

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI “D” BENCH: NEW DELHI**

**BEFORE SHRI G.S.PANNU, VICE PRESIDENT &
SHRI ANUBHAV SHARMA, JUDICIAL MEMBER**

**ITA No. 2733/Del/2023
[Assessment Year : 2021-22]**

New Skies Satellites B.V., C/o-Ernst & Young LLP, Golf View Corporate Tower, Tower-B, Sector-42, Gurgaon, Haryana-122002. PAN-AACCN1866C	vs	DCIT, Circle-2(2)(2), International Taxation, New Delhi.
APPELLANT		RESPONDENT
Appellant by	Shri Salil Kapoor, Adv. & Ms. Ananya Kapoor, Adv.	
Respondent by	S/Shri Vivek K. Upadhyay, Sr. DR & Vivek Vardhan, Sr. DR	
Date of Hearing	07.06.2024	
Date of Pronouncement	07.06.2024	

ORDER

PER G.S. PANNU, VP :

The present appeal filed by the assessee for the assessment year 2021-22 is directed against the order of Ld. DCIT, Circle-2(2)(2), International Taxation, New Delhi dated 28.08.2023.

2. The assessee has raised following Grounds of Appeal:-

- “1. *That on the facts and in the circumstances of the case and in law, the Ld. Dispute Resolution Panel ('the Panel') erred in not directing the Learned Assessing Officer ('Ld. AO') to pass appropriate orders holding that the Appellant is not liable to be assessed to tax in India.*
- 1.1. *That on the facts and circumstances of the case and in law, the Panel and the Ld. AO erred in not following the orders passed by the Hon'ble High Court of Delhi for the Assessment years 2000-01 to 2014-15 and AY 2016-17 to AY 2017-18 and the Hon'ble Income Tax Appellate Tribunal for AY 2016-17 to AY 2018-19 in the Appellant's*

own case since there was no change in facts recorded for the present year.

- 1.2. That on the facts and in the circumstances of the case and in law, the Ld. AO erred in not holding that the payments received by the Appellant from providing data transmission services via Space Segment Capacity are assessable as business profits in India and in the absence of a Permanent Establishment under Article 5 of the India-Netherlands Double Taxation Avoidance Agreement between India and Netherlands ('the DTAA'), the receipts earned by the Appellant are not taxable in India.*
- 2. That on the facts and circumstances of the case and in law, the Ld. AO erred in holding that the payments received by the Appellant as consideration for data transmission services are in the nature of 'Royalty' as defined under section 9(1)(vi) of the Income Tax Act, 1961 ('the Act') and Article 12(4) of the DTAA.*
 - 2.1. That without prejudice to the above, on facts and circumstances of the case and in law, the Panel and the Ld.AO erred in reading into the expanded meaning of 'Royalty' contained in section 9(1)(vi) of the Act as retrospectively amended by Finance Act, 2012, for the purpose of interpreting the definition of 'Royalty' as provided under Article 12(4) of the India-Netherland DTAA, when it is a settled position in law that amendment in the Act cannot have any effect in interpretation of DTAA as also held by the Hon'ble High Court of Delhi in the Appellant's own case in [2016] 382 ITR 114 (Delhi) for AY 2006-07 and AY 2008-09.*
 - 2.2. Without prejudice to ground 2 above, the Ld. AO and the Panel erred in not taking cognizance of the fact that 'use of a secret process' is a sine qua non for the payments to qualify as 'Royalty' under the India-Netherlands DTAA.*
- 3. That the Ld. AO erred in holding that the payments received by the Appellant as consideration for data transmission services would also qualify as "fee for technical- services" as defined under section 9(1)(vii) of the Act as well as within the meaning of Article 12(5) of the India-Netherlands DTAA.*
- 4. That the Ld. AO erred in initiating penalty proceedings under section 270A of the Act.*

The Appellant submits that each of the above grounds is independent and without prejudice to one another. The Appellant craves leave to add, amend, vary, omit or substitute any of the aforesaid grounds of appeal at any time before or at the time of hearing of the appeal.”

