

**INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "D": NEW DELHI
BEFORE SHRI M. BALAGANESH, ACCOUNTANT MEMBER
AND
SHRI VIMAL KUMAR, JUDICIAL MEMBER**

ITA No. 1729/Del/2025
(Assessment Year: 2022-23)

Inmarsat Solutions B. V., 14 th Floor, The Ruby, 29, Senapati Bapat Marg, Dadar (West), Mumbai	Vs.	ACIT, International Taxation, Circle-2(1)(1), Delhi
(Appellant)		(Respondent)
PAN: AACCI9974L		

Assessee by :	Shri Hiten Thakkar, Adv
Revenue by:	Shri M. S. Nethrapal, CIT DR
Date of Hearing	24/09/2025
Date of pronouncement	30/09/2025

ORDER

PER M. BALAGANESH, A. M.:

1. The Assessee Inmarsat Solutions B.V. (hereinafter referred to as 'assessee') by filing the present appeal sought to set aside the impugned order dated 27.01.2025 passed by the Assessing Officer (AO) under section 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961 (for short 'the Act') inconsonance with the order passed by the Dispute Resolution Panel (DRP) dated 06.12.2024 u/s 144C(5).
2. Though the assessee has raised several grounds of appeal before us, the only effective issue to be decided in this appeal is as to whether the income earned from transmitting of satellite signals from ship to the customers and vice versa could be brought to tax in India as royalty in the hands of the assessee in the facts and circumstances of the instant case.

3. We have heard the rival submissions and produced the materials available on record. At the outset, the learned AR stated that the issue in dispute is squarely covered by the decision of this Tribunal in assessment year 2021-22, vide order dated 16-04-2025. He also stated that from assessment years 18-19 to 20-21, the issue is also covered by the decision of Hon'ble Jurisdictional High Court vide order dated 31-05-2024. He also stated that even the lower authorities had merely placed reliance on the orders passed by them in the earlier years. Hence, the facts being identical, it was submitted that the decision of this Tribunal for assessment year 2021-22 may kindly be followed for the year under consideration. No serious objections were raised by the learned DR before us. It is also pertinent to note that the adjournment letter has been placed by the revenue before us, which had been rejected as the issue is apparently covered by the decision of this Tribunal and by the decision of the Hon'ble Delhi High Court in assessee's own case in the earlier years.

4. As stated supra, we find that the issue in dispute is squarely covered by the decision of this Tribunal in assessment year 2021-22 in ITA No. 3569/Del/2023 dated 16-04-2025 in assessee's own case. The relevant operative portion of the said decision of this Tribunal is reproduced hereunder:-

"3. Brief facts of the case are that the assessee has filed its return of income on 15-03-2022 declaring total income of Rs 7,07,387 and claimed refund of Rs 96,93,570/-. The case of assessee was selected for scrutiny under CASS. A notice u/s 143(2) of the Act dated 27-06-2022 was issued and served on the assessee. Again, notice u/s 142(2) of the Act was issued with questionnaire on 24-08-2022. The assessee has filed the submission and stated that Inmarsat derives income from transmitting of satellite signals from ship to the customers and vice versa. An equipment is located on a ship which captures the satellite signals. For provision of such services Inmarsat purchases airtime on the satellite from Inmarsat Global Limited. The assessee is a tax resident of Netherland and it is eligible to claim the treaty benefits as per Indian-Netherland DTAA. A copy of Tax Residency Certificate (TRC) obtained from

Netherland tax authorities has been filed. Further, the assessee has submitted that it does not have a Permanent Establishment (PE) in India. During the year the assessee received a total consideration of Rs.66,78,65,262/- which, according to the assessee, is its business income. Assessee further stated that in absence of a Permanent Establishment in India, the income of Inmarsat is not chargeable to tax in India. The assessing Officer however did not agree with assessee's claim. The AO held that the receipts are in the nature of royalty u/s 9(1) (vi) of the Act as well as under 12 of India - Netherlands tax treaty as they are towards use or right to use of equipment/processes etc. The AO held that the assessee has received the revenue from the customers by leasing transponders in India. Against the draft order the assessee raised the objections before the learned DRP who vide their order dated 29-09-2023 dismissed the objection. The Assessing Officer completed the assessment after making the addition of Rs 66,85,72,650/-

4. Aggrieved the order of the DRP the assessee has filed this appeal before the tribunal.

5. At the outset, the Id. Counsel for the assessee has stated that the issues are squarely covered by assessee's own cases in ITA No. 1717/Del/2022 1883/Del/2022 with ITA No. 731/Del/2023 and others. He drew our attention to series of orders passed by the Tribunal in case of Inmarsat Global Limited. Thus, he submitted that the addition made have to be deleted. A.Y.2018-19& for ITA No.

6. The Counsel for the assessee has relied upon following judicial decisions:

Appellant's own case	
1.	Inmarsat Solutions BV (AY 2019-20 with AY 2020-21) dated 26 October 2023 (ITA No. 1883/Del/2022 with ITA No. 731/Del/2023) (Delhi Tribunal)
2.	Inmarsat Solutions BV (AY 2018-19) dated 4 October 2023 (ITA No. 1717/Del/2022) (Delhi Tribunal)
In the case of Appellant's group company	
3.	Inmarsat Global Limited (AY 2018-19) dated 22 August 2022 (ITA No. 626/Mum/2022) (Mumbai Tribunal)
4.	Inmarsat Global Limited (AY 2017-18) dated 31 May 2022 (ITA No. 1031/Mum/2021) (Mumbai Tribunal)
5.	Inmarsat Global Limited (AY 2016-17) dated 24 March 2021 (ITA No. 7485/Mum/2019) (Mumbai Tribunal)
6.	Inmarsat Global Limited (AY 2015-16) dated 23 October 2020 (ITA No. 7025/Mum/2018) (Mumbai Tribunal)
7.	Inmarsat Global Limited (AY 2013-14 and AY 2014-15) dated 19 January 2021 (ITA No. 2265/Mum/2017 and ITA No. 7339/Mum/2017) (Mumbai Tribunal)
8.	Inmarsat Global Limited (AY 2007-08 to AY 2012-13) dated 12 December 2018 (ITA No. 8544/Mum/2010, ITA No. 7031/Mum/2011, ITA No. 7538/Mum/2012, ITA No. 2075/Mum/2014, ITA No. 1674/Mum/2015 and ITA No. 1105/Mum/2016) (Mumbai Tribunal)
9.	Inmarsat Global Limited (AY 2000-01 to AY 2005-06) dated 14 July 2017 (ITA No. 5102/Mum/2004, ITA No. 423/Mum/2005, ITA No. 7555/Mum/2005, ITA No. 3426/Mum/2007, ITA No. 2583/Mum/2007 and ITA No. 3213/Mum/2008) (Mumbai Tribunal)

7. learned Departmental Representative fairly agreed that the issue is squarely covered by the decisions of the Tribunal in the assessee's own case

in the assessment year 2018-19 as well as in case of IGL. He relied upon the orders of the lower authorities.

