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

ITA No. 410/Del/2019 (Assessment Year: 2015-16)
ITA No. 7534/Del/2019 (Assessment Year: 2016-17)
ITA No. 381/Del/2019 (Assessment Year: 2017-18)

Sabre Marketing Nederland, BV, Westerdoksdijk 423, 1013 BX Alere, Netherlands,	Vs.	ACIT, Circle-3(1)(2), International Taxation, New Delhi
(Appellant)		(Respondent)
PAN: AATCS8885K		

Assessee by :	Shri Tarandeep Singh, Adv
Revenue by:	Ms. Ekta Jain, CIT DR
Date of Hearing	02/12/2025
Date of pronouncement	07/01/2026

O R D E R

PER M. BALAGANESH, A. M.:

1. The Assessee Sabre Marketing Nederland, B.V. (hereinafter referred to as 'assessee) by filing the present appeal sought to set aside the impugned order dated 31.10.2018 for AY 2015-16, 19.07.2019 for AY 2016-17 and 05.02.2021 for AY 2017-18 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)-2, New Delhi dated 25.09.2018, 13.05.2019 and 18.03.2020 u/s 144C(5). Identical issues are involved in all these appeals and hence they are taken up together and disposed of by this common order for the sake of convenience.

2. The facts relevant for assessment year 2015-16 are taken up for adjudication and the decision rendered thereon shall apply mutatis mutandis for assessment years 2016-17 and 2017-18 also, in view of identical facts, except with variance in figures.

3. Though the Assessee has raised several grounds of appeal before, the only effective issue to be decided is as to whether the amounts received from Airlines by the Assessee constitute Royalty chargeable to tax as per the provisions of section 9(1)(vi) of the Act and as per Article 12 of India Netherlands Double Taxation Avoidance Agreement (DTAA) or not.

4. We have heard the rival submissions and perused the materials available on record. The Assessee is a tax resident of Netherlands. The Assessee is a technology solutions provider to the airline industry. The company markets and distributes travel related products and services to airlines which include airline decision support applications and implementation and support services for Sabre software packages. For rendering the above mentioned services, the Assessee primarily makes use of software hosted on its vendors servers located outside India. The Assessee had entered into Master Agreements with various airlines wherein the Assessee has agreed to facilitate provision of aforementioned solutions and implementation and support services. Assessee earns fees from participating airlines for abovementioned services / solutions which are based on activities originating in India or on number of transactions originating in India and such fee is received by the Assessee outside India.

5. The Learned AO in the draft assessment proceedings observed that Assessee has received India generated booking fees, which would be considered as income earned by the PE in India and in view of the decision in Assessee's own

case for assessment years 1997-98 to 2005-06, where the Hon'ble Delhi High Court had held that the Assessee has PE in India under the India- Netherlands DTAA and also has business connection within the meaning of section 9 of the Act under the domestic law. Further in the case of a group company of the Assessee i.e. Sabre GLBL INC, the Hon'ble Delhi High Court had held that Sabre GLBL INC has PE in India and had applied 15% attribution of profits resulting from booking fee generated from India to the PE. Accordingly in the draft assessment order, the Learned AO proposed determined the income of the Assessee at the rate of 15 percent to the PE in India of total business receipts of Rs 16,00,76,064/-. Accordingly, the business income was determined at the rate at an amount of Rs 2,40,11,410/- (15% of 160076064). The Assessee preferred objections before the Learned DRP. The Learned DRP directed the Learned AO to treat the receipts from the airlines in Indian jurisdiction in the nature of royalty taxable under the provisions of section 9(1)(vi) of the Act to be taxed at the rate of 10 percent of gross revenue. The Learned AO pursuant to the directions of the Learned DRP passed the final assessment order determining the total income by treating the receipts from air booking fees as royalty u/s 9(1)(vi) of the Act which was taxed at the rate of 10 percent .