3. Briefly stated, the assessee is a company, incorporated under the laws of the Netherlands and is a tax resident of the Netherlands in terms of Article 4 of the Double taxation Avoidance Agreement (“DTAA”) between India and Netherlands. The assessee provides transmission services of voice, data and programmes by provision of space segment capacity on Satellites to customers under various contracts with customers around the world for these services. The Assessing Officer (“AO”)/TPO (“Transfer Pricing Officer”) proposed certain adjustments in the income of the assessee in respect of the amount received by the assessee treating it as royalty and the AO also treated the same as fee for technical services. Aggrieved against this, the assessee filed objections before Ld. Dispute Resolution Panel (“DRP”) who following the order of the earlier year and confirmed the adjustment. Thereafter, the AO vide impugned order in pursuance of the direction of DRP held that revenue earned by the assessee from the provisions of transmission services of voice, data and programmes of space segment capacity on Satellites to customers was in the nature of “Royalty” u/s 9(1)(vi) of the Income Tax Act, 1961 (“the Act”) and Article 12(4) of the India-Netherland Double Taxation Avoidance Agreement (“DTAA”). Alternatively, he held that the revenue earned by the assessee is “Fee for Technical Services” u/s 9(1)(vii) of the Act r.w. Article 12(5) of the India-Netherlands DTAA. Thus, the AO assessed income of the assessee at INR 273,31,46,361/- vide order dated 28.8.2023 passed u/s. 143(3) r.w.s. 144C(13) of the Act.

4. Aggrieved against this, the assessee preferred appeal before this Tribunal.

5. At the time of hearing, Ld. AR submitted that that Grounds No. 1, 2 & 3 are squarely covered by the judgement of Hon’ble Delhi High Court rendered in the case of *Director of Income Tax vs New Skies Satellite BV & Others in ITA No.473/2012 & Others* order dated 08.02.2016 and also covered by the decision of the Tribunal in the assessee’s own case for assessment year 2020-21 vide ITA No. 2944/Del/2022 dated 06.02.2024 wherein, the aforesaid Hon’ble High Court

judgement was followed. Therefore, he requested to follow the same and accordingly allow the Ground No. 1, 2 & 3 raised by the assessee.

6. Ld. CIT-DR controvert the aforesaid submissions made by the Ld. AR and supported the orders of the authorities below.

7. We have heard the rival contentions and perused the material available on record and also gone through the orders of the authorities below. Undisputedly, Ld.DRP has followed its direction in earlier years in passing the impugned directions. For the sake of clarity, the relevant contents of the DRP directions are reproduced as under:-

4.1 *“The panel notes that the issues and objections raised in Ground numbers 1 to 3 are interrelated and identical to those in case of the assessee for AY 2020-21 as well as AY 2017-18. On same objections filed by the assessee in the AY 2017-18, which was followed by the Panel in AY 2020-21, the DRP had observed as under -*

3.1 All the above grounds are related to the issue of amended definition of Royalty in the Income Tax Act and the definition taken in the DTAA when it was signed. The assessee operates satellites and derives income by leasing out its transponders for telecasts by various TV channels and Internet Service providers (clients). The clients enter agreements with the assessee directly or indirectly to avail of the services. The services are beamed in specific footprints of the satellite catchment area. The services availed by Indian Channels and payments made by such channels have been assessed by the AO as 'Royalty' in view of the amended definition of Royalty per section 9(1)(vi) read with explanations (expln 2 in particular). The assessee has challenged this contention by referring to the definition of

Royalty in the relevant DTAA. The assessee has also submitted the judgment by Hon'ble Delhi High Court in its own case on similar issues where relief has been granted to the assessee basis the definition of Royalty in the DTAA.