8. We have heard the rival submission and perused the materials on record. Considering the rival submission and material placed on record, we observed that similar issues were considered and adjudicated by the Coordinate Bench in assessee's own case for A.Y. 2019-20 & 2020-21 in ITAT No. 1883/ Del/2022 and ITA No.731/Del/2023 and decided the issue in favour of the assessee. The relevant observations are as under:

7. We have perused the order of the co-ordinate bench of the Tribunal in assessee's group concern in the case of Inmarsat Global Ltd. Vs. DCIT in ITA. No. 626/Mum/2022 dated 22.08.2022 for assessment year 2018-19, which is placed at page Nos. 1 to 50 of the paper book and find that the Tribunal decided the issue in favour of the assessee following its earlier orders. We find that the Tribunal in the assessment years 2007-08 to 2012-13 in ITA. No. 8544/Mum/2010 dated 12.12.2018 held as under:-

4. Although the assessee has raised multiple Grounds of appeal, but the substantive dispute revolves around two issues relating to characterisation of income earned by the assessee, and the existence or otherwise of a Permanent Establishment (PE) or a fixed place of business in India.

5. In order to appreciate the controversy, the following discussion is relevant. The appellant is a company incorporated in United Kingdom and is also a tax resident of United Kingdom. The appellant is engaged in the business of providing telecommunication services and for Assessment Year 2007-08, it filed its return of income declaring NIL income, inter-alia, contending that its income was not taxable in India. So far as the income earned by the assessee in this year is concerned, the same stands on similar footing as in the past years, namely, from rendering of telecommunication services to Videsh Sanchar Nigam Ltd. (in short 'VSNL'), whose name has subsequently been changed to Tata Communication Ltd. (in short 'TCL '). The receipts from rendering of telecommunication services to TCL were claimed to be not taxable in India; however, the Assessing Officer has taxed the same as Royalty under the Act as well as in terms of the IndiaUK Double Taxation Avoidance Agreement (in short 'India-UK DTAA '). The stand of the assessee has been that its receipts from TCL are in the nature of 'business profits ' covered by Article 7 of the India-UK DTAA and, in the absence of any PE in India, the same are not taxable in India. It was a common ground between the parties that the manner in which

the services have been rendered by the assessee in the instant year is similar to the manner in which the services have been rendered in the past years. Broadly speaking, the following factsituation asserted by the assessee I.T.A. No. 1717/Del/2022 27 before the Assessing Officer brings out the mechanics of the manner in which the assessee is providing telecommunication services from outside India and deriving its earning from TCL, the same is reproduced below :-

"2.1 Background Inmarsat is engaged in the business of providing telecommunication services from outside India. The aforesaid nature of services essentially involves making available a channel (frequency) in air through which the communication signals are transmitted. This frequency is made available by a network which includes the following resources : —

Satellite —7

Network Co-ordinating Station ('NCS')

Network Operation Centre ('NOC')

Satellite Control Centre Other infrastructure

Inmarsat provides a telecommunication link between the user of mobile telephone system known as Mobile Earth Station ('MES') and Land Earth Station ('LES'). MES is an equipment located on a ship, aircraft or vehicle or carried in hand held case. The users of the equipment are third parties who are not connected with Inmarsat. The LES is a fixed site (with large satellite dishes and related equipment), which is operated by a third party ie a Land Earth Service Operator ('LESO').

Inmarsat is engaged in rendering various telecommunication services including the following :

Voice transmission services Fax transmission service Data transmission service E-mail transmission private/corporate networks, value networks transmission—added — Internet access-browsing e-mail Video conferencing-store andforward video, real time, etc.

In this connection, we enclose herewith in Annexure 7, a diagrammatic representation which describes the above mentioned activities.

The LESO in India is VSNL. Inmarsat has entered into a LESO Agreement with VSNL for providing satellite telecommunication services. We have enclosed herewith in Annexure 8 a copy of the LESO agreement dated 12 April 1999, entered into by Inmarsat with VSNL for provision of telecommunication services. The LES is linked on the ground to the local public telecommunication network. This system enables communication to take place between users of the MES equipment and either other users of similar equipment or users of the

public telephone network. In each case, the communication passes via an Inmarsat satellite and is co-ordinated and connected by the LESO. ”
6. *The Assessing Officer, however, took the stand, following the stand of the assessing authorities of the past years that the impugned receipts earned by the assessee from TCL are in the nature of 'Royalty'. We find that the DRP has also affirmed the decision of the Assessing Officer.*

7. *On this aspect of the controversy, it has been pointed out before us that the Tribunal vide its order in ITA Nos. 5102/Mum/2004 & others dated 14.07.2017 in the context of Assessment Years 2000-01 to 2005-06 has evaluated the rival stands and have disagreed with the stand of the Revenue that the nature of receipt was Royalty. At the time of hearing, the learned representative for the assessee has taken us through the detailed decision made by the Tribunal in its order dated 14.07.2017 (supra), whose relevant portion we are tempted to reproduce as under*

"10. We have heard the rival submissions and perused the material available on record. We find that the material facts of the present case are largely identical to the facts as considered by AAR in the ruling in the case of ISRO Satellite Centre(2008) 307 ITR 59 (AAR). We note that the reasoning and conclusion on facts similar to the facts in the present proceedings with ISRO which has been followed after a detailed discussion and in fact extracted by the Hon'ble Delhi High Court in the case of Asia Satellite Telecommunications Co. Ltd. (2011) 332 ITR 340(Del.). We note that no arguments have been advanced by the Revenue to rebut the assessee's arguments that facts as considered in ISRO Satellite Centre are identical in the present proceedings also. We have taken into consideration that the learned CIT-DR has placed reliance on the decisions of the Hon'ble Madras HighCourt in the case of Verizon I.T.A. No. 1717/Del/2022 29 Communications Singapore Pte Ltd. vs. Income Tax Officer (IT) (2014) 361 ITR 575 (Mad), the decision of the Karnataka High Court in the case of CIT vs. CGI Information Systems and Management Consultants (P) Ltd. and the decision of the Hon'ble Jurisdictional High Court in the case of CIT vs. Siemens Aktiongeswellschaft (2009) 310 ITR 320 (Bom). Reliance has been placed on the order of the Mumbai Bench of the Tribunal in the case of Viacom 18 Media P. Ltd. vs. ADIT (International Taxation)-2(2), Mumbai(2014) 44 taxmann.com 1 (Mum- Trib) in support of the argument that this is the view taken by the Mumbai Bench of the Tribunal. Notwithstanding the fact that at that point of time the Coordinate Bench did not have the benefit of the orders of the Hon'ble Delhi High Court in Asia Satellite Communication Co. Ltd. We also note that consistently the Mumbai Bench of the Tribunal has taken into the consideration the distinction in facts, law

and the issue which was posed before different forums for consideration and find that it has been consistently held relying upon the decisions of the Hon'ble Delhi High Court in the cases of New Skies Satellite(2016) 382 ITR 1, DIT vs. Nokia Networks OY (2013) 358 ITR 259 and Asia Satellite Communications Co. Ltd. (supra) in the decisions of Alcatel-Lucent USA Inc. dated 25.04.2007 in ITA Nos. 7299 & 7300/ Mum/2010 for A.Y. 2005- 06 and 2007-08, DDIT vs. Shell 9 Inmarsat Global Ltd. ITA No. 8544/M/2010 & 5 ors. Information Technology International BV dated 15.03.2017 in ITA No. 5051/Mum/ 2009 & Others for A.Y. 2006-07 to 2008-09 and ADIT vs. Taj TV Ltd. dated 05.07.2016 in ITA No. 4678/Mum2007 for A.Y. 2003-04 to 2005-06. We have also noted that reliance placed by the learned CIT-DR on the decision of the Hon'ble Jurisdictional High Court in Siemens Aktiongeswellschaft (supra) supports its case is misplaced. Specific mention may be made to para 20 of the said decision. Reference therein has been made to a decision of the Canadian Court in the case of Her Majesty the Queen vs. Melford Development Inc. 82 DTC 6281 and the categoric observation on unilateral amendment by a nation which is party to the agreement leaves the issue in no doubt about the view favoured. Accordingly we quote here the decision of the Hon'ble Delhi High Court in DIT vs. New Skies Satellite BV cited supra to support the conclusion why the consistent orders of the ITAT on the issue are being followed:

"48. In Commissioner of Income Tax v. SeimensAktiongessellschaft, [2009] 310 ITR 320 (Bom), the Bombay High Court citing R v Melford Developments Inc. held that "The ratio of the judgment, in our opinion, would mean that by a unilateral amendment it is not possible for one nation which is party to an agreement to tax income which otherwise was not subject to tax. Such income would not be subject to tax under the expression "laws in force ".

While considering the Double Tax Avoidance Agreement the expression "laws in force" would not only include a tax already covered by the treaty but would also include any other tax as taxes of a substantially similar character subsequent to the date of the agreement as set out in article I(2). Considering the express language of article I(2) it is not possible to accept the broad proposition urged on behalf of the assessee that the law would be the law as applicable or as define when the Double Tax Avoidance Agreement was entered into. " 10 Inmarsat Global Ltd. ITA No. 8544/M/2010 & 5 ors.

49. It is essential to note the context in which this judgment was delivered. There, the Court was confronted with a situation where the word royalty was not defined in the German DTAA. Following from our previous discussion on the bifurcation of terms within the treaty, in

situations where words remain undefined, assistance is to be drawn from the definition and import of the words as they exist in the domestic "laws in force ". It was in this context that the Bombay High Court held that they were unable to accept the assessee's contention that the law applicable would be the law as it existed at the time the Double Tax Avoidance Agreement was entered into. This is the context in which the ambulatory approach to tax treaty interpretation was not rejected. The situation before this Court however is materially different as there is in fact a definition of the word royalty under Article 12 of both DTAA, thus dispensing with the need for recourse to Article 3. 50. There are therefore two sets of circumstances. First, where there exists no definition of a word in issue within the DTAA I.T.A. No. 1717/Del/2022 31 itself, regard is to be had to the laws in force in the jurisdiction of the State called upon to interpret the word. The Bombay High Court seems to accept the ambulatory approach in such a situation, thus allowing for successive amendments into the realm of "laws in force ". We express no opinion in this regard since it is not in issue before this Court. This Court's finding is in the context of the second situation, where there does exist a definition of a term within the DTAA. When that is the case, there is no need to refer to the laws in force in the Contracting States, especially to deduce the meaning of the definition under the DTAA and the ultimate taxability of the income under the agreement. That is not to say that the Court may be inconsistent in its interpretation of similar definitions. What that does imply however, is that just because there is a domestic definition similar to the one under the DTAA, amendments to the domestic law, in an attempt to contour, restrict or expand the definition under its statute, cannot extend to the definition under the DTAA. In other words, the domestic law remains static for the purposes of the DTAA. The Court in Sanofi (supra), had also held similarly: "We are in agreement with the petitioners and in the light of our preceding analyses, discern no textual, grammatical or syntactic ambiguity in Article 14(5), warranting an interpretive recourse. In the circumstances, invoking provisions of Article 3(2) by an artificial insemination of ambiguity (to accommodate an expanded meaning to the DTAA provision), would be contrary to good faith interpretation. A further problematic of contriving an ambiguity to unwarrantedly invite application of domestic law of a contracting State would be that while India would interpret an undefined DTAA provision according to the provisions of the Act, France could do so by reference to its tax code. As a consequence, the purpose of entering into a treaty with a view to avoiding double-taxation of cross-border transactions would be frustrated. "

51. Pertinently, this Court in *Director of Income Tax v Nokia Networks, 2013 (358) ITR 259* specifically dealt with the question of the effect of amendments to domestic law and the manner of their

operation on parallel treaties. The Court delivered its judgment in the context of the very amendments that are in question today; the Explanations to Section 9(1)(vi) vis a vis the interpretation of a Double Tax Avoidance Agreement. This Court rejected that any amendment could I.T.A. No. 1717/Del/2022 32 change the situation and render the service or activity taxable, in the following observations: "He, thus 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" as sought to be made out by the Special Bench of the ITAT in the present case. However, the above argument misses the vital point namely the assessee has opted to be governed by the treaty and the language of the said treaty differs from the amended Section 9 of the Act. It is categorically held in CIT Vs. Siemens Aktiongesellschaft, 310 ITR 320 (Bom) that the amendments cannot be read into the treaty. On the wording of the treaty, we have already held in Ericsson (supra) that a copyrighted article does not fall within the purview of Royalty. Therefore, we decide question of law no.1 & 2 in favour of the assessee and against the Revenue. "

52. Thus, an interpretive exercise by the Parliament cannot be taken so far as to control the meaning of a word expressly defined in a treaty. Parliament, supreme as it may be, is not equipped, with the power to amend a treaty. It is certainly true that law laid down by the Parliament in our domestic context, even if it were in violation of treaty principles, is to be given effect to; but where the State unilaterally seeks to amend a treaty through its legislature, the situation becomes one quite different from when it breaches the treaty. In the latter case, while internationally condemnable, the State's power to breach very much exists; Courts in India have no jurisdiction in the matter, because in the absence of enactment through appropriate legislation in accordance with Article 253 of the Constitution, courts do not possess any power to pronounce on the power of the State to enact a law contrary to its treaty obligations. The domestic courts, in other words, are not empowered to legally strike down such action, as they cannot dictate the executive action of the State in the context of an international treaty, unless of course, the Constitution enables them to. That being said, the amendment to a treaty is I.T.A. No. 1717/Del/2022 33 not on the same footing. The Parliament is simply not equipped with the power to, through domestic law, change the terms of a treaty. A treaty to begin with, is not drafted by the Parliament; it is an act of the Executive. Logically

therefore, the Executive cannot employ an amendment within the domestic laws of the State to imply an amendment within the treaty. Moreover, a treaty of this nature is a carefully negotiated economic bargain between two States. No one party to the treaty can ascribe to itself the power to unilaterally change the terms of the treaty and annul this economic bargain. It may decide to not follow the treaty, it may chose to renege from its obligations under it and exit it, but it cannot amend the treaty, especially by employing domestic law. The principle is reciprocal. Every treaty entered into be the Indian State, unless self-executory, becomes operative within the State once Parliament passes a law to such effect, which governs the relationship between the treaty terms and the other laws of the State. It then becomes part of the general conspectus of domestic law. Now, if an amendment were to be effected to the terms of such treaty, unless the existing operationalizing domestic law states that such amendments are to become automatically applicable, Parliament will have to by either a separate law, or through an amendment to the original law, make the amendment effective. Similarly, amendments to domestic law cannot be read into treaty provisions without amending the treaty itself.