6. We find that the show cause notice issued by the Learned DRP initially was to tax the receipts from Indian customers as Fee for Technical Services (FTS) both under the Act as well as under the India-Netherlands Treaty vide Article 12. The Assessee filed its submissions before the Learned DRP to the said show cause notice. But ultimately, the Learned DRP sought to treat the receipts from Indian customers as Royalty taxable u/s 9(1)(vi) of the Act instead of FTS u/s 9(1)(vii) of the Act. There was no occasion for the Assessee to make its submissions for non-taxability of receipts as Royalty under the India –Netherlands Treaty in assessment

year 2015-16. However, we find that in assessment year 2016-17, the Assessee made duly its submissions for non-taxability of Royalty both under the domestic law as well as under the Treaty. In assessment year 2016-17, the Learned AO held the receipts from Indian customers to be taxable as Royalty both under the domestic law as well as under the Treaty. The Learned AR fairly stated that the taxability of receipts from Indian customers as Royalty under the domestic law is not disputed by him. He submitted that the receipts from Indian customers, though treated as Royalty, would not be taxable under the India-Netherlands Treaty. He drew our attention to Article 12 of India –Netherlands Treaty wherein under clause 4, the term Royalties is defined. For the sake of convenience, the same is reproduced below:-

> *"Article 12(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.*
>
> *6.1.It would be relevant to refer to the Master Agreement dated 30-12-2014 entered into between Jet Airways India Ltd and Assessee herein. The relevant clauses thereon are reproduced below:-*
>
> ***5. <u>Intellectual Property</u>***
>
> *5.1.**Retention of Rights** .*
> *As between the parties, all Intellectual Property Rights subsisting and vesting in a party prior to the Effective Date shall remain vested in that party and except as expressly set out in this <u>Section 5</u> or under any Work Order, nothing in this Agreement shall be deemed to grant to one party, by implication, estoppel or otherwise any license rights, ownership rights, or any other interest in the other party's Intellectual Property Rights.*
>
> *5.2. **Sabre's Intellectual Property Rights**.*
>
> *Notwithstanding anything contained in this Agreement or any Work Order, Sabre warrants and represents that Sabre owns Intellectual Property Rights*

or has the appropriate licenses in and to the system and documentation in order to provide customer with the use and access rights provided under this Agreement.

5.3 ***License***.

Unless otherwise agreed in a Work Order, Sabre hereby grants to Customer a non-exclusive, non-transferable, worldwide right during the Term of the applicable Work Order to access and use the System provided by Sabre under the Work Order and integrate the system with such other software and platforms as is necessary for customer to utilise the System for Customer's Internal airline business.

Customer's access to and usage rights of, the System(s) for a particular Work Order under this Section 5.3 may be extended to any subsidiary airline in which Customer has (i) an equity ownership of atleast 51% of the entire issued share capital or (ii) management control, subject to execution of an amendment to this Agreement and /or a further Work Order to the Agreement and the payment of additional, agreed fees and charges to Sabre for such extension. As of the Effective Date, Customer's wholly owned subsidiary for which it has management control consists of Jet Lite (India) Ltd. It is, however, clarified that no additional Subscription Fees will be payable for any such extension since figures of Passengers Boarded as furnished in Exhibit-4, already reflect the number of total passengers of both Customer and Jet Lite (India) Ltd.

5.4. ***Sabre Retention of Rights***
Unless otherwise agreed in a Work Order, Sabre retains exclusive ownership of all worldwide Intellectual Property Rights in the System(s) and Documentation, including any derivative work, modification, update or version thereof. Sabre and its suppliers reserve all rights in and to the System and Documentation not expressly granted to Customer in this Agreement.

