his invention but unless some there inventor independently and by his own efforts come to duplicate the invention the original invention remains exclusive to the investor and it is conceivable that such an inventor might exploit his invention permitting some other person to have the user thereof against payment. Similarly, it is possible for a person carrying out operations of manufacture and production of a particular product to acquire specialised knowledge in respect of such manufacture and production which is not generally available. A person having such specialised knowledge can claim exclusive right to the same as long as he chooses not to make such specialised knowledge public. It is also conceivable that such a person can exploit and utilise such specialised knowledge in the same way as a person holding a patent or owning a mineral right or having the copyright of a publication to allow a limited user of such specialised knowledge to others in confidence against payment. There is no reason why payment for the user of such specialised knowledge, though not protected by a patent, should not be treated as royalty or in the nature of royalty.-Handley Page us. Butterioorth. 19 Tax Cases 322 relied on. "*

*Thus, the term 'royalty' connotes exclusivity and the exclusive right in relation to the thing (be it physical or intellectual property) for which royalty is paid should be with the grantor of that right. In case an intellectual property, it is generally associated with some discovery, invention, creation, specialized knowledge etc. emanating from human mind and is payable to the inventor / creator for allowing the usage of his invention or creation and having an exclusive right over it. The Hon'ble Calcutta High Court in the case of NV Philips Gloeilampenfabrieken Eindhoven Vs. CIT (Supra) held that a person having some specialised knowledge can claim exclusive right to the same as long as he chooses not to make such specialised knowledge public. Such a person can exploit and utilise such specialised knowledge in the same way as a person holding a patent or owning a mineral right or having the copyright of a publication to allow a limited use of such specialised knowledge to others in confidence against payment in which case it is termed as royalty. However, once such specialized knowledge becomes public; such person loses the exclusivity in respect of such special knowledge and hence, loses the right to receive any royalty in respect of the same. Thus, for a payment to be classified assessee royalty, 'exclusivity' of the subject matter is of crucial relevance.*

54. The Dictionary meaning of the term 'process' (as defined in Business Dictionary.com) is as under:-

*"Sequence of interdependent and linked procedures which, at every stage consume one or more resources (employee time, energy, machines, money) to convert inputs (data, material, parts, etc.) into*

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*outputs. These outputs then serve as inputs for the next stage until a known goal or end result is reached."*

*As Cambridge Dictionaries Online, defines "process" to mean a series of actions that you take in order to achieve a result.*

*54.1 Hence, the term 'process' implies a sequence of interdependent and linked procedures or actions consuming resources to convert inputs into outputs. Therefore, 'process' when viewed as an asset is an intangible asset and does not have physical existence. Various tangible equipments and resources may be employed in executing a process but 'process' per se, just like a formula or design, is intangible. The term 'process' as contemplated by the definition is thus referable to 'know-how' and intellectual property. There is a clear distinction between a 'process' and the physical equipments and resources deployed in the execution of a 'process'. While the former is an intangible asset, the latter is tangible and has a physical existence. The right to receive a royalty in respect of a process would only be with the person having exclusive right over such 'process' and 'process' being in the nature of intellectual property, the grantor of such right would normally be the inventor or creator of such process or person enjoying exclusive ownership of such process. The owner of the 'process' might grant the 'use' or 'right to sue' to different persons at the same time, but the exclusivity of the ownership should be with the grantor. The royalty is paid for the "use of" the 'process' as an item of IP by the manufacturing company in contradistinction to the equipments or resources deployed in the execution of such 'process'. The payer must therefore use the IP on its own and bear the risk of its exploitation. If the IP is used by the owner himself and he bears the risk of exploitation or liabilities for the use, then as the owner makes own entrepreneurial use of the IP the income would fall under the scope of "Business Income" and not "royalty". A 'process' which is widely known and deployed by everyone in the field and for which the owner does not have exclusive rights cannot be a "process" contemplated in this Section 9(1)(vi) Explanation (iii).*