53. Finally, States are expected to fulfill their obligations under a treaty in good faith. This includes the obligation to not defeat the purpose and object of the treaty. These obligations are rooted in customary international law, codified by the VCLT, especially Article 26 (binding nature of treaties and the obligation to perform them in good faith); Article 27 (Internal law and observance of treaties, i.e provisions of internal or municipal law of a nation cannot be used to justify omission to perform a treaty); General rule of interpretation under Article 31 (1) (i.e that it shall be interpreted in goodfaith, in accordance with ordinary meaning to be given to the terms of a treaty) and Article 31 (4) (A special meaning shall be given to a term if it is established that the parties so intended). The expression "process " and treaty interpretation in this case. "

10.1 The next decision also cited by the CIT-DR is the case of Formula One World Championship Ltd. vs. CIT (International Taxation) for the proposition that the decision of the Hon'ble Delhi High Court in the case of Asia Satellite Communication Co. Ltd. and New Skies Satellite is overruled. On a reading of the said decision we note that the reliance is misplaced. The issue for consideration before the Hon'ble Apex Court was on an entirely different set of facts and circumstances and an entirely different 14 Inmarsat Global Ltd. ITA No. 8544/M/2010 & 5 ors. issue was being considered. The said decisions were neither cited before the Court nor referred to by it nor considered in the said judgement. Accordingly on a reading of the decisions rendered on peculiar facts of the present case which we have brought out in detail

in the earlier part of this order we find ourselves in agreement with the detailed finding and conclusion drawn by the Coordinate Benches and respectfully following the same conclude that the appeals of the assessee are to be allowed. For ready reference we extract from one of the decisions cited before us. We reproduce the relevant extract from the decision in the case of AlcatelLucent USA Inc. being the most latest in point of time hereunder: -

"5. We have heard the rival submissions and perused the material before us. We find that the basic issue to be decided is as to whether the payments received by the assessee from Reliance can be taxed as royalty in view of the amendment to section 9(1) of the Act. It is said that a DTAA is a result of negotiations between two countries as to the extent to which special concessional tax provisions can be made notwithstanding that there might be a loss of revenue. A plain reading of section 90(2) of the Act makes it clear that the provisions of the DTAA would prevail over the Act unless the Act is more beneficial to the assessee. Therefore, except to the extent a provision of the Act is more beneficial to it, the DTAA will override the Act. This is irrespective of whether the Act contains a provision that corresponds to the treaty provision. In our opinion, international- taxation issues have to be decided keeping in mind the above broad principles.

5.1. It is found that all the issues raised by the DR, before us, have been dealt with by the Tribunal in the case of Antwerp Diamond(supra). We are reproducing the arguments of the representatives of both the sides and the relevant portion of that order and it reads as under: I. T.A. No. 1717/Del/2022 35 "2. At the outset, the Ld. Counsel, Mr K. K. Ved submitted that similar issue has been decided by the Tribunal in favour of the assessee in assessee's own case right from the assessment years 2004-05, 2005-06 and 2008-09. The second issue relating to disallowance of interest paid to the Head Office also has been decided in favour of the assessee by the Special Bench in Sumitomo Mitsui Banking Corpn., wherein, the assessee was one of the party. 3. On the other hand, Ld. DR strongly relied upon the order of the Assessing Officer and submitted that, so far as Data Processing Cost is concerned, the same is in the nature of 'Royalty' and in support he has strongly relied upon the two Karnataka High Court decisions in the case of:- i) CIT vs. Wipro Ltd., reported in 355 ITR 284; ii) CIT vs. CGI Information Systems & Management Consultants (P) Ltd., 226 Taxman 319 The issue whether the amendment brought by Finance Act 2012 in Section 9(1)(vi) by way of Explanations inserted in the Income-tax Act with retrospective effect can be read into DTAA or not has to be seen in the light of the decision of Hon 'ble Bombay High Court in the case of CIT v Siemens Aktiongesellschaft, reported in 310 ITR 320 (Bom HC) accordingly, he submitted that other decisions rendered by the Delhi High Court and

the Tribunal may not be applicable. While appreciating the Siemens AG (supra) he submitted that, it may kind be borne in mind that: i) The question of law before the Hon 'ble High Court was not that whether amendments in the Income-tax Act can be read into the DTAA or not; ii) In the said case, old DTAA (1960) between India and Germany was under consideration; iii) The said decision was rendered in 20008 when the only clarificatory provision by way of Explanation in section 9 was the Explanation below S.9(2) inserted by the Finance Act, 2007 doing with the requirement of PE for Royalty; iv) That amendments/Explanations in the Incometax Act are being sought to be read into DTAA by virtue of Article 3(12) of the modern treaties; v) Section 9(1)(vi) up to and including Explanation 2 are substantive provisions as inserted by Finance Act 1976 and thereafter, Explanation 3 to 6 are only clarificatory provisions inserted subsequently; and vi) It is not disputed by the revenue that the provisions of DTAA if beneficial to the assessee shall be preferred over the provisions of the Income-tax Act. He further submitted that, the Hon 'ble Bombay High Court decision in the case of Siemens Aktiongesellschaft (supra) would reveal that, i) Nowhere in I.T.A. No. 1717/Del/2022 36 the said order, the High Court has held that Amendments/Explanations cannot be read into DTAA as it was not question before the Hon 'ble High Court; ii) The natures of services rendered in the said case were found to be not Royalty under the DTAA though found to be Royalty under the Act. Those services were found to fall under the expression "commercial or industrial profits" as per the then DTAA (Old) and therefore could not be taxed in India in absence of PE. The provisions of DTAA being the beneficial to the assessee were preferred over the provisions of the Income-tax Act; iii) In paras 13, 22 and 28 of its order, the Hon 'ble High Court has approved the insertion of Explanation below section 9(2) inserted by the

Finance Act 2007, thereby implying that the explanations inserted by FA 2007 could be read into modern DTAA's; iv) Mumbai Tribunal in the case of Viacom 18 Media (P.) Ltd. [2014] 162 TTJ 336 (Mum) has explained the import of Bombay High Court decision in right perspective in paras 16 and 17 of its order while rejecting the assessee's argument that the HC has held that amendments in the Act cannot be read into DTAA's; and v) The Bombay High Court has approved ambulatory approach (para 22) to interpretation of treaties against Static approach adopted by the Delhi High Court. So far as the interest paid by the Branch Office to the Head Office income of Headquarter, he submitted that, expenditure including interest attributable of earning of income which does not form part of the total income has to be disallowed under section 14A if it has to be held that in view of the Special Bench decision in the case of the assessee, the interest paid by the Branch Office to the Head Office is not the commission of the Head Office. In support, he relied upon the decision

of Oman International Bank AG on the admissibility of the belief, he relied upon the decision of Hon'ble Supreme Court in the case of NTPC vs. CIT, reported in 229 ITR 383. 4. After considering the aforesaid submissions and on perusal of the impugned orders, we find that so far as the issue raised vide ground No.1 to 3 is concerned it is a recurring issue in the case of the assessee right from the earlier years. The Ld.CIT (A) too has followed the CIT(A) 's orders for the assessment years 2003-04 to 2004-05, 2005-06 and 2008-09. The Tribunal in the assessment year 2004-05 in ITA No. 734 7/Mum/200 7 on the issue of disallowance of Data Processing Cost has dealt and decided this issue in the following manner:-