5.5. ***Express Restrictions***

The System(s) and its structure, organization, and source code constitute valuable trade secrets of Sabre. Customer agrees not to without Sabre's prior, written consent; (i) modify, adapt, alter, translate or create derivative works from a System; (iii) sublicense, lease, rent, or loan a system to any third party; (iv) reverse engineer, decompile, disassemble, or otherwise attempt to derive the source code for a System; or (v) otherwise use or copy

the System except as expressly allowed in this Agreement. Decompiling a System is permitted to the extent the laws of Customer's jurisdiction give Customer the right to do so to obtain information necessary to render a System interoperable with other software; provided, however, that Customer must first request such information from Sabre and Sabre shall not unreasonably withhold the information required. The parties acknowledge that certain software provided by Sabre such as Qlk developer enables Customer to make modifications to certain aspects of Systems and such modification is expressly allowed.

6.2. It would also be relevant to reproduce the relevant clauses of the Work Order to the Master Agreement which are as under:-

1.Description of System and Services

a. ***System Description*** *: Sabre will provide Customer with access to, and use of the System described in the attached Appendix A. Customer acknowledges the core System has been previously delivered and is currently in productive use by Customer. Additional in-scope System components identified in Table 1 of Exhibit 4 to the Agreement (the* ***"In-Scope Components"****) will be implemented in accordance with a Project Schedule to be mutually agreed upon by the parties. Once implemented, the In-Scope Components shall be considered to be a part of, and included within, the System.*

b. ***Hosting of System****: Sabre has established and will make available the System for Customer's use, including any necessary physical lines from the System to the Internet via an Internet service provider or through a direct telecommunication connection. The System shall reside on a server, or cluster of servers, which are physically located at Sabre's or its designee's palce of business and may be used for the applications of other Sabre customers or third parties. Sabre shall only be responsible for the operation and performance of the System within the Sabre Data Center. At its expense, Customer shall be responsible for obtaining, installing and maintaining equipment, network, Internet or direct telecommunications connection and software applications required for Customer to access and utilize the System from the Sabre Data Center. The System requirements may change from time to time as notified by Sabre to Customer in writing. Sabre shall not be responsible for the operation of the Customer's Internet, network or other communication services including those that are provided or procured by Sabre on behalf of the Customer.*

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2. Usage Rights and Restrictions

a. ***Usage Rights*** *: Effective upon the date on which the System is made available for Customer's use, and provided that Customer is and remains in compliance with the terms of the Agreement and this Work Order, Sabre grants to Customer a personal, limited, revocable, non-exclusive and non-transferable right, during the term of this Work Order, to (i) access and use the System via the Internet or direct telecommunication link solely for Customer's internal airline operations, and (ii) use the associated Documentation in support of Customer's authorized use of the System. The Documentation will be provided via the Sabre Community Portal website.*

b. ***Express Restrictions on Use:*** *In addition to the restrictions contained in the Agreement, Customer agrees not to (i) copy, re-sell, reproduce, distribute, republish, download, post, frame or transmit in any form or by any means , or allow another to use or access the Systems, (ii) transmit any data to the System that contains software viruses or other harmful or deleterious computer code, files or programs or (iii) interfere with or disrupt services or networks connected to the System, or violate the regulations, policies or procedures of such networks."*

7. In the case before us, the Assessee had not given any use or right to use any Intellectual Property Rights to the Customers. Infact this has been addressed by the Hon'ble Delhi High Court in the case of CIT vs Telstra Singapore PTE Ltd reported in 467 ITR 302 (Del). The relevant operative portion of the said judgement is reproduced below:-

"H. THE USE/RIGHT TO USE QUESTION

78. *Reverting then to Article 12 of the DTAA itself, we find that paragraph 3 thereof defines "royalty" to mean the payment of consideration for the use or the right to use, any copyright, patent, trademark, design or model plan, secret formula or process, and other activities mentioned therein. The respondents had sought to contend that the service availed of by customers from the respondent assessee would fall within the ambit of 'secret formula' or 'process'. It is in the aforesaid context that Mr. Sabharwal had commended for our consideration the principle of noscitur a sociis and had submitted that the word 'process' must derive colour and meaning from the other intellectual property rights which are spoken of in Para 3 of Article 12. There appears to be significant force in that submission when one views Para 3(a) in its entirety.*