*54.2 In the case of telecom industry, all the telecom operators have similar infrastructure and telecom networks in place, for rendition of telecommunication services. The process embedded in the networks of all telecom operators is the same. The equipments, resources etc. employed in the execution of the process may be different in physical terms i.e. in terms of ownership and physical presence, but the process embedded in the execution of a telecom infrastructure is the same and commonly available with all the telecom operators. The 'royalty' in respect of use of a 'process' would imply that the grantor of the right has an exclusive right over such 'process' and allows the 'use' thereof to the grantee in return for a 'royalty'. It is necessary that guarantee must 'use' the 'process' on its own and bear the risk of exploitation. The 'process' of running the networks in the case of all the telecom operators is essentially the same and they do not have any exclusive right over such 'process' so as to be in a position to charge a 'royalty'. For allowing the use of such process, the term 'use' in context of royalty connotes use by the grantee and not by the grantor. A 'process' which has been in*

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*public domain for some time and is widely used by everyone in the field cannot constitute an item of intellectual property for the purpose of charge of 'royalty'. Any compensation or consideration, if at all received for allowing the use of any such 'process' which is publically available and not exclusively owned by the grantor constitutes business income and not royalty.*

**55. We now consider the interpretation of the term "process" after insertion of Explanation 6 to Section 9(1)(vi) by the Finance Act, 2012 with retrospective effect from 1.6.1976.** As per this Explanation, 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." 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. None of the FTOs have any exclusive ownership or rights in respect of such process, and hence in our view the payment in question cannot be considered as royalty. The telecom operator merely render Telecommunications Services to the subscribers, as well as interconnecting telecom operators with the aid of their network and the process embedded therein. This is a standard facility which is used by the FTO itself. Thus the insertion of Explanation 6 to Section 9(1)(vi) does not alter the decision taken by us on this issue.

56. As far as the insertion of Explanation 5 to Section 9(1)(vi) is concerned, we hold that this Explanation comes into play only in case of Royalty falling within the ambit of Section 2 of Section 9(1)(vi). When a process is widely available in the public domain and is not exclusively owned by anyone the it cannot constitute an item of intellectual property for the purpose of charge of 'Royalty' under clauses (i), (ii) and (iii) of Explanation 2 to Section 9(1)(vi). Hence, the criteria of possession, control, location indirect use etc., as explained by Explanation 5 has no effect in the case in hand.

57. The arguments of the Ld. DR that Explanation 5 is attracted since the assessee company is indirectly using such equipment and process through the services provided by the FTO, in our view is devoid of merits. There is difference between the services rendering agreements and royalty agreements. If the arguments of the DR is accepted it would result in absurdity. For example:-

- i) A person hiring a taxi will be paying a royalty for indirectly using the process of running of the engines of the taxi.*
- ii) A person using a cable connection will be termed to be paying royalty in the form of cable charges for indirectly using the process of running of the systems of the cable operators.*
- iii) A telephone subscriber using or making a call would be held as indirectly using the process of the service of telecom.*

58. The Hon'ble Delhi High Court in the case of CIT vs. Bharati Cellular Ltd. reported in 319 ITR 139 has given a finding that the facility in question

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provided to the assessee is a "service" and in a broader sense a "communication service". The facility of interconnection is held as providing service which is "technical" in the sense that involved sophisticated technology. Thus the factual finding of the Jurisdictional High Court in this very facts and circumstances is that "technical services" is being provided by the FTO's to the assessee but that such "Technical Service" is not FTS as defined u/s. 9(1)(vii) of the Act as there is no human intervention. This finding that it is a "service" has not been upheld by the Hon'ble Supreme Court of India only the factual issue as to whether there was human intervention was set aside to AO. Under such circumstances, the question of taking a contrary view that it is not a "technical services", but a case where the FTO had granted the assessee a right to use a process and the payment is for 'royalty' cannot be countenanced. Applying the binding decision of the Hon'ble Jurisdictional High Court we have to hold that the payment cannot be termed as covered by Explanation 2 read with Section 9(1)(vi) of the Act. On this ground alone the order of the First Appellate Authority has to be upheld. The charge that the payment in question is FTS u/s. 9(1)(vii) excludes the possibility of the payment being royalty under section 9(1)(vi) of the Act. Both these sections deal with different set of facts situation which cannot co-exist.