"15. Now, coming to the main issue i.e., whether the reimbursement of data processing cost of Rs.34,03,734, amounts to royalty or not, we find from the record that the assessee is engaged in the banking business and operates in India through branch in Mumbai. It has acquired banking application software named as "Flexcube " from an Indian software company which is exclusively used for the banking purpose by the assessee all over the world. When the Mumbai Branch was set-up, the Branch was allowed to use the said software by making it assessable through servers located at Belgium. The Branch sends its data to the

Belgium server from where the data gets processed as per the requirement of the banking operations. As per the terms of agreement between the Branch and the Head Office for the usage of software by the Branch, which has been incorporated above, it is evident that the Head Office only has the non-exclusive non- transferrable rights to use the computer software brought for personal use and clause 16 of the said agreement specifically provides that the Head Office does not have any right to assign, sub-license or otherwise transfer the license of this agreement. Thus, the payment by the Branch for use of computer software is not the right in the copy right but only for doing the work from the said software which subsist in the copy right of the software. The branch is using the computer software and the I.T. resources installed at Belgium for which the payment is made by the Head Office towards the use of such software license. Since the Branch is using the same software for the purpose of business operations, the Head Office allocates the said expenditure on a prorata basis for the use of the said resources which is being reimbursed by the Branch to the Head Office. It is not in dispute that the assessee has sought the benefit of treaty between India and Belgium and had specifically relied upon the definition of "royalty " as given in the Article 12. Clause (a) of Para-3 of Article-12, which defines the term "royalty" in the following manner:- 3(a) 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, trademark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience. 16. The above definition of "royalty" thus provides that, when the payment of any kind is received as a consideration for "use" of or "the right to use" of any of the copy right of any item or for various terms used in the said Article, then only it can be held to be I.T. A. No. 1717/Del/2022 38 for the purpose of "royalty". The said definition of "royalty" is exhaustive and not inclusive and, therefore, it has to be given the meaning as contained in the Article itself and no other meaning should be looked upon. If the assessee is claiming the application of the DTAA, then the definition and scope of "royalty" given in the domestic law, in the present case, section 9(1)(vi) should not be read into or looked upon. The character of payment towards royalty depends upon the independent "use" or the "right to use" of the computer software, which is a kind of copy right. In the present case, the payment made by the Branch is not for "use" of or "right to use" of software which is being exclusively done by the Head Office only, installed in Belgium. The Branch does not have any independent right to use or control over such main frame of the computer software installed in Belgium, but it simply sends the data to the Head Office for getting it processed. Insofar as the Branch is concerned, it is only reimbursing the cost of processing of such data to the Head Office, which has been allocated on prorata basis. Such reimbursement of payment does not fall within the ambit of definition of "royalty" within the Article 12(3)(a). To fall within its ambit, the Branch should have exclusive and independent use or right to use the software and for such usage, payment has to be made in consideration thereof. It is not the case of the Revenue that the Head Office has provided any copy right of software or any copyrighted article developed by the Head Office for the exclusive use of the assessee for, which the assessee is making the payment along with the mark-up exclusively for the purpose of royalty. If the payment for license for the software which is installed in the Head Office is being made by the Head Office, then any allocation of cost and reimbursement thereof by the Branch to the Head Office cannot be termed as independent payment for the purpose of royalty. To fall within the ambit of "royalty" under Article, the payment should be exclusively qua the use or the right to use the software exclusively by the Branch. The character of the payment under the royalty transactions depends upon the rights that the transferee acquires in relation to the use and exploitation of the software programme. Here, there is no such right which has been acquired by the Branch in relation to the usage of software, because the Head Office alone has the exclusive right of the license to use the software. Thus, the reimbursement of the data processing cost to the Head Office does not fall within the ambit of definition of "royalty"

under Article 12(3)(a).

17. The learned Commissioner (Appeals) and the learned Senior Counsel have strongly relied upon the decision of the co-ordinate bench of the Tribunal in Kotak Mahindra Primus Ltd. (supra). On a perusal of the said decision, it is seen that the conclusion drawn by the Tribunal, is directly applicable to the facts of the assessee's case also, which is evident from the following observations and conclusions drawn by the Tribunal:-

"11. The consideration of payment is only this data process work. No part of this payment can be said to be for the use of specialized software on which data is processed or for the use of mainframe computer because the Indian company does not have any independent right to use the computer or even physical access to the mainframe computer, so as to use the mainframe computer or the specialized software. All that the right is for processing of data, and the use of mainframe computer is permitted only for that purpose. The Indian company can feed the raw data in the mainframe computer in Australia, with the help of the telecommunication link, and the output data, after due processing is transmitted back to the Indian company. There is no privilege or right granted to the Indian company by the Australian company. The control of the Indian company is only on the input transmission and the right is to get the output processed data back. The actual processing of data is the exclusive control of the Australian company and it is for this work that the Australian company gets paid. In our considered view, therefore, in essence the impugned payment is made to the Australian company inconsideration of its processing of data belonging to the Indian company. As far as the scope of article 12(3)(a) is concerned, we find that it covers only a payment for the use of, or the right to use of, any copyright, patent, design or model, plan, secret formula or process, trademark, or other like property or right. The case of the revenue is that the payment is made for the use of specialized software with the help of which data is processed. We are not persuaded. As we have concluded earlier in this order, on the facts of this case, the payment made by the Indian company is not for the use of, or right to use of, software, the payment is for data processing. Be that as it may, even if stand of the revenue is to be upheld and it is to be concluded that the payment is made for software per se, that does not lead to taxability of receipt in the hands of the Australian company either. It is also by now settled that the payment for software is for a copyrighted article and not I. T.A. No. 1717/Del/2022 40 copyright per se, and, therefore, is not covered by the scope of payment for copyright. The authority for this proposition is contained in Special Bench decision in the case of Motorola Inc. v. Dy. CIT (2005) 95ITD 269 (Del)(SB), Samsung Electronics Company Ltd. v. ITO (2005) 94 ITD 91 (Bang), and Lucent

Technologies Hindustan Ltd. v ITO (2005) 92 ITD 366 (Bang). It is not even the revenues case that the payment in question is not (sic) for the use of, or right to use of, patent, design or model, plan, secret formula or process, or trade mark. In any event, having perused these classifications and having considered the facts before us, we are of the considered view that the payment does not fit into any of these classifications. It is, however, contended that the impugned payment is covered by the residuary clause, i.e., "other like property or right". It is contended that by making payment of US \$ 60,000 per annum, the Indian company gets a valuable property and right as the payment cannot be said to have been made in vacuum and without any consideration. This plea also does not impress us. It is not every property or right which can be covered by these expressions appearing in the end of article 12(3)(a), because, following the principles of ejusdem generis meaning of the general words following the specific words have to take colour from the specific words preceding it. When that property or right, even if it so exists, is not of the nature of any of the specific categories set out in article 12(3)(a), it cannot be covered by the general words following those categories either. For all these reasons, we are of the considered view that provisions of article 12(3)(a) cannot be invoked on the facts of the case before us. That takes us to the question whether the provisions of article 12(3)(b), as relied upon by the revenue authorities, can be invoked on the facts of the present case. Article 12(3)(b) can apply only when the payment in question can be held to be payment for "the use of, or the right to use, any industrial, commercial or scientific equipment". This condition can only be satisfied when it is established that the impugned payment is made for the use of, or right to use of,

mainframe computer. The Indian company does not have any control over, or physical access to, the mainframe computer in Australia. There cannot, therefore, be any question of payment for use of the mainframe computer. It is indeed true that the use of mainframe computer is integral to the data processing but what is important to bear in mind is the fact that the payment is not for the use of mainframe computer per se, that the Indian company does not have any control over the mainframe computer or physical access to the I.T.A. No. 1717/Del/2022 41 mainframe computer, and that the payment is for act of specialized data processing by the Australian company. Use of mainframe computer in the course of processing of data is one of the important aspects of the whole activity but that is not the purpose of, and consideration for, the impugned payment being made to Australian company. The payment, as we have observed earlier, is for the activity of specialized data processing. It is neither practicable, nor permissible, to assign monetary value to each of the segment of this economic activity and consider that amount in isolation, for the purpose of deciding character of that amount.