> ***79.*** *As noted hereinabove, Article 12(3) defines 'royalty' to mean payments received for the use or right to use copyrighted articles, patents, trademarks, designs, models, secret formulae or processes. The latter part of Para 3(a) also ropes in consideration that may be received from the alienation of any such right, property, or information. The expression "use" or "right to use" must consequently be understood in the aforesaid light and thus contemplating a positive conferral of a right to employ, possess or utilize a patent, trademark, process or equipment. In order to fall within the ambit of the royalty Article, it would be imperative for the Court discerning a right given to make use of the patent, trademark process or equipment. The key element would be effective control or dominion having been conferred upon an individual or entity for consideration. Use or right to use would necessarily entail the grant of a right to exploit or bring into effective use. A mere advantage or benefit derived from a service provided cannot possibly be countenanced to fall within the meaning of the expression's "use" or "right to use" as they appear in Article 12. What we seek to emphasise is that the use of a service while equipment or process remains with and in the control of the provider cannot attract process or equipment royalty provisions. Similarly, merely because an equipment or process comes to be deployed or used in the course of providing a service would not attract Article 12. This since no dominion or control came to be granted or transferred."*

8. As per the definition of Royalty given in the Treaty, the Assessee should have given the Secret Process or Formula to the Customers in India, which is factually not done in the instant case before us. Reliance in this regard has been rightly placed by the Learned AR on the decision of the Hon'ble Delhi High Court in the case of DIT vs New Skies Satellite BV reported in 382 ITR 114 (Del) wherein the relevant operative portion is reproduced hereunder:-

> ***"29.*** *The Revenue argues that critical aspects of this judgment, primarily that the function performed by the transponder could not be categorized as a "process" and that even in the event it could be, there was no "use" of this process since there was no control exercised by the customers, is no longer good law in light of the inclusion of Explanations 4-6 by the Finance Act, 2012. In other words the Revenue contends that a mere reading of Explanation 4-6 will go to show that they are clarificatory and are therefore automatically retrospective. By this reason, as clarificatory amendments do, these explanations relate back to the time when the main provision of Section 9(1)(vi) first came into force. By logical extension, the judgment in Asia*

Satellite Telecommunications Co. Ltd.'s case (supra) was based on a misinterpretation of the section and thus no longer holds the field or corresponds to the correct interpretation of the definition of royalty.

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31. *In a judgment by the Madras High Court in Verizon Communications Singapore Pte Ltd. v. ITO, International Taxation [2014] 361 ITR575/224 Taxman 237 (Mag.)/[2013] 39 taxmann.com 70, the Court held the Explanations to be applicable to not only the domestic definition but also carried them to influence the meaning of royalty under Article 12. Notably, in both cases, the clarificatory nature of the amendment was not questioned, but was instead applied squarely to assessment years predating the amendment. The crucial difference between the judgments however lies in the application of the amendments to the DTAA. While TV Today Network Ltd.'s case (supra) recognizes that the question will have to be decided and the submission argued, Verizon Communications Singapure Pte. Ltd.'s case (supra) cites no reason for the extension of the amendments to the DTAA.*

……
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 DTAAs 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 DTAAs and the domestic definition. For greater clarity and to illustrate this difference, we reproduce the definitions of royalty across both DTAAs 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 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

*'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." Holmes v. Pheonix Insurance Co. [1899] 98 F 240 It has been held in CGT v. Budur Thippaiah [1976] 103 ITR 189 (AP) and Hindustan Construction Co. Ltd. v. CIT [1994] 208 ITR 291/[1993] 68 Taxman 471 (Bom.) 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 Construction Co. Ltd's case (supra).*