59.1 Even under the DTAA, as held by the Ld. First Appellate Authority we are of the view that the payment in question cannot be termed as royalty.

59.2 The assessee company has entered into interconnect agreements with various foreign telecom operators who are residents of countries like Australia, Canada, France, Israel, Netherlands, Portuguese, Republic, Singapore, Spain, Sweden, United Kingdom, United States of America, Bangladesh, Indonesia, Mauritius, Nepal, Philippines, Saudi Arabia, Sri Lanka, Thailand, UAE etc. India has Double Taxation Avoidance Agreements with all the aforesaid countries.

59.3 The definition of 'royalties' (simply referred to as 'royalty' under the Income-tax Act, 1961) is mostly contained in Articles 12 & 13 of the DTAAs between India and the aforesaid countries. The definitions of 'royalties' contained in the Treaties with the aforesaid countries are almost *pari materia* insofar as the royalty is for 'use of process' is concerned. We quote from Article 13(3) of Indo-UK treaty defining the term 'royalties' hereunder:

- "3. For the purpose 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, trademark, 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

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*equipment, other than income derived by an enterprise of a Contracting State from the operation of ships or aircraft in international traffic.*

*(Emphasis ours)*

59.4 Further, as per Article 12(3) of the Indo-US treaty, the term 'royalties' has been defined as under:

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

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

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

*(Emphasis ours)*

The definition of 'royalties' under Indo-Canada treaty is the same as above.

59.5 Similarly, Article 13(3) of the Indo-France Treaty defines 'royalties' as under:

*"3. The term "royalties" as used in this article means payments of any kind received as consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work including cinematograph films, or films or tapes used for radio or television broadcasting, any patent, trade mark, design or model, plan, secret formula or process, of for information concerning industrial, commercial or scientific experience."*

*(Emphasis ours)*

The definition of royalties under Indo-Netherlands Treaty is the same as above.

59.6 The term 'royalties', has been similarly defined in all other treaties. On a perusal of the definition of 'royalties' provided in various treaties, it is clear that, all the treaties use the expression 'secret formula or process' is separated by a comma before and after the expression. This implies that" formula/process is a part of the same group and the adjective 'secret' governs both. Thus, under the treaties, in order to constitute royalty for use of or the right to

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*use of a process, the process has to be 'secret'. In the case of telecom industry, however, telecommunication services as already observed by us are rendered through standard facilities and no 'secret process' is involved.*

60. *A perusal of the wording of these Treaties show that only payments received as consideration for the "use of", or "the right to use" is necessary for the payment to be termed as Royalty. This is much narrower to the definition of royalty under the Act. As held by the Ld. CIT(A) there is no 'use of' or 'right to use' of any process in the facts and circumstances of the case on hand and hence, even under the DTAA's, the payment in question cannot be termed as royalty.*

60.1 *The Hon'ble High Court of Delhi in the case of Asia Satellite Telecommunications Co. Ltd. vs. Director of Income Tax (2011) 332 340 considered this issue and held as follows :-*

*"The taxpayer, a Hong Kong based company, was engaged in the business of satellite communications and broadcasting facilities. This business: was carried out through the medium of satellites, owned and leased, which are placed in geostationary orbits. These satellites did not use Indian orbital slots. They also did not get placed over the Indian sky space on any occasion. The assessee entered into agreements with TV Channels & communication companies so that they are able to utilize its transponder capacity for data transmission. They could plink their signals on the transponder through their own earth stations. Such earth stations are located outside India. On receipt of the signals, the transponder amplifies the signal and sends it to the target area. The area so covered, called the footprint area, included the territory of India. The assessee held that its income was not chargeable to tax in India because it does not have any permanent establishment in India. In particular, it was argued that there was no office or customers in India. The Delhi Tribunal in the said case held that despite the fact that the assessee could have business connection in India, none of its operations were carried out in India. In addition, the payment made by the customers was not for use of the equipments so that there was no equipment royalty angle in this case. However, the Hon'ble Tribunal also held that in the facts of the case, the customers were making payment to the non-resident for use of a process. It was observed that to constitute royalty, the process need not be a secret process. The income of the non-resident was ruled to be 'process royalty.' The Court held,*