Therefore, neither the impugned payment can be said to be towards use of, or right to use of, the mainframe computer, nor is it permissible to allocate apart of the impugned payment, as attributable to use of, or right to use of, mainframe computer. Accordingly, the provisions of article 12(3)(b) cannot have any application in the matter. "

18. Insofar as the reliance placed by the learned Departmental Representative on the decisions of the Madras High Court and also the scope of "royalty" as given in Explanation 4 and 5 to section 9(1)(vi) brought in statute by the Finance Act, 2012 are concerned, we find that the same is not tenable for the reason that once the assessee has opted for the benefit of the DTAA, then there is no requirement for resorting to the definition and the scope of "royalty" as given in section 9(1)(vi). The said amendment cannot be read into the treaty and will not influence the definition of "royalty", as given in Article 12(3). This proposition is squarely covered by the decision of the Bombay High Court in Siemens Aktiongesellschaft (supra), the decision of Delhi High Court in Nokia Network (supra) and DIT v/s Ericson AB, [2012] 343 ITR 470. Even the decisions of Madras High Court as

relied upon by the learned Departmental Representative is not applicable which is evident from the issue involved as is evident from the substantial question of law which were formulated by the High Court for adjudication. Hence, the said decisions are not applicable.

19. Thus, in view of the aforesaid reasons, we hold that the impugned payment made by the Branch to the H. O. towards reimbursement of cost of data processing cannot be held to be covered within the scope of expression "royalty" under Article 12(3)(a) of the India Belgium DTAA. Accordingly, the conclusion drawn by the learned Commissioner (Appeals) is

I. T.A. No. 1717/Del/2022 42 affirmed. 20. Since we have already held that the data processing cost paid by the assessee does not amount to royalty, consequently, there is no requirement for deducting tax at source on such payment. Therefore, the provisions of section 40(a)(i) will not apply. Accordingly, the issue arising out of ground no.1 and 2 is dismissed". This decision of the Tribunal have been followed in the subsequent years by the Tribunal, i.e., in AY2006-07 and 2007-08. In the aforesaid decision of the Tribunal, the decision of Bombay High Court in the case of Siemens Aktiongesellschaft (supra) and Delhi High Court decision in the case of Nokia Network, reported in [2012] 253 CTR (De) 417 and DIT v Sony Ericson AB, reported in [2012] 343 ITR 470 have been taken note of. Thus, this issue has been decided in favour of the assessee after detail analysis and discussion. Moreover, we find that in the latest decision of Hon 'ble Delhi High Court in the case of DIT vs. News Sky Satellite BV passed in ITA 473/2012, order dated 8.02.2016 have explained the

ratio and principle of Hon 'ble Bombay High Court in the case of Siemens Aktiongesellschaft (supra). The relevant observation of the Hon 'ble Delhi High Court in the said case reads as under:-

"48 In Commissioner of Income Tax v. SeimensAktiongesellschaft, [2009] 310 ITR 320 (Bom), the Bombay High Court citing R v Melford Developments Inc. held that "The ratio of the judgment, in our opinion, would mean that by a unilateral amendment it is not possible for one nation which is party to an agreement to tax income which otherwise was not subject to tax. Such income would not be subject to tax under the expression "laws in force". While considering the Double Tax Avoidance Agreement the expression "laws in force" would not only include a tax already covered by the treaty but would also include any other tax as taxes of a substantially similar character subsequent to the date of the agreement as set out in article 1(2). Considering the express language of article 1(2) it is not possible to accept the broad proposition urged on behalf of the assessee that the law would be the law as applicable or as define when the Double Tax Avoidance Agreement was entered into. "

49. It is essential to note the context in which this judgment was delivered. There, the Court was confronted with a situation where the word royalty was not defined in the German DTAA. Following from our previous discussion on the I. T.A. No. 1717/Del/2022 43 bifurcation of terms within the treaty, in situations where words remain undefined, assistance is to be drawn from the definition and import of the words as they exist in the domestic "laws in force ". It was in this context that the Bombay High Court held that they were unable to accept the assessee's contention that the law applicable would be the law as it existed at the time the Double Tax Avoidance Agreement was entered into. This is the context in which the ambulatory approach to tax treaty interpretation was not rejected. The situation before this Court however is materially different as there is in fact a definition of the word royalty under Article 12 of both DTAA, thus dispensing with the need for recourse to Article 3. 50. There are therefore two sets of circumstances. First, where there exists no definition of a word in issue within the DTAA itself, regard is to be had to the laws in force in the jurisdiction of the State called upon to interpret the word. The Bombay High Court seems to accept the ambulatory approach in such a situation, thus allowing for successive amendments into the realm of "laws in force ". We express no opinion in this regard since it is not in issue before this Court. This Court's finding is in the context of the second situation, where there does exist a definition of a term within the DTAA. When that is the case, there is no need to refer to the laws in force in the Contracting States, especially to deduce the meaning of the definition under the DTAA and the ultimate taxability of the income under the agreement. That is not to say that the Court may be

inconsistent in its interpretation of similar definitions. What that does imply however, is that just because there is a domestic definition similar to the one under the DTAA, amendments to the domestic law, in an attempt to contour, restrict or expand the definition under its statute, cannot extend to the definition under the DTAA. In other words, the domestic law remains static for the purposes of the DTAA ”.

5. Thus, on the facts of the present case, we are bound to follow the judicial precedence in assessee’s own case for the earlier years and in view of the finding given therein, we upheld the order of the CIT (A) and dismiss the grounds raised by the revenue. Accordingly, grounds no. 1, 2 & 3 are dismissed.