3.2 The matter is in litigation since last many years starting AY 2006-07 and upto AY 2014-15. The AO in his draft order, in para 9.7 brought out that the department is in appeal before Hon'ble Supreme Court against the judgment of Hon'ble Delhi High Court in case of the assessee which has been admitted. It has to be borne in mind that the panel is an extension of the assessment process and the AO is now bound by the directions of DRP. Accordingly, the matter needs to be kept alive in view of its pendency before the Apex Court. The panel accordingly upholds the adjustment made by the AO in this matter. The objections are rejected."

4.2 During DRP proceedings the AR of the assessee has submitted that on identical facts and issues for AY 2001-02 to 2014-15, 2016-17, 2017-18 & 2018-19, the matter has been decided in favour of the assessee by Hon'ble Delhi High Court. It is further submitted that the Department has preferred appeal for AY 2001-02 to 2014-15 before the Hon'ble Supreme Court but the AR has no information regarding filing of appeals against the order of Hon'ble Delhi High Court for AY 2016-17 to 2018-19. The AO is directed to verify the decision of the Hon'ble Delhi High court for AY 2016-17 to 2018-19 has been accepted by the Revenue and no further appeal has been filed on identical issues before the Hon'ble Supreme Court. If the decision of the Hon'ble Delhi High Court has been accepted by the Revenue, and no further appeal filed, the AO will follow the same. However, if the same has been contested before the Hon'ble Supreme Court, the panel, in order to keep the

issue alive and for the reasons recorded by the AO in Paras 3 to 9.6 of the DAO upholds the variations proposed by the AO in the DAO. Grounds No. 1 to 3 are accordingly disposed of.”

7.1. We find that in earlier years, Hon'ble Delhi High Court in the case of assessee had framed the substantial questions vide order dated 8.2.2016, in ITA 473-474/2012 for AY 2006-07 and AY 2008-09 as under:-

- (1) *“whether the receipts of the asses sees earned from providing data transmission services, fall within the term royalty under the Income Tax Act, 1961, and*
- (2) *if the answer to the first is in the affirmative, whether the assessee would be eligible for the benefit under the relevant Double Tax Avoidance Agreements.”*

7.2. The Jurisdictional Delhi High Court answered the aforesaid questions in favour of the assessee by observing as under:-

59. *“On a final note, India's change in position to the OECD Commentary cannot be a fact that influences the interpretation of the words defining royalty as they stand today. The only manner in which such change in position can be relevant is if such change is incorporated into the agreement itself and not otherwise. A change in executive position cannot bring about a unilateral legislative amendment into a treaty concluded between two sovereign states. It is fallacious to assume that any change made to domestic law to rectify a situation of mistaken interpretation can spontaneously further their case in an international treaty. Therefore, mere amendment to Section 9(1)(vi) cannot result in a change. It is imperative that such amendment is brought about in the agreement as well. Any attempt short of this, even if it is evidence of the State's discomfort at letting*

data broadcast revenues slip by, will be insufficient to persuade this Court to hold that such amendments are applicable to the DTAAAs.

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

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

8. The facts and circumstances are identical in the instant year as well. The Revenue has not pointed any change into facts and circumstances of the present case. We therefore, respectfully following binding precedent (Supra), hereby direct the AO to delete the impugned addition. Accordingly, the Grounds No. 1 to 3 are allowed.

9. As regards Ground No. 4 is concerned, the same is against the initiation of penalty u/s 270A of the Act, hence, this Ground of Appeal is pre-mature at this stage, therefore, the same is dismissed.

10. In the result, appeal of the assessee is partly allowed.

Order pronounced in the Open Court on 07TH June, 2024.

Sd/-

(ANUBHAV SHARMA)
JUDICIAL MEMBER

Sd/-

(G.S. PANNU)
VICE PRESIDENT

SRBHATNAGAR

Copy forwarded to: -

1. Appellant
2. Respondent
3. CIT/DIT/CIT(A)
4. Assessing Officer
5. DR: ITAT.

By Order,

Assistant Registrar, ITAT,
Delhi Benches