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 Textile Ltd. [1998] 231 ITR 573/[1997] 95 Taxman 293 (Mad.); Sama Alana Abdulla v. State of Gujarat AIR 1996 SC 569; Mohd Shabbir v. State of Maharashtra AIR 1979 SC 564; Lewis Pugh Evans Pugh v. Ashutosh Sen AIR 1929 SC 69; Ashwini Kumar Ghose v. Arbinda Bose AIR 1952 SC 369; Pope Alliance Corpn. v. Spanish River Pulp & Paper Mills Ltd. AIR 1929 PC 38 An illustration of the aid derived from punctuation may be furnished from the case of Mohd. Shabbir (supra) 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 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. 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 treatises, and discussions that are applicable and specially formulated for the purpose of that definition. The following extract from Asia Satellite Telecommunications Co. Ltd's case (supra) 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 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 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 in the event the entire direction and control over the satellite, such 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 DTAAs 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.

(b) Commissioner of Income Tax Vs. Vishakhapatnam Port Trust [(1983) 144 ITR 146 (AP)] at pages 156-157.

(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 DTAAs.

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, 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 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."*

8.1. Though this decision was rendered in the context of functions performed by the Transponder, the analogy could be drawn to the facts of the instant case before us. One of the essences of this judgement is that any amendment made in the domestic law cannot be read automatically into the Treaty for the purpose of taxability of Royalty or otherwise.

9. The third limb of the definition of Royalty under the treaty speaks about information concerning industrial, commercial or scientific experience. To explain the same, the Learned AR rightly placed reliance on the decision of this Delhi

Tribunal in the case of Salesforce.com Singapore Pte vs DDIT (IT) reported in 137 taxmann.com 3 (Del Trib) dated 25-3-2022 wherein the relevant operative portion is reproduced hereunder:-

> ***"13.*** *We have given thoughtful consideration to the contentions of the ld. DR and have duly considered the written submissions. In our understanding of the facts, the assessee provides web-based online access to its customer's data hosted on servers located in data centers maintained by the assessee outside India. The assessee does not have any data centers in India and hence it cannot be considered to have a fixed place of business in India. The assessee neither has a place of management in India nor has any equipment or personnel in India. This fact has also been accepted by the ld. CIT(A) in his order. Therefore, in the absence of granting any control over the equipment belonging to the assessee to its customers, the allegation of the AO that the amount so received will constitute 'Royalty' is not acceptable.*
>
> ***14.*** *Further, the assessee does not provide any information concerning industrial, commercial, scientific experience. The assessee only processes the proprietary data of the customers and provides the result in form of desired reports etc. On this count also, it cannot be said that consideration for CRM services are in the nature of royalty.*
>
> ***15.*** *In our considered opinion, if the services have been rendered de hors imparting of knowledge or transfer of any knowledge, experience or skill, then such services will not fall within the ambit of article 12 of the treaty.*
>
> ***16.*** *Further, by granting access to the information forming part of the database, the assessee neither shares its own experience, technique or methodology employed in evolving databases with the users, nor imparts any information relating to them.*
>
> ***17.*** *In our considered view, the income earned by the assessee from the Indian customers with respect to the subscription fees for CRM cannot be taxed as royalty as per section 9(1)(vi) of the Act as well as article 12(3) of the treaty."*

9.1. It is pertinent to note that this decision has been affirmed by the Hon'ble Delhi High Court reported in 165 taxmann.com 580 (Del HC). This decision is relied upon only for the limited purpose of non-taxability of Royalty under the Treaty using the third limb of the definition given in the Treaty.

10. In view of the aforesaid observations and respectfully following the various judicial precedents relied upon hereinabove, we hold that the amounts received by the Assessee from its Indian customers would not constitute Royalty as per Article 12(4) of India-Netherlands Treaty and accordingly the Assessee was duly justified in not offering the same to tax in India.

11. In the result, all the appeals of the Assessee are partly allowed.

Order pronounced in the open court on 07/01/2026.

-Sd/-	-Sd/-
(VIKAS AWASTHY)	**(M. BALAGANESH)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: 07/01/2026

A K Keot

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

ASSISTANT REGISTRAR
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