5.2. As far as filing of writ petition to be filed before the Hon’ble High court is concerned if would be sufficient to I.T.A. No. 1717/Del/2022 44 mention that nothing was brought on record to prove that writ had been filed and heard. Had the final hearing taken place, it would have been a different situation. So, in anticipation of filing of a writ-petition, we are not inclined to defer the decision especially when same is covered by the orders for the earlier years. Considering the above and respectfully following the orders of the Tribunal in the cases of Antwerp Diamond Bank NV Engineering Centre (supra) and Antwerp Diamond Bank NV(supra), we decide the effective ground of appeal in favour of the assessee. 10.2 In view of the above reasoning on facts and law we find that the judicial precedent as cited before us and as discussed and considered at length by the Hon'ble Delhi High Court in facts as upheld in the ruling of AAR in the case of ISRO (supra) is also found supported by the Hon'ble Jurisdictional High Court supports the view taken and the decision of the Hon'ble Madras High Court stands considered and the decision of the Hon'ble Karnataka High Court it is noted having been rendered on 9th June, 2014 did not have the benefit of the view taken by the Hon'ble Delhi High Court in the order of the Coordinate Bench in Viacom 18 the benefit of the said decisions was not available and in the said decisions relied upon by the Revenue, the similarity of the peculiar facts with the facts of AAR’s ruling in ISRO as considered by the Hon'ble Delhi High Court was not considered. Thus the lone ITAT decision cited by the learned CIT-DR of the Mumbai Tribunal it has been noticed did not have the benefit of the decisions of the Hon'ble Delhi High Court and in fact relies on the order of the Special Bench of the ITAT and the position of law as was then available. Accordingly, in view of the preponderance of the consistent views of Coordinate Benches the appeals of the assessee are allowed. ”

8. Since the facts and circumstances in this year remain the same as in the past years, which has been considered by the Tribunal, we find no reason to distract from the earlier decision of the Tribunal

dated 14.07.2017 (supra). Pertinently, it is also not the case of the Revenue that there is any change in the nature of the income being earned by the assessee from TCL than that considered by the Tribunal in its order dated 14.07.2017 (supra). Therefore, following the precedent in assessee's own case for I.T.A. No. 1717/Del/2022 45 Assessment Years 2000-01 to 2005-06, the stand of the assessee has to be approved.

9. So, however, before parting, we may make a mention of the discussion sought to be made by the DRP in the impugned order regarding the inapplicability of the ratio of the decision of the AAR in the case of ISRO Satellite Centre reported in 307 ITR 59 (AAR). In this context, we find that this aspect of the controversy has been expressly considered by our coordinate Bench while rendering its decision dated 14.07.2017 (supra). Therefore, we find no reason to uphold the stand of the Revenue in this year following the precedent in the assessee's own case. Therefore, so far as Ground of appeal nos. 2 & 3 are concerned, the same are allowed, as above. "

8. We further observe that in the case of DIT Vs. New Skies Satellite BV (supra) the Hon 'ble Delhi High Court held as under:- "The expression "process" and treaty interpretation in this case

54. Neither can an Act of Parliament supply or alter the boundaries of the definition under Article 12 of the DTAA's by supplying redundancy to any part of it. This becomes especially important in the context of Explanation 6, which states that whether the 'process' is secret or not is immaterial, the income from the use of such process is taxable, nonetheless. Explanation 6 precipitated from confusion on the question of whether it was vital that the "process" used must be secret or not. This confusion was brought about by a difference in the punctuation of the definitions in the DTAA's and the domestic definition. For greater clarity and to illustrate this difference, we reproduce the definitions of royalty across both DTAA's and sub clause (iii) to Explanation 2 to 9(1)(vi). 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 I.T. A. No.1717/Del/2022 46 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." (emphasis supplied) Article 12(4), Indo Netherlands Double Tax Avoidance Agreement ITA 473/2012, 474/2012, 500/2012 & 244/2014 Page 42 "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." (emphasis supplied) 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; (emphasis supplied)

55. *The slight but apparently vital difference between the definitions under the DTAA and the domestic definition is the presence of a comma following the word process in the former. In the initial determinations before various ITATs across the country, much discussion took place on the implications of the presence or absence of the "comma". A lot has been said about the relevance or otherwise of punctuation in the context of statutory construction. In spoken English, it would be unwise to argue against the importance of punctuation, where the placement of commas is notorious for diametrically opposite implications. However in the realm of statutory interpretation, courts are circumspect in allowing punctuation to dictate the meaning of provisions. Judge Caldwell once famously said "The*

words control the punctuation marks, and not the punctuation marks the words." ITA 473/2012, 474/2012, 500/2012 & 244/2014 Page 43 Holmes v. Pheonix Insurance Co.47. It has been held in CGT v. Budur 48and Hindustan Const v. CIT49 that while punctuation may assist in arriving at the correct construction, yet it cannot control the clear meaning of a statutory provision. It is but, a minor element in the construction of a statute, Hindustan Const50.

56. *The courts have however created an exception to the general rule that punctuation is not to be looked at to ascertain meaning. That exception operates wherever a statute is carefully punctuated. Only then should weight undoubtedly be given to punctuation; CIT v. Loyal Textile51; Sama Alana Abdulla vs. State of Gujarat52; Mohd Shabbir vs. State of Maharashtra53; Lewis Pugh Evans Pugh vs. Ashutosh Sen54; Ashwini Kumar Ghose v Arbinda Bose55; Pope Alliance Corporation v. Spanish River Pulp and Paper Mills Ltd.56. An illustration of the aid derived from punctuation may be furnished from the case of Mohd. Shabbir v. State of Maharashtra57 where Section 27 of the Drugs and Cosmetics Act, 1940 came up for construction. By this section whoever "manufactures for sale, sells, stocks or exhibits for sale or distributes" a drug without a license is liable for punishment. In holding that mere stocking shall not amount to an offence under the section, the Supreme Court pointed out the presence of comma 98 F 240 (1899) 103 ITR 189 208 ITR 291 supra*

note 46 231 ITR 573 AIR 1996 SC 569 AIR 1979 SC 564 AIR 1929 Privy Council 69 AIR 1952 SC 369 AIR 1929 PC 38 AIR 1979 SC 564 ITA 473/2012, 474/2012, 500/2012 & 244/2014 Page 44 after "manufactures for sale" and "sells" and the absence of any comma after "stocks" was indicative of the fact "stocks" was to be read along with "for sale" and not in a manner so as to be divorced from it, an interpretation which would have been sound had there been a comma after the word "stocks". It was therefore held that only stocking for the purpose of sale would amount to an offence but not mere stocking.

57. However, the question, which then arises, is as follows. How is the court to decide whether a provision is carefully punctuated or not? The test- to decide whether a statute is carefully (read consciously) punctuated or not- would be to

see what the consequence would be had the section been punctuated otherwise. Would there be any substantial difference in the import of the section if it were not punctuated the way it actually is? While this may not be conclusive evidence of a carefully punctuated provision, the repercussions go a long way to signify intent. If the inclusion or lack of a comma or a period gives rise to diametrically opposite consequences or large variations in taxing powers, as is in the present case, then the assumption must be that it was punctuated with a particular end in mind. The test therefore is not to see if it makes "grammatical sense " but to see if it takes on any "legal consequences".