*(i) that under the agreement with television channels, the role attributed to the assessee was as follows: (i) programmes were uplinked by the television channels (admittedly not from India); (ii) after receipt of the programmes at the satellite (at locations not situated in Indian airspace), these were amplified through complicated process; and (iii) the programmes so amplified were relayed in the footprint area including India where the cable operators caught the waves and*

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*passed them over to the Indian population. The first two steps were not carried out in India. Merely because the footprint area included India and the programmers by ultimate consumers/viewers watched the programmes in India, even when they were uplinked and relayed outside, India, that would not mean that the assessee was carrying out its business 'Operations in India. The expressions "operations" and "carried out in India" occurring in Explanation I(a) to section 9(1)(i) signify that it was necessary' to establish that any part of the assessee's operations were carried out in India. No machinery or computer was installed by the assessee in India through which the programmes reached India. The process of amplifying and relaying the programmes was performed' in the satellite which was not situated in Indian airspace. Even the tracking, telemetry and control operations to be performed outside India in Hong Kong. There was no contract or agreement between the assessee either with the cable operators or viewers for reception of signals in India. Thus, section 9(1)(i) was not attracted.*

*(ii) 'That the process of transmission of television programmes started with television channels (customers of the assessee) uplinking the signals containing the television programmes ; thereafter the satellite received the signals and after amplifying 'and changing their frequency relayed it down in India and other countries where the cable operators caught the signals and distributed them to the public. Any person who had a dish antenna, could also catch the signals relayed from these satellites: 'The role of the assessee was that of receiving the signals, amplifying them and after changing the frequency relaying them on the earth. For this service, the television channels made payment to the assessee. The assessee was the operator of the satellites and was in control of the satellite. It had not leased out the equipment to the customers. The assessee had merely given access to a broadband width available in a transponder which can be utilized for the purpose of transmitting the signals of the customer. A satellite is not a mere carrier, nor is the transponder something which is distinct and separable from the satellite as such. The transponder in fact cannot function without the continuous support of various systems and components of the satellite. Consequently, it is entirely wrong to assume that a transponder is a self-contained operating unit, the control and constructive possession of which is or can be handed over by the satellite operator to its customers. The terms "lease of transponder capacity", "lessor", "lessee" and "rental" used in the agreement would not be the determinative factors. There was no use of "process" by the television channels. Moreover, no such purported use had taken place in India. The telecast companies/customers were situated outside India and so was the assessee. The agreements under which the services were provided by the assessee to its customers were executed abroad. The transponder was in orbit. Merely because it had its footprint on various continents that would not that the process had taken place in India.*

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*ISRO SATELLITE CENTRE [ISAC], In re [2008] 307 ITR 59 (AAR), ISHIKAWAJIMA-HARIMA HEAVY INDUSTRIES LTD. v. DIT [2007] 288 ITR 408 (SC) and LAKSHMI AUDIO VISUAL INC. v. ASST. CCT [2001] 124 STC 426 (Karn) applied.*

*(iii) That the money received from the cable operators by the operators was treated as income by these telecast operators which had in India and they had offered and paid tax. Thus, the income generated in India had been duly subjected to tax in India. The payment made by the tele cast operators situated abroad to the assessee which was also a nonresident did not represent income by way of royalty as defined in Explanation section 9(1)(vi) of the Act. Article 12 of the model double taxation avoidance agreement framed by the Organisation of Economic Co-operation and Development contains a definition of "royalty" which is in all respects virtually the same as the definition of "royalty" contained in (iii) of Explanation 2 to section 9(1)(vi) of the Act. The commentary by the OECD can be relied upon.*

*(iv) That the Tribunal rightly admitted the additional ground question of applicability of section 9(1)(vii) on the ground that it was legal and did not require consideration of any fresh facts, as all necessary for adjudication whether the amount received was chargeable to tax section 9(1)(vii) were available on record. However, no arguments been advanced by the Department on this ground, it had to be presumed that the case was not sought to be covered under this provision."*

61. In the case of DCIT vs. PanAmSat International Systems Inc. (2006) 103 TTJ 861 (Del) the Tribunal has held as under:-

*"There is a "process" involved in the activity carried on by the assessee. There is a comma after the words "secret formula or process" in art. 12.3(a) of Indo-US DTAA 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. Normally punctuation by itself cannot control the interpretation of a statutory provision. However, the punctuation-the use of the comma-coupled with the setting and words surrounding the words under consideration, indicates 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 words which surround the words "secret formula or process", in art. 12.3(a) of the treaty refer to various species of intellectual properties such as patent, trade mark, 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 sociis.-Asia Satellite Telecommunication Co. Ltd. vs. Dy.*

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CITT(2003) 78 TTJ (Del) 489 : (2003) 85 ITD 478 (Del) distinguished.  
(Para 19)

*So far as the transponder technology is concerned there appears to be no "secret technology", known only to a few. There is evidence 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. 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" (Para 20) The argument that the consideration has been received by the assessee for letting the broadcasters use the patent relating to the transponder/satellite goes farther than the assessment order and therefore cannot be accepted. Even on merits the argument is not acceptable since the patent relating to the transponder/satellite is not with the assessee but is with the manufacturer of the same. There is no clause in the purchase agreement to show that the patent relating to the transponder/satellite was also transferred to the assessee by the manufacturer. If the patent did not ensure to the assessee, how the assessee could have, even in the wildest of imaginations, let the broadcasters use the same for consideration. The argument sought to be made is factually not borne out. There is not on iota of evidence to show that the assessee had any patent to the satellite or transponder which it allowed the broadcasters to use for a consideration." (Para 21)*

62. In the case of *Cable & Wireless Networks India (P) Ltd. in re* (2009) 315 ITR 0072, the AAR held as under:-

*"Cable & Wireless Networks India (P) Ltd.; In Re (2009) 315 ITR 0072: Held that "Payment made by applicant to the UK company for providing international leg of the services in transmitting voice/data to places outside India using its international infrastructure and equipments is neither royalty nor fees for technical services; payment is in the nature of business profits and in the absence of PE of UK company in India, same is not taxable in India." Further, at paras 8.1 to 8.3, the Hon'ble AAR held as under: "No material has been placed to show that C&W UK uses any secret process in the transmission of the international leg of the service, or that the applicant pays towards the use or right to use that secret process. It is well settled that telecom services are standard services. The arrangement between the applicant and C& W UK is for rendition of service and the applicant pays for the same. It is for C & W UK to see how it will provide that service. The applicant is not concerned with the same. The Revenue has thus failed to show how the payments made by the applicant will be royalty income in the hands of C&W UK."-Dell International Services India (P) Ltd., In re(2008) 218 CTR*

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(AAR) 209 : (2008) 10 DTR (AAR) 249 : (2008) 305 ITR 37 (AAR) followed."

62.1 Applying the proposition laid down in the case laws to the facts of the case, we have to hold that the payment in question is not 'Royalty' as contemplated under the DTAA's.

62.2 Now the question is whether there would be any change in this position subsequent to the retrospective amendments brought out by the Finance Act, 2002 w.e.f. 1.6.1976 by adding Explanation 5 & 6 to Section 9(1)(vi) of the Act. The answer is no as changes in domestic law cannot be read into the Treaties as long as there is no change in the working of the Treaties.

63. The Hon'ble High court of Delhi in the case of DIT vs. Nokia Networks (2013) 358 ITR 259 has held as under:-

"S. 9 has been amended vide Finance Act, 2012 and Explanations have been inserted with retrospective effect from 1-6-1976. The revenue argued that the amendments are only clarificatory in nature and submitted that the question of "copyrighted article" or actual copyright does not arise in the context of software both in the DTAA and in the Income Tax Act since the right to use simpliciter of a software program itself is a part of the copyright in the software irrespective of whether or not a further right to make copies is granted. The decision of the Delhi Bench of the ITAT has dealt with this aspect in its judgment in Gracemac Co. Vs. ADIT 134 TTJ (Delhi) 257 pointing out that even software bought off the shelf, does not constitute a "copyrighted article". It was categorically held in CIT Vs. Siemens Aktiengesellschaft, 310 ITR 320 (Bom) that the amendments cannot be read into the treaty and on 'the wording of the treaty, it was already held that a copyrighted article does not fall within the purview of Royalty.'" Gracemac Co. vs. ADIT 134 TTJ (Delhi) 257, CIT vs. Siemens Aktiengesellschaft, 310 ITR 320 (Bom.), DIT vs. Ericsson, 343 ITR 370, relied on."

64. Recently, the Hon'ble Delhi High Court in the case of DIT vs. New Skies Satellite BV & Ors. In ITA No. 473/2012 & Ors. Vide judgment dated 8.2.2016 has held as under:-

"39. It is now essential to decide the second question i.e. whether the assessee in the present case will obtain any relief from the provisions of the DTAA's. Under Article 12 of the Double Tax Avoidance Agreements, the general rule states that whereas the State of Residence shall have the primary right to tax royalties, the Source State shall concurrently have the right to tax the income, to the extent of 15% of the total income. Before the amendment brought about by the Finance Act of 2012, the definition of royalty under the Act and the DTAA's were treated as *pari materia*. The definitions are reproduced below:

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*Article 12(3), Indo Thai Double Tax Avoidance Agreement: "3. The term "royalties" as used in this article means payments of any kind received as a consideration for the alienation or the use of, or the right to use, any copyright of literary, artistic or scientific work (including cinematograph films, phonographic records and films or tapes for radio or television broadcasting), any patent, trade mark, design or model, plan, secret formula or process, or for the use of, or the right to use industrial, commercial or scientific equipment, or for information concerning industrial, commercial or scientific experience."*

*Article 12(4), Indo Netherlands Double Tax Avoidance Agreement ITA 473/2012, 474/2012, 500/2012 & 244/2014 Page 31 "4. The term "royalties" as used in this Article means payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work including cinematograph films, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience."*

*Section 9(1)(vi), Explanation 2, Income Tax Act, 1961 "(iii) the use of any patent, invention, model, design, secret formula or process or trade mark or similar property"*

*40. In Asia Satellite Telecommunication the Court, while interpreting the definition of royalty under the Act, placed reliance on the definition in the OECD Model Convention. Similar cases, before the Tax Tribunals through the nation, even while disagreeing on the ultimate import of the definition of the word royalty in the context of data transmission services, systematically and without exception, have treated the two definitions as pari materia. This Court cannot take a different view, nor is inclined to disagree with this approach for it is imperative that definitions that are similarly worded be interpreted similarly in order to avoid incongruity between the two. This is, of course, unless law mandates that they be treated differently. The Finance Act of 2012 has now, as observed earlier, introduced Explanations 4, 5, and 6 to the Section 9(1)(vi). The question is therefore, whether in an attempt to interpret the two definitions uniformly, i.e. the domestic definition and the treaty definition, the amendments will have to be read into the treaty as well. In essence, will the interpretation given to the DTAA's fluctuate with successive Finance Act amendments, whether retrospective or prospective? The Revenue argues that it must, while the Assessee's argue to the contrary. This Court is inclined to uphold the contention of the latter.*

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

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

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

*"60. Consequently, since we have held that the Finance Act, 2012 will not affect Article 12 of the DTAAs, it would follow that the first determinative interpretation given to the word "royalty" in Asia Satellite<sup>59</sup>, when the definitions were in fact pari materia (in the absence of any contouring explanations), will continue to hold the field for the purpose of assessment years preceding the Finance Act, 2012 and in all cases which involve a Double Tax Avoidance Agreement, unless the said DTAAs are amended jointly by both parties to incorporate income from data transmission services as partaking of the nature of royalty, or amend the definition in a manner so <sup>59</sup> supra note 1 ITA 473/2012, 474/2012, 500/2012 & 244/2014 Page 50 that such income automatically becomes royalty. It is reiterated that the Court has not returned a finding on whether the amendment is in fact retrospective and applicable to cases preceding the Finance Act of 2012 where there exists no Double Tax Avoidance Agreement."*

65. Thus, respectfully following the jurisdictional High Court decision as well as the judgments of the other Courts, we agree with the submission of the Ld. Counsel for the assessee that the amendments to the Finance Acts cannot be read into the DTAA's.

66. Ld. DR relied upon the decision of the Bangalore Bench of the ITAT in the case of Vodafone South vs. DCIT (Supra) wherein it was held that there is liability for deduction of tax at source on "IUC" payments as these payments were held to be payments, for use of process and hence payment for royalty. We have perused this decision of the ITAT. The proposition laid down therein are contrary to the propositions laid down by the Hon'ble Jurisdictional High Court in the case of DIT vs. New Skies Satellite BV & Ors. (Supra) as well as Asia Satellite Telecommunications Co. Ltd. vs. Director of Income Tax (Supra) and in the case of the assessee itself as well as in the case of DIT vs. Nokia Networks (Supra) and other judgments referred in our decision. Even the Hon'ble Supreme Court has held that such payments are only for service rendered. Moreover, the agreements entered into by M/s Vodafone South India with the FTOs, are not before us. As per the terms of the agreement before us,

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*the assessee had to pay the Inter Connectivity Usage charges to the FTOs, for services provided by them and not for the 'use of' or 'the right to use' of the process in their telecom network. In the case in hand, the Assessee never used or had acquired the right to use the process of the FTOs. This decision of the ITAT, Bangalore Bench as already stated, is contrary to the proposition laid down in judgment of the Jurisdictional High Court in the case of the assessee itself where it is held that the payment was for service and this necessarily excludes the possibility of the payment being held as that which is made for Royalty, as both are contradictory position. This decision has been affirmed by the Hon'ble Supreme Court. Thus, we follow the binding decision of the Jurisdictional High Court in the matter and uphold the finding of the Ld. CIT(A).*

67. *Similarly, the reliance placed by the Ld. DR on the judgment of the Hon'ble Madras High court in the case of Verizon Communications Singapore Pte. Ltd. vs. ITO (International Taxation) reported in (2014) 361 ITR 0575 is also misplaced for the following reasons:-*

*(a) M/s Verizon Communications received International Private Leased Circuit charges from customers for providing point to point dedicated private line to communicate between offices that are geographically dispersed throughout the world, the said case the bandwidth capacity was dedicated for the use of the Indian customer irrespective of actual usage. In the case of the present assessee, no such point to point dedicated private line was made available by the FTOs.*

*(b) In the case of Verizon Communications the customer has dedicated active internet connection at a particular speed, so that the contracted bandwidth is provided and the equipment at the customer end is also delivered by VCPL. In the case of the assessee no equipment is given by the FTO to the assessee. The assessee merely delivers a call using its own network, to the interconnection location of the FTOs which picks up the call and further transmit and terminates at the desired destination by using its own network.*

*(c) In the case of Verizon Communication the customer has a significant economic interest in the VCPL's equipment to the extent of the bandwidth hired by the customer. The bandwidth capacity is given to the customer on a dedicated basis for a entire contract period. The Assessee has no such interest.*

68. *Ld. DR further relied upon the decision of ITAT, Mumbai in the case of Viacom 18 Media (P) Ltd. vs. ADIT (International Taxation), (2014) 44 taxmann.com 1 (Mumbai Tribunal). This decision is also contrary to the proposition of law laid down by the Hon'ble Jurisdictional High Court in the assessee's own case. The ITAT has held that M/s Viacom 18 Media Pvt. Ltd. was engaged in the broadcasting of its various programmes on TV channels including marketing and advertising airtime. The Mumbai Bench also held that the judgment of the Hon'ble Jurisdictional High court in the case of Asia Satellite Communications Co. Ltd. vs. DIT (Supra) is not applicable to the facts*

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*of Viacom 18 (Supra) case. It is not so in the case on hand. In any event the interpretation given by the Mumbai ITAT is divergent from the law laid down by the Jurisdictional High court in the case of Asia Satellite Communication Co. Ltd. (Supra) and hence we cannot follow the same.*

**69. Thus, we uphold the order of the Ld. First Appellate Authority that the payment made for FTO for interconnection charges does not fall within the ambit of the definition of 'Royalty' under section 9(1)(vi) of the Act or under the definition of 'Royalty' under the Treaties."**

[Emphasis supplied]

14. Ld. DR for revenue, though dutifully supported the orders of lower-authorities, yet could not point out any change in facts or law for non-applicability of various decisions cited by Ld. AR for assessee.

15. We have considered rival submissions of both sides and perused the controversy involved in the light of provisions of law and the decisions cited before us. The precise controversy before us is whether or not the payment of roaming charges made by assessee to OTOs constituted 'FTS' or 'Royalty' so as to attract TDS u/s 194J? After a careful consideration, we find that it is vehemently held in various decisions, as narrated above, that such payment of roaming charges is neither in the nature of 'FTS' nor 'Royalty' and hence did not require TDS u/s 194J. Therefore, respectfully following the orders of different appellate forums, we are of the view that the assessee cannot be held as 'assessee-in-default' for non-deduction of tax at source out of payment of roaming charges. Accordingly, the grounds of assessee are allowed.

Ground No. VII:

16. This ground reads as under:

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**"GROUND VII: INTEREST LEVIED U/S 201(1A) OF THE ACT FOR ALLEGED NON-DEDUCTION OF TAX U/S 194H AND 194J OF THE ACT.**

1. *On the facts and in the circumstances of the case and in law, the Hon'ble CIT(A) erred in levying the interest u/s 201(1A) of the Act.*
2. *The Ld. CIT(A) failed to appreciate and ought to have held that:*
  - i. *When the recipient of income claims the refund of taxes paid by them or files the loss return of income, default in payment of taxes does not arise and therefore the interest cannot be levied u/s 201(1A) of the Act on Appellant.*
  - ii. *Without prejudice to the above interest u/s 201(1A) of the Act should be computed after considering advance tax and self-assessment tax paid by recipient and only up to date of return filing by the recipient.*
3. *The Appellant prays that interest levied u/s 201(1A) of the Act be deleted or be appropriately reduced."*

17. This ground challenges the levy of interest u/s 201(1A). The levy of interest is consequential to the levy of TDS. Since we have already deleted the demand of TDS on merit, the interest levied by AO automatically comes to end. Therefore, this ground becomes infructuous and does not require separate adjudication.

**ITA No. 415/Ind/2014:**

18. Learned Representatives of both sides are ad idem that if the ITA No. 265/Ind/2018 is decided in favour of assessee, the ITA No. 415/Ind/2014 would become infructuous. Since we have already decided ITA No. 265/Ind/2018 in favour of assessee, the ITA No. 415/Ind/2014 is now infructuous. Accordingly, it does not require any adjudication by us and dismissed therefore.

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19. Resultantly, the ITA No. 415/Ind/2014 is dismissed and ITA No. 265/Ind/2018 is allowed.

Order pronounced in open court on 23.04.2024.

Sd/-  
(VIJAY PAL RAO)  
JUDICIAL MEMBER

sd/-  
(B.M. BIYANI)  
ACCOUNTANT MEMBER

**Indore**

दिनांक/ Dated :23.04.2024.  
CPU/Sr. PS

Copies to: (1) The appellant  
(2) The respondent  
(3) CIT  
(4) CIT(A)  
(5) Departmental Representative  
(6) Guard File

By order  
Assistant Registrar  
Income Tax Appellate Tribunal  
Indore Bench, Indore