58. Nevertheless, whether or not punctuation plays an important part in statute interpretation, the construction Parliament gives to such punctuation, or in this case, the irrelevancy that it imputes to it, cannot be carried over to an international instrument where such comma may or may not have been evidence of a deliberate inclusion to influence the reading of the section. There is sufficient evidence for us to conclude that the process referred to in Article 12 must in fact be a secret process and was always meant to be such. ITA 473/2012, 474/2012, 500/2012 & 244/2014 Page 45 In any event, the precincts of Indian law may not dictate such conclusion. That conclusion must be the result of an interpretation of the words employed in the law and the treaties, and discussions that are applicable and specially formulated for the purpose of that definition. The following extract from Asia Satellite⁵⁸ takes note of the OECD Commentary and Klaus Vogel on Double Tax Conventions, to show that the process must in fact be secret and that specifically, income from data transmission services do not partake of the nature of royalty. "74. Even when we look into the matter from the standpoint of Double Taxation Avoidance Agreement (DTAA), the case of the appellant gets boost. The Organisation of Economic Cooperation and Development (OECD) has

framed a model of Double Taxation Avoidance Agreement (DTAA) entered into by India are based. Article 12 of the said model DTAA contains a definition of royalty which is in all material respects virtually the same as the definition of royalty contained in clause (iii) of Explanation 2 to Section 9(1) (vi) of the Act. This fact is also not in dispute. The learned counsel for the appellant had relied upon the commentary issued by the OECD on the aforesaid model DTAA and particularly, referred to the following amendment proposed by OECD to its commentary on Article 12, which reads as under: '9.1 Satellite operators and their customers (including broadcasting and telecommunication enterprises) frequently enter into transponder leasing agreements under which the satellite operator allows the customer to utilize the capacity of a satellite transponder to transmit over large geographical areas. Payments made by customers under typical transponder leasing I.T.A. No. 1717/Del/2022 49 agreements are made for the use of the transponder transmitting capacity and will not constitute royalties under the definition of paragraph 2; these payments are not made in consideration for the use of, or right to use, property, or for information, that is referred supra note 1 ITA 473/2012, 474/2012, 500/2012 & 244/2014 Page 46 to in the definition (they cannot be viewed, for instance, as payments for information or for the use of, or right to use, a secret process since the satellite technology is not transferred to the customer). As regards treaties that include the leasing of industrial, commercial or scientific (ICS) equipment in the definition of royalties, the characterization of the payment will depend to a large extent on the relevant contractual arrangements. Whilst the relevant contracts often refer to the lease of a transponder, in most cases the customer does not acquire the physical possession of the transponder but simply its transmission capacity: the satellite is operated by the lessor and the lessee has no access to the transponder that has been assigned to it. In such cases, the payments made by the customers would therefore be in the nature of payments for services, to which Article 7 applies, rather than payments for the use, or right to use, ICS equipment. A different, but much less frequent, transaction would be where the owner of the satellite leases it to another party so that the latter may operate it and either use it for its own purposes or offer its data transmission capacity to third parties. In such a case, the payment made by the satellite operator to the satellite owner could well be considered as a payment for the leasing of industrial, commercial or scientific equipment. Similar considerations apply to payments made to lease or purchase the capacity of cables for the transmission of electrical power or communities (e.g. through a contract granting an indefeasible right of use of such capacity) or pipelines (e.g. for the transportation of gas or oil). 75. Much reliance was placed upon the commentary written by Klaus Vogel on Double Taxation Conventions (3rd Edition)'. It is

recorded therein: 'The use of a satellite is a service, not a rental (thus correctly, Rabe, A., 38 RIW 135 (1992), on Germany's DTC with Luxembourg); this would not be the case only I.T.A. No. 1717/Del/2022 50 in the event the entire direction and control over the satellite, such ITA 473/2012, 474/2012, 500/2012 & 244/2014 Page 47 as its piloting or steering, etc. were transferred to the user.' 76. Klaus Vogel has also made a distinction between letting an asset and use of the asset by the owner for providing services as below: *'On the other hand, another distinction to be made is letting the proprietary right, experience, etc., on the one hand and use of it by the licensor himself, e.g., within the framework of an advisory activity. Within the range from services', viz. outright transfer of the asset involved (right, etc.) to the payer of the royalty. The other, just as clear-cut extreme is the exercise by the payee of activities in the service of the payer, activities for which the payee uses his own proprietary rights, know-how, etc., while not letting or transferring them to the payer.'* 77. The Tribunal has discarded the aforesaid commentary of OECD as well as Klaus Vogel only on the ground that it is not safe to rely upon the same. However, what is ignored is that when the technical terms used in the DTAA are the same which appear in Section 9(1)(vi), for better understanding all these very terms, OECD commentary can always be relied upon. The Apex Court has emphasized so in number of judgments clearly holding that the well-settled internationally accepted meaning and interpretation placed on identical or similar terms employed in various DTAA's should be followed by the Courts in India when it comes to construing similar terms occurring in the Indian Income Tax Act.... *****

78. There are judgments of other High Courts also to the same effect.

(a) Commissioner of Income Tax Vs. Ahmedabad Manufacturing and Calico Printing Co., [139 ITR 806 (Guj.)] at Pages 820-822. I.T.A. No. 1717/Del/2022 51

(b) Commissioner of Income Tax Vs. Vishakhapatnam Port Trust [(1983) 144 ITR 146 (AP)] at pages 156-157. ITA 473/2012, 474/2012, 500/2012 & 244/2014 Page 48

(c) N.V Philips Vs. Commissioner of Income Tax [172 ITR 521] at pages 527 & 538-539."

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 DTAA's.

60. *Consequently, since we have held that the Finance Act, 2012 will not affect Article 12 of the DTAA's, it would follow that the first determinative interpretation given to the word "royalty" in Asia Satellite59, when the definitions were in fact parimateria (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 DTAA's 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 supra note 1 ITA 473/2012, 474/2012, 500/2012 & 244/2014 Page 49 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 I.T.A. No. 1717/Del/2022 52 of law framed is accordingly answered against the Revenue. The appeals fail and are dismissed, without any order as to costs. "*

9. *In view of above, respectfully following the decision of the coordinate bench and the decisions of the jurisdictional High Court referred to above, we hold that the amounts received by the assessee for the use of transponder of tele-communication service charges are not royalty under section 9(1)(vi) of the Act and also under Article 128) of Indo Netherland DTAA.*

10. *Ground Nos. 1 to 9 of the assessee are allowed.*

9. *Ld. AR of the assessee also submitted that appeals filed by the revenue have been dismissed by the Hon'ble Delhi High Court. In the appeals of The Commissioner of Income Tax - International Taxation -2 v. Inmarsat Solutions BV ITA No. 310/2024 and others appeals the Hon'ble Delhi High Court held as under:*

Having heard learned counsel for the appellant and on going through the judgment rendered by the Income Tax Appellate Tribunal ['Tribunal'], we find that the issues raised here stand concluded against the appellant in light of the decision rendered in Asia Satellite Telecommunications Co. Ltd. Vs. DIT

[2011 SCC On Line Del507] as well as DIT vs. New Skies Satellite BV [2016 SCC On Line Del 796]. Consequently, and in view of the aforesaid, the appeals shall stand dismissed.

10. Since the issues are exactly similar and grounds as well as the facts are also identical, respectfully following the above decision in assessee's own case for the A.Y. 2019-20 & 2020-21, we allow the grounds except ground No.2 raised by the assessee in this regard."

5. Respectfully following the aforesaid decision, the grounds raised by the assessee are allowed.

6. In the result, the appeal of the assessee is allowed.

Order pronounced in the open court on 30/09/2025.

-Sd/-
(VIMAL KUMAR)
JUDICIAL MEMBER

-Sd/-
(M. BALAGANESH)
ACCOUNTANT MEMBER

Dated: 30/09/2025
A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi