

CTR ENCYCLOPAEDIA ON INDIAN TAX LAWS

DEPUTY COMMISSIONER OF INCOME TAX vs. PANAMSAT INTERNATIONAL SYSTEMS INC.*

ITAT, DELHI 'A' BENCH

R.V. Easwar, Vice President & G.S. Pannu, A.M.

ITA No. 1796/Del/2001

11th August, 2006

(2006) 103 TTJ (Del) 861 : (2006) 9 SOT 100 (Del)

Legislation referred to

Section 9(1)(vi), Explan. 2, 90, DTAA between India & USA, Art. 12.3(a), DTAA between India & USA, Art. 12.4(b), DTAA between India & USA, Art. 12.7

Case pertains to

Asst. yr. 1997-98

Decision in favour of

Assessee

*Also **PanAmSat International Systems LLC vs. Dy. CIT** (C.O. No. 274/Del/2004 and ITA No. 2041/Del/2004; asst. yr. 1997-98)

Double taxation relief—Agreement between India and USA—Payment for use of transponder capacity—Requirement under art. 12.3(a) of Indo-US treaty is that both the formula and the process for which payment is made should be a secret formula or a secret process in order that the consideration may be characterised as royalty—Transponder technology is not a secret technology known only to few, and is neither protected by law nor is capable of being so protected—This technology is even available in the form of published literature/book from which an interested person can obtain knowledge relating thereto—Since there is nothing secret about the process involved in the operation of a transponder, the payment for the use of the process, assuming it to be so, does not amount to royalty—There is not an iota of evidence to show that the assessee had any patent to the satellite or transponder which it allowed the broadcasters to use for a consideration—Broadcaster has made the payment of "service fee" for use of transponder to transmit the signals and not for use of any process—Thus, the payment made to the assessee does not amount to royalty—Also, the payment cannot be considered and taxed as "fees for included services" under art. 12.4(b)—Assessee does not render any technical service to the broadcasters by permitting them to make use of transmission facility—Question of "making available" any technical knowledge, etc., therefore, does not arise

Held :

There is a "process" involved in the activity carried on by the assessee. There is a comma after the words "secret formula or process" in art. 12.3(a) of Indo-US DTAA which indicates that both the words "formula" and "process" are qualified by the word "secret". The requirement thus under the treaty is that both the formula and the process, for which the payment is made, should be a secret formula or a secret process in order that the consideration may be characterised as royalty. Normally punctuation by itself cannot control the interpretation of a statutory provision. However, the punctuation—the use of the comma—coupled with the setting and words surrounding the words under consideration, indicates that under the treaty even the process should be a secret process so that the payment therefor, if any, may be assessed in India as royalty. The words which surround the words "secret formula or process", in art. 12.3(a) of the treaty refer to various species of intellectual properties such as patent, trade mark, design or model, plan, etc. Thus the words "secret formula or process" must also refer to a specie of intellectual property applying the rule of ejusdem generis or noscitur a sociis.—[Asia Satellite Telecommunication Co. Ltd. vs. Dy. CIT](#) (2003) 78 TTJ (Del) 489 : (2003) 85 ITD 478 (Del) **distinguished**.

(Para 19)

So far as the transponder technology is concerned there appears to be no "secret technology", known only to a few. There is evidence to show that the technology is even available in the form of published literature/book from which a person interested in it can obtain knowledge relating thereto. There is no evidence led from the side of the Department to show that the transponder technology is secret, known only to a few, and is either protected by law or is capable of being protected by law. Since there is nothing secret about the process involved in the operation of a transponder, the payment for the use of the process—assuming it to be so—does not amount to royalty.

(Para 20)

The argument that the consideration has been received by the assessee for letting the broadcasters use the patent relating to the transponder/satellite goes farther than the assessment order and therefore cannot be accepted. Even on merits the argument is not acceptable since the patent relating to the transponder/satellite is not with the assessee but is with the manufacturer of the same. There is no clause in the purchase agreement to show that the patent relating to the transponder/satellite was also transferred to the assessee by the manufacturer. If the patent did not enure to the assessee, how the assessee could have, even in the wildest of imaginations, let the broadcasters use the same for consideration. The argument sought to be made is factually not borne out. There is not on iota of evidence to show that the assessee had any patent to the satellite or transponder which it allowed the broadcasters to use for a consideration.

(Para 21)

The broadcaster has made the payment of "service fee" for the use of the transponder to transmit the signals; he is hardly interested in the technology used inside the transponder. He is only concerned with the transmission of the signals and what technology is used by the transponder or the satellite is hardly of his concern. He only means to utilise the services of the assessee, the service being the undertaking of the task of transmitting the signals produced or uplinked by the broadcaster and beaming them over the footprint area to enable the cable operators to catch the signals and beam them to the viewers. Thus, the intention of the parties gathered on a wholesome reading of the agreement is that payment should represent consideration for the use of a service, and not for the use of any process. It is a standard facility or service provided to all those willing to pay. In this view of the matter, the payment made to the assessee does not represent consideration for the use of any process.—[Skycell Communications Ltd. & Anr. vs. Dy. CIT & Ors.](#) (2001) 170 CTR (Mad) 238 : (2001) 251 ITR 53 (Mad) **applied**; [ABC, In re](#) (1999) 154 CTR (AAR) 246 : (1999) 238 ITR 296 (AAR), [XYZ, In re](#) (1999) 153 CTR (AAR) 224 : (1999) 238 ITR 99 (AAR) **distinguished**.

(Para 23)

Under art. 12.4(b), technical knowledge, etc., have to be made available to the broadcaster in consideration for the payment. It is not enough that the assessee renders any technical or consultancy services. The further requirement is that such services should make available to the broadcaster technical knowledge etc. The assessee does not render any technical service to the broadcasters by permitting them to make use of the transmission facility. The question of "making available" any technical knowledge etc. therefore simply does not arise. Even if the view that the assessee does not provide any technical service to the broadcasters is wrong, still it has to be proved (by the Revenue) that some technical knowledge, experience etc. was made available to the broadcasters in regard to the working of the transponder/satellite which they (the broadcasters) may apply by themselves, without reference to the assessee, in future for the purpose of their business. This is not possible. During the period of working of the agreement, no technology relating to transponder/satellite can be said to have been made available to the broadcaster just because he has been using the services of the assessee for a number of years. The mere possibility that the broadcaster may have acquired some familiarity with or insights into the working of the transponder during the currency of the agreement does not trigger art. 12.4(b) of the treaty into action because the act of "making available" should emanate from the person who renders the technical services and does not take in the capacity or ability of the person to whom the services are rendered to gather, by his own efforts or inquisitiveness, any technical knowledge, experience, skill etc. There should be an agreement or formal understanding or arrangement under which the technical knowledge, experience etc. are transmitted to the person utilizing the technical services, with both parties at that time clearly acknowledging or being aware of the right of the person utilising the technical services to apply the technical knowledge, experience etc. in future for his own benefit without recourse to the person rendering the technical services. In this view of the matter, it is not possible to accept the argument of the Department that the broadcaster may have acquired a working knowledge of the way the transponder functions or operates which would bring the case under art. 12.4(b).—[Raymond Ltd. vs. Dy. CIT](#) (2003) 80 TJJ (Mumbai) 120 : (2003) 86 ITD 791 (Mumbai) **applied**.

(Para 26)

The MoU concerning fees for included services in art. 12.4 entered into on 5th May, 1989 under the heading "para 4(b)", on which reliance has been placed by the Department is not apposite. What the MoU does is to give examples of areas or fields in which it is possible for the parties to agree to transfer technology. Communication through satellite or otherwise is one such area, given as example, in which transfer of technology is possible. Though the assessee is engaged in the business of transmitting TV signals from one place to another, it has not agreed to transfer any technology relating to this activity to the broadcasters. It has merely undertaken to transmit the signals sent by the broadcaster for a price. That essentially is a service contract. The example given in the MoU cannot be understood to mean that wherever a satellite is used in relation to the rendering of a service, it must be assumed that there is a transfer of technology relating to the area of communication through satellite. Thus the payment does not also fall within art. 12.4(b) as "fees for included services".

(Paras 27 & 28)

The service fee is payable monthly. Even if it is assumed that the payment of the fee is linked to the productivity, meaning thereby that it is linked to the number of hours the transponder is utilized by the broadcaster, art. 12.3(a) requires that the consideration should amount to "gains derived from the alienation of any such right or property which are contingent on the productivity." The right referred to is the right to use the secret process. Since it is held that there is no right conferred to the broadcaster to use any secret process developed by the assessee, the payment of the service fee, even if it is assumed to be contingent on the productivity (number of hours of transmission) cannot be considered to be royalty.

(Para 30)

The argument that under the agreement it was the broadcaster's responsibility to install the earth-station which would uplink the signals and in doing so, he would get enriched with the technology which would attract the principle of "make available" is not tenable because the technology, if any, involved in the setting up of the earth-station is not to be provided by the assessee at all. The broadcaster/TV channel may itself possess the technology and be capable of setting up the earth-station or it may engage an entity which specialises in setting up earth stations. There is no evidence to show that it was the assessee which helped the broadcasters in setting up the earth-stations; in fact, and on the contrary, the responsibility was that of the broadcasters. Even assuming that the broadcasters did get enriched with the knowledge of the technology involved in setting up the earth stations, such technology, knowledge, skill etc. did not get transmitted from the assessee.

(Para 34)

Clauses (a) and (b) of art. 12.7 are mutually exclusive. In other words, if the income arises in one of the two States in accordance with cl. (a), then in respect of such income cl. (b) becomes irrelevant and it is not permissible to look into it. Therefore, it follows that any payment received by the assessee from the US customers (broadcasters residents of USA) arises in USA under cl. (a) and are taxable there. Even if it is assumed for the sake of argument that cl. (b) applies, the language of the treaty is materially different and is narrower than the corresponding provisions of the IT Act relating to the "source rule" embodied in s. 9(1)(vii)(c) and s. 9(1)(vi)(c). Under cl. (b) of art. 12.7 of the treaty, it seems that the process itself must be used in India to be taxed in India as royalty, a situation which does not obtain in the case on hand. The "process" of conversion of the uplinked signals into beamable signals that can be caught and seen in the homes on the TV screens takes place several thousands of kilometers above the earth. It cannot therefore be said that the "process" itself takes place in India as appears to be the requirement of cl. (b). Even with regard to fees for included services, it appears from the language of the clause that the services have to be performed in India. This situation also does not obtain in the case on hand. The payment should relate to services "performed" in India in order to be taxed in India. The performance of the services is not in India and it is several thousand kilometers above the earth. The word "performed" is equivalent to "rendered". The word "utilised" connotes an idea in total contrast with the idea conveyed by the words "performed" and "rendered". A service could be "performed" or "rendered" in a place which is different from the place where it is "utilised". Whereas the Act uses the word "utilised" the treaty uses the word "performed". However, no final views are expressed as it is considered to be unnecessary in the light of basic finding that the payments made to the assessee before us are not "royalties" within the meaning of art. 12.3(a) or "fees for included services" within the meaning of art. 12.4(b). The source rule embodied in art. 12.7 would come into play only when it is found that the payment is royalty or fees for included services.—[Steffen, Robertson and Kirsten Consulting Engineers & Scientists, In re](#) (1998) 144 CTR (AAR) 90 : (1998) 230 ITR 206 (AAR) **applied**.

(Paras 35 & 36)

Conclusion :

Payment made to assessee, a US company, by non-resident television channels for use of telecommunication satellite (transponder) to transmit signals to Indian viewers does not amount to royalty within the meaning of art. 12.3(a) of DTAA between India and USA but it is payment of "service fee"; such payment cannot be considered and taxed as "fees for included services" under art. 12.4(b).

In favour of :

Assessee

Cases referred to

CIT vs. P.V.A.L. Kulandagan Chettiar (Dead) Through LRs (2004) 189 CTR (SC) 193 : (2004) 267 ITR 654 (SC)

Dun & Broadstreet Espana, S.A., In re (2005) 193 CTR (AAR) 9 : (2005) 272 ITR 99 (AAR)

Motorola Inc. vs. Dy. CIT (2005) 96 TTJ (Del)(SB) 1 : (2005) 95 ITD 269 (Del)(SB)

Sedco Forex International Drilling Inc. vs. Dy. CIT (2000) 67 TTJ (Del) 670 : (2000) 72 ITD 415 (Del)

State of UP vs. Union of India (2004) 190 CTR (SC) 569

Union of India vs. Azadi Bachao Andolan (2003) 184 CTR (SC) 450 : (2003) 263 ITR 706 (SC)

Counsel appeared :

O.P. Vaish, Ajay Vohra & Ajay Behl, for the Assessee : Y.K. Kapoor & B.N. Verma, for the Revenue

ORDER

r.v. easwar, vice president :

The appeals are both by the assessee and the Revenue, and the cross-objection is by the assessee all pertaining to the asst. yr. 1997-98. These matters were heard over a long period of time spanning several months. ITA No. 2041/Del/2004 arises out of the reassessment made on 28th March, 2003 upon PanAmSat International Systems LLC, which is a non-resident company incorporated under the laws of the United States of America ("USA"). ITA No. 1796/Del/2001 and C.O. No. 274/Del/2004 arise out of the assessment made on the amalgamating company by name PanAmSat International Systems Inc., of Connecticut, USA. The question which arises in these matters simply is whether the payments made by some of the non-resident companies (referred to as broadcasters or television channels) to the assessee-company are subject to the tax under the IT Act, 1961.

Brief facts : Assessment proceedings

2. The assessee owns and operates a global network of telecommunication satellite which is located at a height of around 35,900 kms. (22,300 miles) above the earth. Several television channels use the satellite for purposes of transmission of the images. They videograph the events as they happen, use the uplink facilities to send the signals, after encoding them, to the satellite owned by the assessee. At the satellite, which is also referred to as transponder, the signals are decoded and they are down-linked and scattered over the area covered by the satellite, which area is referred to as the "footprint" of the satellite. The television channels enter into contracts with the assessee-company for using the satellite (actually, the transponder capacity). They make use of the facility to make the signals available to the cable operators who in turn beam the signals to the viewers at their homes. There are agreements entered into for this purpose between the television channels and the assessee.

3. During the accounting period 1st April, 1996 to 31st March, 1997 the assessee derived total revenues of US \$ 213,97,554 from the various non-resident television channels as shown at p. 13 of the assessment order, the Indian rupee equivalent of which was Rs. 77,35,21,577. According to

the AO, cl. (iii) of Explan. 2 below cl. (vi) of sub-s. (1) of s. 9 of the IT Act, 1961 was applicable and the revenues were liable to be assessed as "royalty". Under these provisions, royalty meant consideration "for the use of any patent, invention, model, design, secret formula or process or trade mark or similar property". He further held that the amounts would be considered as "royalty" even though they are received from non-resident television channels. In support of this decision, he held that the foreign television channels are utilizing the services provided by the assessee for their business that is being carried out in India. He referred to the fact that the television channels have a large section of Indian viewers and the programmes are so produced as to cater to the tastes and preferences of the Indian viewers. The income, according to the AO, accrued in India because of the fact that the services of the assessee were utilized by the television channels in India.

4. Having held as above, the AO proceeded to consider whether the revenues fall to be taxed under art. 12 of the Double Tax Avoidance Agreement between India and USA. He referred to the article, particularly to art. 12.3 which defines royalty as meaning "payments of any kind received as a consideration for the use of, or the right to use any copyright of a literary, artistic, or scientific work, including cinematograph films or work on film, tape, or other means of re-production for use in connection with radio or television broadcasting any patent, trade mark, design or model plan, secret formula or process, or for information concerning industrial, commercial or scientific experience, including gains derived from the alienation of any such right or property which are contingent on the productivity, use, or disposition thereof". According to the AO, the transponder owned by the assessee carried out a process, that the process was also a secret process since satellite technology and the processes performed within a satellite are secret processes protected by law and that on these facts the case was completely governed by the decision of the Delhi Bench of the Tribunal in the case of Asia Satellite Telecommunication Ltd. vs. Dy. CIT (2003) 78 TTJ (Del) 489 : (2003) 85 ITD 478 (Del) in which on identical facts the revenues received by the satellite owner was held taxable as "royalty". It appears that the assessee had objected, inter alia, on the ground that the royalty does not arise in India since the payments are not made by the Contracting State (except Doordarshan) or a political sub-division or a local authority or a resident of India and, therefore, art. 12(7) is not attracted. The AO overruled the objection by saying that even under art. 12(2) the royalties may be taxed in the Contracting State in which they arise and that in the present case since the services of the assessee are being utilized in India for the benefit of Indian viewers the royalty arises in India, and therefore there is no need to rely on art. 12(7) which is a deeming provision. In his view, there are only two places (alternative) where the royalty may be said to have accrued : (1) the place where the process for which the payment is made is being carried out, which is the outer space where the transponder is located or (2) the place where the services are being utilised to earn the necessary income out of that, which is India. According to the AO, the second alternative is more relevant or appropriate and hence even under art. 12(2) itself the royalty can be said to have accrued in India.

5. The AO also held, in the alternative, that even if art. 12(3) is not applicable, the revenues are taxable as "fees for included services" as defined in protocol 4(b) of the Indo-US treaty which specifically states that receipts in view of communication through satellite is in the nature of "fees for included services".

6. For the above reasons, which are elaborated in the assessment order, the AO brought the amount of Rs. 77,35,21,577 to tax in India under art. 12(3) of the DTAA and taxed the same at 15 per cent. He also assessed a sum of Rs. 75,00,00,000 as "estimated revenue from Radio Broadcasting and Communication services and other T.V. Channels, details of which have not been furnished by the assessee", also at the rate of 15 per cent.

First appellate proceedings :

7. Before the CIT(A) the assessee took up several objections. The first objection was that the reassessment proceedings were without jurisdiction. This objection was rejected. The second

objection was to the assessment of the revenues as royalty both under s. 9(1)(vi) of the Act and under art. 12(3) of the DTAA. This ground was also rejected, fully relying on the order of the Tribunal in the case of Asia Satellite (supra). The objection that the revenues in any case were not properly computed was accepted and the AO was directed to assess only US \$ 197,80,322 as against US \$ 213,97,554 assessed by the AO. The addition of the estimated amount of Rs. 75 crores as revenues from radio broadcasting and communication services was deleted as being without basis. The assessee had also raised a ground, without prejudice, that computation of the income at US \$ 197,80,322 is excessive since only a portion of the revenues can be brought to tax in India since the signals transmitted by the satellite are beamed to large areas outside India. This claim was rejected. As regards the challenge to the levy of interest under ss. 234A and 234B, it was contended that since the entire revenues received were, even according to the Department, subject to tax deducted at source, the assessee was under no obligation to pay advance tax. This contention was rejected on the ground that the levy of interest was mandatory and cannot be relaxed.

Further appeal to the Tribunal :

8. In the appeal filed by the assessee, grounds have been taken challenging the findings and decision of the CIT(A) which are against the assessee. In particular, a ground has been taken to the effect that the CIT(A) has not considered the contention that the DTAA overrides the Act (ground No. 2). The other grounds challenge the finding of the IT authorities that the income received by the assessee is "royalty", that the royalty accrued in India and also challenge the quantification of the royalty income. The assessee has also questioned the finding that the broadcasters were using the PAS-4 satellite services of the assessee only for India-specific programmes. Ground No. 9 is to the effect that the CIT(A) erred in not permitting the assessee to produce an expert witness to explain the technical working and commercial use of the satellite. In ground No. 10, objection is taken to the levy of interest under s. 234B.

9. In the appeal filed by the Revenue, grounds have been taken to the effect that the CIT(A) erred in holding that the notice issued under s. 142(1) to PanAmSat International Systems Inc. is invalid and consequently the assessment made under s. 144 is also invalid and further that the CIT(A) erred in holding that the amounts received by the assessee are not to be treated as royalty.

10. The assessee has also filed cross-objections on 17th Dec., 2004 in the appeal filed by the Department in ITA No. 1796/Del/2001 and has taken grounds (4 in all) to the effect that the IT authorities were not right in law in holding that the revenues received by the assessee from both Indian and non-resident broadcasters (television channels) were on account of use of secret process in the satellite/transponder and constituted "royalty" under the Act as well as the DTAA. The quantification of the income is also challenged, without prejudice.

11. Here, some clarification is necessary. The IT Department originally assessed the income in the hands of PanAmSat International Systems Inc. which was cancelled by the CIT(A) by order dt. 22nd Feb., 2001. Thereafter proceedings were taken for assessing the revenues in the hands of the successor-company, PanAmSat International Systems LLC by issue of notice under s. 148. The same income which was earlier assessed in the hands of PanAmSat International Systems Inc. was assessed in the hands of PanAmSat International Systems LLC. The Department is in appeal against the order of the CIT(A) passed in the case of the predecessor-company cancelling the assessment, whereas the assessee is in appeal in the case of successor-company where the CIT(A) has upheld the assessment. The cross-objections filed by the assessee are in the case of the predecessor-company. A disposal of the appeal filed by PanAmSat International Systems LLC will effectively dispose of all the three appeals, including the cross-objections.

Principal contentions/arguments of the assessee :

12. We may note the contentions in brief and would expand them at the appropriate juncture,

wherever necessary or required.

(1) The payments cannot be considered as "royalty" at all as it does not satisfy the requirements for being so characterised. Royalty generally is paid for use of intellectual property rights. Even under Explan. 2 below s. 9(1)(vi) of the Act introduced w.e.f. 1st April, 1976, the nature of royalty has not been changed and the idea runs throughout. The word "process" is surrounded by words such as patent, invention, model, design, trademark etc. which denote intellectual property rights or rights which are privy to the grantor. The payments in question in the present case were not made for use of any intellectual property rights vested in the assessee.

(2) There is no "process" involved in the use of the satellite or transponder. Article 12(3) of the DTAA in which the word "process" appears, must be interpreted having regard to the context and the object and purpose as pointed out by Klaus Vogel in his book on "Vienna Convention on the Law of Treaties". The ordinary meaning of the word is not to be preferred.

(3) Even if a "process" is involved in the use of the transponder, it is not a "secret process,". The prefix "secret" in the section is applicable both to "formula" and "process". In art. 12(3) of the DTAA, the expression used is "secret formula or process,". The comma after the word "process" shows that both "formula" and "process" are treated under the same class and therefore the prefix "secret" qualifies both. The satellite technology is not secret, but is available off the shelf. Even publications about the technology are available.

(4) Essentially, what the assessee provides is a service and has been so described in the agreements with the television channels. They are service agreements. A perusal of the various terms of the agreements shows that there is no process or secret process involved. The intention of the parties is that the assessee shall provide a service of receiving and re-transmitting the signals to the broadcasters.

(5) The appreciation and understanding of the word "process" appearing in the relevant section of the Act in the case of Asia Satellite (supra) is erroneous.

(6) The reliance placed on the decision of the Tribunal in Asia Satellite can at best be only to a limited extent, that is, to the extent that it covers s. 9(1)(vi) r/w Explan. 2(iii) thereto, but the decision cannot govern the present case entirely for the simple reason that the decision was not concerned with the interpretation of any DTAA (India has no DTAA with Hong Kong) where the phraseology and the punctuation is different.

(7) The payment cannot also be considered as "fees for included services" within the meaning of art. 12(4) of the DTAA (this contention was taken by means of an additional ground filed before us).

(8) The computation of the income is arbitrary and excessive. This argument was taken without prejudice.

Principal contentions/arguments of the Revenue :

13. Mr. Y.K. Kapoor, the special counsel appearing for the Revenue, defended the assessment and the order of the CIT(A) on the basis of the following contentions :

(1) The payments are not for any "services", but are to be treated only as "royalty" both under Explan. 2 to s. 9(1)(vi) of the Act and under art. 12(3) of the DTAA since they are made for the use of a "process" carried out by the transponder. The activity carried out by the transponder is caught within the meaning of the word "process" under various dictionaries to which we have to look as the word is not defined either in the Act or in the DTAA. The physical characteristics of the

signals/beams which are uplinked from the earth stations are changed inside the transponder. This is a continuous process and goes on for 24 hours a day for a period of 10 years under the agreements. The assessee has to bring the signals/beams to a certain stage at the request of the broadcaster (television channel). The "cycle is complete only when the assessee downlinks the signals, which means to ensure that the signals are sent down to the earth stations, and then on to the cable systems". Further, the process involved in the present case is the same as in the case of Asia Sat (supra). The AO has rightly summarized the working of the satellite which matches with what the assessee itself has stated in its website (p. 67 of the paper book), which is an admission within the meaning of ss. 17 and 18 of the Evidence Act and estops the assessee from contending that no process is involved.

(2) The "process" involved is also a "secret process" within the meaning of art. 12.3(a) of the treaty with USA. The treaty is part of s. 90 of the IT Act and the same words appearing in the Act as well as the treaty must be given the same meaning. Accordingly, if the word "secret" in Explan. 2 to s. 9(1)(vi) of the Act qualifies both "formula" and "process", then on parity of reasoning it must be held that the word "secret" in art. 12.3(a) of the treaty qualifies the word "process". According to the generally accepted rules of interpretation, punctuation, such as the existence or otherwise of a comma, cannot control the interpretation to be placed on a statutory provision. Several authorities were cited in support of this submission. It was thus contended that Explan. 2 to s. 9(1)(vi) having been interpreted in a certain manner by Asia Sat (supra) the same interpretation shall be placed on art. 12.3(a) of the treaty. It was further contended that all the six sub-clauses of Explan. 2 to s. 9(1)(vi) have been put in a single article in the treaty, that is, in art. 12.3(a). There is a disjunctive, that is, the word "or" between the words "formula" and "process" in the said article which cannot be read as "and" as the assessee wants to, which would be contrary to the intention expressed by the legislature. As regards the argument of the assessee that the information about the functioning of the transponder is available off the shelf and hence not "secret", and the reliance placed by the assessee on the order of the AAR in Dun & Broadstreet Espanna, S.A., In re (2005) 193 CTR (AAR) 9 : (2005) 272 ITR 99 (AAR), it was contended that the judgment was rendered without reference to the full facts of the case and that the relevant provisions of the statute and the law on the point was not before the AAR and that the spheres of the AAR ruling and the Tribunal's order in Asia Sat (supra) are different and hence the judgment does not even enjoy a persuasive authority. It was further pointed out that only some of the clauses of Explan. 2 below s. 9(1)(vi) were considered by the AAR and those clauses are not relevant in the present context. Therefore, the process carried on by the assessee amounts to a secret process and if that is so, the payment therefore amounts to royalty.

(3) Reference was made in connection with the above contention to the view expressed by Klaus Vogel in his commentary (extracts placed at p. 51 of paper book No. III-B) that the word "process" cannot be a secret in itself, but it is secret because it is protected by law or agreement. Attention was drawn to the confidentiality clause (cl. 11) in the agreement between the assessee and the TV channel (p. 273 of the paper book filed by the assessee). Accordingly, the entire process of the satellite is protected, hence secret, and therefore the payment is royalty. Further, one of the characteristics of royalty is that it is normally linked to the productivity. According to the agreement between the parties, any outages or disruption in the beaming of the signals can be deducted by the TV channel, which means that the assessee will receive payment only for the actual hours beamed which accords with the notion of royalty, as also opined by Klaus Vogel in his commentary (pp. 53-4 of the paper book No. III-B). Strong reliance is placed on the order passed by the AAR in P. No. 30 of 1999, ABC, In re (1999) 154 CTR (AAR) 246 : (1999) 238 ITR 296 (AAR) and in P. No. 22 of 1996, XYZ, In re (1999) 153 CTR (AAR) 224 : (1999) 238 ITR 99 (AAR).

(4) With reference to the argument that the amount, even if it is treated as royalty, must have been paid for the "use" of the secret process and that there is no physical contact between the processing of signals and the broadcaster from whom the payment is received, it was submitted on the strength of the judgment of the Supreme Court in State of UP vs. Union of India (2004) 190 CTR (SC) 569 that a "right to use" the goods can be given without parting with the possession of

goods and therefore physical use is not the requirement under art. 12.3(a) of the treaty.

(5) The payment, in any case, falls to be considered as one for the use of a "literary work".

(6) The payment, in any case, is covered by art. 12.4(b) of the treaty as "fees for included services" ("FIS"), and reliance is placed on the memorandum of understanding reached in 1989 between the signatories to the treaty in which it has been agreed in para 4(b) that "communication through satellite or otherwise" is an area where technology could be made available. It is contended on the basis of the MoU that satellite technology has been made available by the assessee (to the broadcaster/TV channel) in consideration for the payment, which enables the broadcaster/TV channel to apply the same in future for the purpose of its business without recourse to the assessee and therefore the payment is taxable as FIS. Strong reliance has been placed on the order of the Mumbai Bench of the Tribunal in the case of *Raymond Ltd. vs. Dy. CIT* (2003) 80 TTJ (Mumbai) 120 : (2003) 86 ITD 791 (Mumbai) where the words "make available" have been interpreted. Our attention was drawn to paras 1.4, 1.5, 2.1, 2.2, 4.1, 4.2 and 4.3 of the agreement and it was contended that these clauses show that the technical knowledge/skill (relating to satellite technology) has already been imparted to the broadcasters and the broadcaster's responsibilities under the agreement cannot be discharged unless something has been "made available" to him by the assessee, that they also show that the "entire gamut of technical knowledge" was made available by the assessee to the broadcaster and that the words "in consultation with customers" appearing in para 2.1 mean that the know-how is being passed on (i.e., made available) to the broadcaster. Reference was also made to Example No. 3 of the DTAA which, according to the special counsel for the Department, applies to the facts of the case.

(7) There is one more reason for the applicability of art. 12.4(b) and that is that as per the agreement, it is the broadcaster's responsibility to install the earth-station. By doing so, the broadcaster gets "enriched" with the technology, and that falls within art. 12.4(b) read with the decision in *Raymond Ltd.* (supra). It was further submitted that the sequence of the events was firstly the testing of the signals which gave rise to the freedom to transmit signals "borne out of technological literacy" which was made available to the broadcaster and once such literacy was secured, the broadcaster was enabled to use the technology by itself for its own benefit. This knowledge or literacy is "process-specific" which is acquired by the broadcaster and the fields of such knowledge are mentioned in Appendix "D" to the agreement. Thus, there is transfer of technology meeting the requirements of art. 12.4(b). The judgment of the Madras High Court in the case of *Skycell Communications Ltd. & Anr. vs. Dy. CIT & Ors.* (2001) 170 CTR (Mad) 238 : (2001) 251 ITR 53 (Mad) cited on behalf of the assessee to contend that what the assessee did was to only render services was rendered under s. 9(1)(vii) under which the definition of "fees for technical services" is different from the definition of FIS under the treaty and hence distinguishable or at any rate not helpful in understanding the treaty language.

Reply on behalf of the assessee to the arguments of the Revenue :

14. In the course of a detailed reply, the learned counsel for the assessee contended as follows :

(a) Characterisation of the income : The income earned by the assessee is for rendering services, which is the business of the assessee, in the field of transponders which enables the transmission of signals and ought to be normally taxed as business income. In the absence of any permanent establishment in India, as required by art. 7 of the treaty, the business income is not taxable in India. The article is not applicable to royalty. The technology relating to transponders is used by the assessee only to provide the service to the others and no transfer of technology ("making available") is involved. All the agreements which the assessee has entered into with the broadcasters/TV channels refer only to "service". These agreements were entered into even before the IT authorities took any action to assess the assessee and hence they were not got up for the occasion or tailor-made for the situation. There is no reference to any "process" in any of the agreements. The payment is therefore not as consideration for the use of any process; it is

consideration only for the rendering of the service of transmitting the signals from one place to another with the help of a transponder. The normal meaning of "royalty" is that it is a payment for "undivulged" information not generally in the public domain, which is not the case here. The various terms used in art. 12.3(a) are all species of intellectual property. A detailed synopsis on this aspect was filed.

(b) Is there a "process" involved? There is no process involved. The word "process", judged by the context and setting in which it is used in the article, is seen to be surrounded by words denoting intellectual property rights which are either protected or capable of being protected in law and therefore, the word "process" should fit in with them. In that case, the process should be one which remained "undivulged" and outside the public domain, or in other words, should be "secret".

(c) The "process" should be "secret". The word "secret" qualifies both the words "formula" or "process", regard being had to the setting and the context as explained in the preceding paragraph. The use of the comma after the words "secret formula or process" in art. 12.3(a) of the treaty, in a deliberate or conscious departure from s. 9(1)(vi) Expln. 2 of the Act (i) removes all ambiguity compared to cl. (iii) of Expln. 2 below s. 9(1)(vi); (ii) removes the "defect" pointed out by the Tribunal in "Asia Sat (supra) and (iii) makes it explicit as to what is intended. Therefore, the punctuation cannot be ignored. In all the three models (OECD, UN and US) of conventions, the words used are "secret formulae or process". Factually speaking, there is nothing unique about a transponder or a satellite. The customers may choose any satellite or transponder depending upon their requirements, cost involved etc. as shown in pp. 162-180 of the paper book. All the information about the transponder is available in the public domain. Nothing is secret or undivulged.

(d) There are several basic differences between s. 9(1)(vi) Expln. 2 and art. 12.3(a) of the treaty with USA. Firstly, cl. (i) of the Explanation includes an outright sale of the right in the definition of "royalty" whereas the treaty includes only certain types of an outright sale as royalty and not all. Secondly, cl. (iva) of the Explanation was introduced only w.e.f. 1st April, 2002, whereas it existed in the treaty even earlier. The Act and the treaty have thus not kept pace with each other. Thirdly, cl. (vi) of the Explanation has no parallel in the treaty. For these reasons, the treaty has to be interpreted on a "stand-alone" basis without seeking any aid from the interpretation of the Act. The decision of the AAR in P. No. 30 of 1999, ABC, In re (supra) is distinguishable on facts. That was a case of a customized and secret software which can be downloaded and the payment made was for the software. Hence it was characterized as royalty. These features are not involved in the case on hand.

(e) The facts of the case of State of UP vs. Union of India (supra) cited by the special counsel do not match with the present case. In that case, the Department of Technology (DoT) made available the instrument, the number and the exchange in such a manner that it amounted to transfer of the right to use the goods, whereas in the present case, the assessee (PanAmSat) does not own any equipment other than the transponder. To our query, the learned counsel replied that the decision cited cannot in the very nature of things apply to intellectual property rights since the right to use such rights cannot be enjoyed without a transfer of the right itself. Therefore, he submitted, that the judgment has to be confined to tangible property and cannot be extended to IPRs.

(f) The reference to the website of the assessee and the alleged admissions therein is irrelevant. Particularly, the reference to data files at p. 69A is irrelevant because it is nobody's case that the data files are being transferred by the assessee to the broadcasters. Similarly, the reference to the report of a high-power committee is also irrelevant to the decision in the present case.

(g) It was clarified that the payment to the assessee was not dependent on the productivity of the transponder, as claimed by the Department. It is a fixed monthly fee, subject to reduction for "outages".

(h) Arguments re-applicability of Art. 12.4(b)—"Fees for included services"

No technology is "made available" by the assessee in any field to the broadcasters. The example No. 4 in the MoU arrived at in 1989 under the treaty fits into the case of the assessee. If the article is to apply, it is required of the assessee to make available technology etc. about the transponder transmission, and not any incidental information. Page 292 of the paper book No. III-B on which the Department relied, does not give any information about transponder technology. It only makes available information to the broadcaster as to how to make compatible use of the service. The Appendix "D" to the agreement on which also reliance was placed is freely available on the website of the assessee (www.panamsat.com). The purpose of the information is only to ensure compatibility so that the transmission is smooth. That does not mean that technology is transferred. It is similar to the user manual handed over to the purchaser of an electrical appliance, say, an air-conditioner. The handing over of such a manual which contains information as to how to effectively and efficiently use the air-conditioner can hardly be described as transfer of any technical service or skill or technology etc., though it may be part of a service or incidental to the sale of the air-conditioner. Paragraph 4(b) in the MoU which refers to "communication through satellite or otherwise" in Item No. 4 as a field in which transfer of technology is possible applies to a different setting, where a person, for example, desires to start a business of laying under-water cables seeks technical advice or information from another person who is aware of the technology required. That may amount to "make available". In particular, p. 291 of paper book No. III-B on which reliance was placed by the Department (i) relates to the steps to be taken before commencement of the service; (ii) provides for "consultation" with the customer for compatibility and (iii) mere consultation does not amount to "making available" some technology.

15. The learned counsel for the assessee summed up his submissions as under :

(a) The amount received for satellite transmission services is assessable as business profits.

(b) In the absence of a PE, the business profits are not taxable in India, as per art. 7 of the treaty.

(c) The services are rendered in outer space and do not amount to any "process".

(d) A "process" is no doubt used by the assessee in providing the services but the use of or right to use the process has not been granted to the broadcasters.

(e) In order to constitute "royalty" the process must have the attributes of IPRs, i.e., it must be undivulged, undisclosed and not available in the public domain.

(f) The word "process" has to be interpreted not according to any dictionary, but according to the context and on the basis of the rule of *ejusdem generis* or *noscitur a sociis*.

(g) The "process" must be secret in order that the consideration, if any, paid therefore is assessed as royalty. In the present case, the satellite technology is available as published literature. There is no exclusivity or uniqueness about the satellite owned by the assessee. It is a mere standard facility providing a standard service to those who need the service and are willing to pay for it.

(h) The agreements with the broadcasters show that they are "service" agreements and cannot be re-written as something else. Many such agreements were entered into even before any issue was raised about the taxability of the receipts. They have not been got up for the occasion.

(i) What the assessee renders is a service, but not a "technical service" under art. 12.4(b) so that the amount received can be characterized as FIS.

(j) In any case, there is no "making available" of any technical knowledge, service, skill etc. within

the meaning of the above article.

(k) Both arts. 12.3(a) and 12.4(b) having failed, the amount is taxable only as business profits.

(l) If all these arguments are not accepted, then the question of attribution of income crops up in respect of which the guidelines laid down in *Asia Sat* (supra) may be followed.

16. We also heard Mr. Ajay Behl for the assessee and the special counsel for the Department on the question of "source rule" vis-a-vis arts. 12.2 and 12.7 and this point will be considered at the appropriate juncture if found necessary.

Consideration of the issues and decision:

17. Before taking up the issues for consideration, we have to remember the fundamental principles that have been laid down recently by the Supreme Court in two judgments. In *Union of India vs. Azadi Bachao Andolan* (2003) 184 CTR (SC) 450 : (2003) 263 ITR 706 (SC) the Supreme Court held as under :

"A survey of the aforesaid cases makes it clear that the judicial consensus in India has been that s. 90 is specifically intended to enable and empower the Central Government to issue a notification for implementation of the terms of a double taxation avoidance agreement. When that happens, the provisions of such an agreement, with respect to cases to which where they apply, would operate even if inconsistent with the provisions of the IT Act. We approve of the reasoning in the decisions which we have noticed. If it was not the intention of the legislature to make a departure from the general principle of chargeability to tax under s. 4 and the general principle of ascertainment of total income under s. 5 of the Act, then there was no purpose in making those sections "subject to the provisions" of the Act. The very object of grafting the said two sections with the said clause is to enable the Central Government to issue a notification under s. 90 towards implementation of the terms of the DTAA's which would automatically override the provisions of the IT Act in the matter of ascertainment of chargeability to income-tax and ascertainment of total income, to the extent of inconsistency with the terms of the DTAA".

Again, in *CIT vs. P.V.A.L. Kulandagan Chettiar (Dead) Through LRs* (2004) 189 CTR (SC) 193 : (2004) 267 ITR 654 (SC) the Supreme Court summed up the position as under :

"Where liability to tax arises under the local enactment the provisions of ss. 4 and 5 of the Act provide for taxation of global income of an assessee chargeable to tax thereunder. It is subject to the provisions of an agreement entered into between the Central Government and the Government of a foreign country for avoidance of double taxation as envisaged under s. 90 to the contrary, if any, and such an agreement will act as an exception to or modification of ss. 4 and 5 of the IT Act. The provisions of such agreement cannot fasten a tax liability where the liability is not imposed by the local Act. Where tax liability is imposed by the Act, the agreement may be resorted to either for reducing the tax liability or altogether avoiding the tax liability. In case of any conflict between the provisions of the agreement and the Act, the provisions of the agreement would prevail over the provisions of the Act, as is clear from the provisions of s. 90(2) of the Act. Sec. 90(2) made it clear that "where the Central Government has entered into an agreement with the Government of any country outside India for granting relief of tax, or for avoidance of double taxation, then in relation to the assessee to whom such agreement applies, the provisions of the Act shall apply to the extent they are more beneficial to that assessee" meaning thereby that the Act gets modified in regard to the assessee insofar as the agreement is concerned if it falls within the category stated therein".

18. Having noted these fundamental principles, we proceed to discuss and decide the issues that arise for consideration.

19. The question that first comes up for consideration is whether s. 9(1)(vi) of the IT Act, read with the Explan. 2 below thereto, is applicable. This also involves the subsidiary question whether the issue is covered by the order of the Delhi Bench of the Tribunal in the case of Asia Sat (supra) which is also a case of a non-resident company based in Hong Kong which owned a transponder and allowed it to be used by broadcasters. Both issues are interlinked in the sense that in the above order the Tribunal has held, in the context of the provisions of cl. (iii) of Explan. 2 below s. 9(1)(vi), that a "process" is involved when the signals that are uplinked through the earth stations to the transponder get converted into different frequencies and fit for being down-linked via earth stations over the footprint area. It was therefore held that the payment was for the use of a "process" and hence royalty within the meaning of the aforesaid clause. The clause reads as follows :

"(iii) the use of any patent, invention, model, design, secret formula or process or trade mark or similar property."

It was not disputed before us on behalf of the assessee that the nature of the activity carried on by it is the same as in the case of Asia Sat (supra). If that is so, we have to hold, respectfully following the order of the co-ordinate Bench, that there is a "process" involved in the activity carried on by the assessee before us. In Asia Sat (supra) it was further held that the word "secret" appearing in cl. (iii) above qualifies only the word "formula" but not the word "process" and therefore even if the process involved in the operation of the transponder is in the public domain and no longer a secret known only to a few, the payment for the process would still be taxable as royalty. The reason or logic given in para 6.18 of the order by the Tribunal to hold that the word "secret" does not qualify the word "process" is that "there is no comma after the use of the word 'secret' till the end of cl. (iii) and if the intention has been to apply the word 'secret' before the word 'process' also, then a comma would have been used after the word "formula" and further that the word "secret" cannot also be applied to the word "trade mark" because once registered there is nothing secret about the trade mark and the impossibility of reading the word "secret" before the word "trade mark" further strengthens the view that the word "secret" cannot be read before the word "process" also. This naturally takes us to the question whether there is anything in art. 12.3 (a) of the DTAA between India and USA which militates against such a view. It must be remembered that India had no DTAA with Hong Kong and hence the view taken by the Tribunal (supra) with regard to the cl. (iii) of Explan. 2 below s. 9(1)(vi) would apply if we were to also interpret the same provision. But art. 12.3(a) is worded as below :

"The term "royalties" as used in this article means :

(a) payments of any kind received as consideration for the use of, or the right to use, any copyright of a literary, artistic, or scientific work, including cinematograph films or work on film, tape or other means of reproduction for use in connection with radio or television broadcasting, any patent, trademark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience, including gains derived from the alienation of any such right or property which are contingent on the productivity, use or disposition thereof, and".

In Asia Sat (supra) the Tribunal pointed out, while repelling the argument that the word "secret" also qualifies the word "process" appearing in cl. (iii) of Explan. 2, that there is no comma after the word "secret" till the end of the clause and had the intention been to qualify the word "process" also with the word "secret" there would have been a comma after the word "process" (by mistake mentioned in the order as "formula"). The Tribunal was thus prepared, with respect, to accept the argument that both the words "formula" and "process" can be said to be qualified by the word "secret" had the clause been drafted as under :

"the use of any patent, invention, model, design, secret formula or process, or trade mark or similar property".

What the Tribunal has pointed out stands fulfilled in art. 12.3(a) of the treaty with USA. From the article quoted above, it may be seen that there is a comma after the words "secret formula or process" which indicates that both the words "formula" and "process" are qualified by the word "secret". The requirement thus under the treaty is that both the formula and the process, for which the payment is made, should be a secret formula or a secret process in order that the consideration may be characterised as royalty. We do agree with the argument of the special counsel for the Department, on the strength of the several authorities cited by him, that normally punctuation by itself cannot control the interpretation of a statutory provision and in fact the learned counsel for the assessee did not seriously dispute the proposition. However, the punctuation—the use of the comma—coupled with the setting and words surrounding the words under consideration, do persuade us to hold that under the treaty even the process should be a secret process so that the payment therefor, if any, may be assessed in India as royalty. The Tribunal in *Asia Sat* (supra) have recognized that all the items referred to in cl. (iii) of Explan. 2 such as patent, invention, model, formula and process etc. are intellectual properties. Similarly, the words which surround the words "secret formula or process", in art. 12.3(a) of the treaty refer to various species of intellectual properties such as patent, trade mark, design or model, plan, etc. Thus the words "secret formula or process" must also refer to a specie of intellectual property applying the rule of *ejusdem generis* or *noscitur a sociis*.

20. That takes us to a consideration of the question whether the process carried on by the assessee is a secret process. On this question, we have weighed the elaborate arguments advanced by both the sides carefully and hold that so far as the transponder technology is concerned there appears to be no "secret technology", known only to a few. There is evidence adduced before us to show that the technology is even available in the form of published literature/book from which a person interested in it can obtain knowledge relating thereto. There is no evidence led from the side of the Department to show that the transponder technology is secret, known only to a few, and is either protected by law or is capable of being protected by law. This aspect of the matter was not required to be considered by the Tribunal in the case of *Asiasat* (supra) because the view taken by the Tribunal was that there was no requirement in cl. (iii) of Explan. 2 below s. 9(1)(vi) of the Act that the process involved, for which the payment is being made, should be a secret process. But in the view we have taken on the language employed by art. 12.3(a) of the treaty coupled with the punctuation and the setting and surrounding words, the payment would be considered as royalty only if it is made for the use of a secret process. Since there is nothing secret about the process involved in the operation of a transponder, the payment for the use of the process—assuming it to be so—does not amount to royalty.

21. The argument of the learned special counsel for the Department that the consideration has been received by the assessee for letting the broadcasters use the patent relating to the transponder/satellite goes farther than the assessment order and therefore cannot be accepted. Even on merits the argument is not acceptable since the patent relating to the transponder/satellite is not with the assessee but is with the manufacturer of the same. At our instance the learned counsel for the assessee filed a copy of the "Satellites Purchase Contract Between Hughes Aircraft Company and PanAmSat, L.P.". This agreement shows that the satellite was purchased by the assessee from Hughes Aircraft Company of California. It has no relevance to the argument sought to be canvassed on behalf of the Department. The learned special counsel did not draw our attention to any clause in this agreement to show that the patent relating to the transponder/satellite was also transferred to the assessee by Hughes Aircraft Company. If the patent did not enure to the assessee, we do not see how the assessee could have, even in the wildest of imaginations, let the broadcasters use the same for consideration. The argument sought to be made is factually not borne out. Some debate was made about the "security agreement" referred to in the recitals, r/w para 3.1.7 at p. 13 of the agreement and it was pointed out that the assessee did not file the same. It was clarified on behalf of the assessee that the security agreement relates to the national defence security of the USA since a satellite or transponder contains equipment sensitive to the defence and security requirements of a country. We are satisfied with the clarification and see no point in pursuing the issue further. In any case, there is

not on iota of evidence to show that the assessee had any patent to the satellite or transponder which it allowed the broadcasters to use for a consideration.

22. That takes us to the next question whether the payment is for the "use of the secret process". Though we have already held that there is no secret process involved and hence the payment cannot be considered to be royalty under the treaty, the question is being considered on the footing that we are wrong in holding that the process is not secret. We have to first look into the agreement between the assessee and the broadcasters to gather the intention of the parties. Both sides agreed that the agreement between the assessee and Turner Broadcasting System, Inc., of USA can be adverted to as representative of all the agreements. This agreement is at pp. 249 to 300 of the paper book No. II filed by the assessee. It is titled "Full-Time Transponder Service Agreement for Television Service Delivery in the Indian Ocean Region (Pre-launch)". The preamble recites that the agreement covers "the provision of a twenty-four hour fixed term non-preemptible transponder (the "service") by PanAmSat to customer" and that "the service shall be supplied by PanAmSat, in outerspace, from one C-band transponder that will be identified in Appendix A." Article 1 is titled "provision of service". Article 1.3 is titled "customer service" and says that the customer (Turner Broadcasting System) intends to use the service as a satellite distribution vehicle for India and the Middle East. The customer intends to use the service primarily for the full time wide distribution of customer's television services to cable systems in India. Article 1.4 permits the customer to encrypt some or all of the signals provided the customer provides the assessee with equipment necessary to decode the encrypted signals. The agreement is to remain in force for a period of ten years and in art. 2 provisions were also made for extension of the term and for pre-launch progress reports. Article 3 provided for "customer payments". Article 3.1 is titled "service fee". The service fee is payable monthly as shown in Appendix A. Article 4 provides for customer's obligations while utilizing the service. In particular it says that the customer shall be responsible for installing the earth stations and is bound to follow the procedures laid down by the assessee for initiating or terminating the transmission from the satellite. Article 5 provides for outages and a proportionate reduction in the service fee payable through somewhat complicated calculation which is not very relevant for our purpose. Article 10 says that the agreement is a service contract and does not grant any right or interest etc. in any property or assets of the assessee including the satellite and related equipment. Article 11 provides for confidentiality and prohibits both the parties from divulging information obtained or exchanged in connection with the agreement, except to the extent necessary to comply with the law or obtaining insurance or for normal reporting, etc. The other clauses are not very relevant for our purpose.

23. A close reading of the agreement as a whole shows that the intention of both the parties is that the assessee should provide, and the customer (the TV broadcaster) should utilise, the services of the transponder for the purpose of transmitting the signals over the footprint area of the satellite through various cable operators. The question that arises for consideration is whether on the terms of the agreement it is possible to hold that the payment of the service fee is for using or for the right of using the secret process. There was much debate before us on the applicability of the judgment of the Madras High Court in the case of Skycell (supra) on this question. This judgment has been considered by the Tribunal in Asiasat (supra) and has been distinguished on facts. That judgment actually related to the interpretation of s. 194J of the Act which required tax to be deducted at source by the person paying any "fees for technical services". This term was to have the same meaning as in Expln. 3 below s. 9(1)(vii) of the Act. The case was that of a company whose business it was to provide cellular mobile phone facility to its subscribers. The subscribers were directed to deduct tax from the payments made to the company under s. 194J on the footing that the amount paid was fees for technical services. The Madras High Court ruled that the payment cannot be termed as fees for technical services. From a close reading of the judgment it seems to us that the ratio laid down is that there is a distinction between payment made for the use of technical services and for utilising a facility or a service and merely because the provider of the service or the facility has to make use of certain technology in doing so would not change the character of the payment made therefor from a fee paid for services rendered to a fee paid for technical services. The examples given by the High Court at pp. 57-59 of the judgment, with great

respect, bring out the distinction between the two clearly. What has happened in the case before us is that the broadcaster has made the payment of "service fee" for the use of the transponder to transmit the signals; he is hardly interested in the technology used inside the transponder. He is only concerned with the transmission of the signals and what technology is used by the transponder or the satellite is hardly of his concern. He only means to utilise the services of the assessee, the service being the undertaking of the task of transmitting the signals produced or uplinked by the broadcaster and beaming them over the footprint area to enable the cable operators to catch the signals and beam them to the viewers. Thus, we are inclined to hold that the intention of the parties gathered on a wholesome reading of the agreement is that payment should represent consideration for the use of a service, and not for the use of any process. It is a standard facility or service provided to all those willing to pay. In this view of the matter, and on the basis of our humble understanding of the ratio of the judgment of the Madras High Court, we hold that the payment made to the assessee does not represent consideration for the use of any process.

24. We now proceed to a consideration of the question whether the payment can be considered and taxed as "fees for included services" under art. 12.4(b) of the treaty. The article reads as under :

"4. For purposes of this article, "fees for included services" means payment of any kind to any person in consideration for the rendering of any technical or consultancy services (including through the provision of services of technical or other personnel) if such services :

(a)

(b) make available technical knowledge, experience, skill, know-how, or processes, or consist of the development and transfer of a technical plan or technical design."

25. In the course of the hearing, the assessee filed an additional ground of appeal which reads as follows :

"That the CIT(A) erred on facts and in law in not holding that the revenues received by the appellant from its customers were not in the nature of "fee for included services" in terms of art. 12.4(b) of the treaty".

In the application for admission of the additional ground it has been explained that the AO while taxing the amounts has invoked art. 12.3 (royalty) and in the alternative, art. 12.4(b) (fees for included services) that though the assessee raised grounds before the CIT(A) both with regard to art. 12.3(a) and art. 12.4, the CIT(A) did not consider the ground relating to "fees for included services" under art. 12.4(b) presumably because he had held that the amounts are taxable as royalty under art. 12.3(a) and that therefore in the appeal before the Tribunal the assessee had only challenged the decision of the CIT(A) with regard to "royalty" under art. 12.3(a), that it was only in the course of the arguments when the special counsel for the Department on 16th Feb., 2005 had made a reference to the assessee having accepted that the amounts paid amounted to fees for included services that the assessee sought to clarify the matter and hastened to file the additional ground. It was prayed that the additional ground filed in the above circumstances may be admitted. Considering the explanation and the fact that the CIT(A) did not render any decision on the question whether the amounts received by the assessee could be taxed as "fees for included services" and therefore the assessee could not have raised a ground in the appeal before the Tribunal originally filed challenging a non-existent decision of the CIT(A) and also having regard to the fact that no further investigation into facts, other than the material already on record, is required to be made, we admit the additional ground of appeal. We may also add that after the position was explained as above on behalf of the assessee, the learned special counsel for the Department fairly stated that he has no objection to the additional ground being admitted. Accordingly, we admit the same for adjudication.

26. We have considered the matter carefully in the light of the arguments placed before us. Under the aforesaid article, technical knowledge etc. have to be made available to the broadcaster in consideration for the payment. It is not enough that the assessee renders any technical or consultancy services. The further requirement is that such services should make available to the broadcaster technical knowledge, etc. The import of the words "make available" has been considered by the Mumbai Bench of the Tribunal in *Raymond Ltd.* (supra). There it has been held that in order that technical knowledge, etc. can be said to be "made available" to the user of the services it is necessary that after the service has been rendered, the user of the service should be enabled to apply the technical knowledge etc. by himself for the purpose of his business without reference to the person who provided the technical service. In the present case, we have already held following the judgment of the Madras High Court that the assessee does not render any technical service to the broadcasters by permitting them to make use of the transmission facility. The question of "making available" any technical knowledge etc. therefore simply does not arise. Even if we are wrong in our view that the assessee does not provide any technical service to the broadcasters, still it has to be proved (by the Revenue) that some technical knowledge, experience, etc. was made available to the broadcasters in regard to the working of the transponder/satellite which they (the broadcasters) may apply by themselves, without reference to the assessee, in future for the purpose of their business. We do not see how this is possible. For example, once Turner Broadcasting Inc., of the USA has made use of the services provided by the assessee for a period of ten years and terminates the agreement, still it has to approach some other company owning a transponder/satellite for beaming the signals over the required area or it has to renew the contract with the assessee. A third option is to purchase a transponder/satellite and use it for transmitting and beaming the signals. During the period of working of the agreement, no technology relating to transponder/satellite can be said to have been made available to the broadcaster just because he has been using the services of the assessee for a number of years. The mere possibility that the broadcaster may have acquired some familiarity with or insights into the working of the transponder during the currency of the agreement does not trigger art. 12.4(b) of the treaty into action because the act of "making available" should emanate from the person who renders the technical services and does not take in the capacity or ability of the person to whom the services are rendered to gather, by his own efforts or inquisitiveness, any technical knowledge, experience, skill, etc. There should be an agreement or formal understanding or arrangement under which the technical knowledge, experience, etc. are transmitted to the person utilizing the technical services, with both parties at that time clearly acknowledging or being aware of the right of the person utilising the technical services to apply the technical knowledge, experience, etc. in future for his own benefit without recourse to the person rendering the technical services. In this view of the matter, it is not possible to accept the argument of the special counsel for the Department that the broadcaster may have acquired a working knowledge of the way the transponder functions or operates which would bring the case under art. 12.4(b).

27. The memorandum of understanding concerning fees for included services in art. 12.4 entered into on 5th May, 1989 under the heading "para 4(b)" on which reliance has been placed by the special counsel is not apposite. It says that "technical and consultancy services could make technology available in a variety of settings, activities and industries. Such services may, for example, relate to any of the following areas" and gives the example of "communication through satellite or otherwise". From this, it was sought to be argued on behalf of the Department that technical knowledge etc. was made available by the assessee (PanAmSat) to the broadcasters in relation to satellites while the broadcasters were using the transponder service for transmitting the signals. With respect, this does not appear to be the correct way of understanding the MoU. What the MoU does, in our humble understanding, is to give examples of areas or fields in which it is possible for the parties to agree to transfer technology. Communication through satellite or otherwise is one such area, given as example, in which transfer of technology is possible. For instance, it is possible for "A", who is engaged in the activity of communicating information through satellites/transponders to agree to transfer technology relating to communication through satellite to "B" and if this is coupled with the rendering of technical services the case would fall under art. 12.4(b). In the case before us, though PanAmSat is engaged in the business of transmitting TV signals from one place to another, it has not agreed to transfer any technology relating to this

activity to the broadcasters. It has merely undertaken to transmit the signals sent by the broadcaster for a price. That essentially is a service contract. The example given in the MoU cannot be understood, in our view, to mean that wherever a satellite is used in relation to the rendering of a service, it must be assumed that there is a transfer of technology relating to the area of communication through satellite. This is made clear if reference is made to the sentence found earlier in the paragraph that "The fact that the provision of the service may require technical input by the person providing the service does not per se mean that technical knowledge, skills, etc. are made available to the person purchasing the service, within the meaning of para 4(b). Similarly, the use of a product which embodies technology shall not per se be considered to make the technology available". In fact, this conforms to the decision of the Madras High Court (supra). The argument of the learned special counsel for the Department, with respect, seems not to take note of the entire paragraph.

28. We thus hold that the payment does not also fall within art. 12.4(b) as "fees for included services".

29. It is now necessary to note some of the important arguments advanced by the special counsel for the Department. A preliminary point was raised by him that under principles of delegated legislation the double taxation avoidance agreement entered into under s. 90 of the IT Act cannot exceed the limits laid down by the Act and in case of conflict between the Act and the treaty the Act shall prevail. Elaborate submissions were permitted to be made on this point, but the issue has been completely settled by the judgments of the Supreme Court in *Azadi Bachao Andolan* (supra) and *P.V.A.L. Kulandagan Chettiar* (supra). In the light of the above judgments, we reject the preliminary point raised by the special counsel for the Department.

30. Since there is no dispute that the nature of the activities carried on by the assessee and the steps involved in the transmission of the signals are the same as in the case of *Asiasat* (supra), the argument that the website of the assessee amounts to an admission about its activities and the assessee is estopped from disputing the same under the Evidence Act needs no further consideration. The argument as to whether the process should be a secret process or not did appear to us at one point of time to be somewhat contradictory. It was first contended by the learned special counsel for the Department that the process need not be secret as held by the Tribunal in *Asia Sat* with reference to cl. (iii) of Explan. 2 below s. 9(1)(vi) and that the same interpretation should be placed on art. 12.3(a). We have, for reasons stated earlier, rejected this argument. However, it was at a later point of time contended that the assessee knew the technology involved in the working of the transponder/satellite to the exclusion of others and had also inserted a confidentiality clause in the agreement with the broadcasters and therefore the process was capable of being protected by law and hence secret. This later refinement in the argument, we presume, is only to cover the counter-point that the word "secret" appearing in the art. 12.3(a) of the treaty qualified both "formula" and "process". Faced with this situation, it was contended by the learned special counsel that the transponder-technology was a "secret process" protected or capable of being protected by law and hence the payment was taxable as royalty under the aforesaid article. We have not accepted this argument also and have held that since the transponder-technology is available off the shelf in the form of published literature, it is no longer a secret process and hence the payment, even if it is assumed to be in consideration for the use of a technological process, does not amount to royalty under the treaty. The argument that the payment in the present case is linked to the productivity is found to be irrelevant in terms of the agreement. We have already referred to the agreement between the assessee and Turner Broadcasting Inc. of USA, which is representative of all the agreements, in which the service fee is payable monthly. Even if it is assumed that the payment of the fee is linked to the productivity, meaning thereby that it is linked to the number of hours the transponder is utilized by the broadcaster, art. 12.3(a) requires that the consideration should amount to "gains derived from the alienation of any such right or property which are contingent on the productivity.." The right referred to is the right to use the secret process. Since we have held that there is no right conferred to the broadcaster to use any secret process developed by the assessee, the payment of

the service fee, even if it is assumed to be contingent on the productivity (number of hours of transmission) cannot be considered to be royalty.

31. In the course of the arguments the learned special counsel referred to the ruling of the Authority for Advance Rulings (AAR) in P. No. 22 of 1996, XYZ, In re (supra). There, there was no dispute that the amount paid was royalty within the meaning of the DTAA with USA. The dispute was whether the payer of the royalty should be a resident of India in order that it may be taxed by India. The AAR held that there is no such requirement and even if the non-resident pays the royalty, so long as it arises from property used for earning income from a source in India it is taxable as royalty under s. 9(1)(vi)(c) of the Act. This ruling is hardly relevant to the dispute which arises in the case before us. The other ruling is in P. No. 30 of 1999, ABC, In re (supra). In this case, the charges for the use of CPU (central processing unit) and CDN (consolidated data network) of an American company, paid by an Indian company and under strict confidentiality, was involved and the question was whether it amounts to royalty under art. 12.3(a) of the Indo-US treaty. It was held that the payment was for the use of the protected software and not merely for the use of the equipment and hence royalty for the use of "design or model, plan, secret formula or process", taxable in India. The argument was that the broadcaster, when it uses the transponder owned by the assessee, actually uses not merely the equipment but the secret process involved in its working and hence the payment is royalty. But it must be remembered that in the case before the AAR, the Indian company was merely accessing the protected software through the CPU and CDN and the payment was really for the use of the protected software. The Indian company was not interested in the equipment, it was interested in the protected software. The CPU and CDN merely enabled the Indian company to gain access to the software. The payment was therefore in truth held to be for the use of the software and hence royalty. When we look at the facts of the case before us, as we have already noted, it seems to us that the broadcaster was in truth paying for the service of transmission of the signals and not for any protected process. There is no evidence to show that the broadcaster had access to any protected software inside the transponder which was indispensable to him for the purpose of transmitting the signals. We cannot, in the absence of any evidence, first make an assumption that there existed a protected software inside the transponder and make a further assumption that the broadcasters were allowed access to the same and a still further assumption that the software was protected by means of a patent enuring to the assessee. The broadcaster was not interested in the process or the intricacies of the working of the transponder. In fact, even the assessee is not interested in them. He is only as much interested in the technology or intricacies of the transponder as a cinema theatre owner would be interested in the technology involved in the working of the film-projector (to give a crude example). Neither is the film-goer interested in it. He pays for the entertainment value. In a somewhat similar manner, the broadcaster is least interested in the technology involved in the working of the satellite/transponder and pays for the service rendered by the assessee, viz., to transmit the signals. The facts are quite different from the case before the AAR. Hence the ruling inapplicable.

32. The argument that there was no physical contact between the processing of the signals and the broadcaster was not pursued by the assessee and hence the objections to the same raised by the special counsel for the Department need not be considered.

33. At some point of time during the arguments, the special counsel did faintly refer to the possibility of the payment being considered as consideration for the use of a "literary work" taxable as royalty within the opening words of art. 12.3(a) but abandoned the same later. It is therefore not considered. In any case, the argument is without any merit.

34. In the course of the arguments with reference to the applicability of art. 12.4(b)—fees for included services—the learned special counsel submitted that under the agreement it was the broadcaster's responsibility to install the earth-station which would uplink the signals and in doing so, he would get enriched with the technology which would attract the principle of "make available". The argument is not acceptable, with respect, because the technology, if any, involved in the setting up of the earth-station is not to be provided by the assessee at all. The

broadcaster/TV channel may itself possess the technology and be capable of setting up the earth-station or it may engage an entity which specialises in setting up earth stations. There is no evidence to show that it was PanAmSat which helped the broadcasters in setting up the earth-stations; in fact, and on the contrary, the responsibility was that of the broadcasters. Even assuming that the broadcasters did get enriched with the knowledge of the technology involved in setting up the earth stations, such technology, knowledge, skill, etc. did not get transmitted from the assessee. The argument fails.

35. An interesting debate was made before us with reference to the art. 12.7 of the DTAA with USA. Under art. 12.2, royalties may be taxed by the State in which they arise. This article is however controlled by art. 12.7. Article 12.7 reads as follows :

"7. (a) Royalties and fees for included services shall be deemed to arise in a Contracting State when the payer is that State itself, a political sub-division, a local authority, or a resident of that State. Where, however, the person paying the royalties or fees for included services, whether he is a resident of a Contracting State or not, has in a Contracting State a permanent establishment or a fixed base in connection with which the liability to pay the royalties or fees for included services was incurred, and such royalties or fees for included services are borne by such permanent establishment or fixed base, then such royalties or fees for included services shall be deemed to arise in the Contracting State in which the permanent establishment or fixed base is situated.

(b) Where under sub-para (a) royalties or fees for included services do not arise in one of the Contracting States, and the royalties relate to the use of, or the right to use, the right or property, or the fees for included services relate to services performed, in one of the Contracting States, the royalties or fees for included services shall be deemed to arise in that Contracting State."

It will be seen that cls. (a) and (b) are mutually exclusive. In other words, if the income arises in one of the two States (here, in India or the US) in accordance with cl. (a), then in respect of such income cl. (b) becomes irrelevant and it is not permissible to look into it. Therefore, it follows that any payment received by the assessee (PanAmSat) from the US customers (broadcasters residents of USA) arises in USA under cl. (a) and are taxable there. Even if it is assumed for the sake of argument that cl. (b) applies, the language of the treaty is materially different and is narrower than the corresponding provisions of the IT Act relating to the "source rule" embodied in s. 9(1)(vii)(c) and s. 9(1)(vi)(c). Under cl. (b) of art. 12.7 of the treaty, it seems to us that the process itself must be used in India to be taxed in India as royalty, a situation which does not obtain in the case on hand. The "process" of conversion of the uplinked signals into beamable signals that can be caught and seen in the homes on the TV screens takes place several thousands of kilometers above the earth. It cannot therefore be said that the "process" itself takes place in India as appears to be the requirement of cl. (b). Even with regard to fees for included services, it appears to us from the language of the clause that the services have to be performed in India. This situation also does not obtain in the case on hand. The order of the AAR in Steffen, Robertson and Kirsten Consulting Engineers & Scientists, In re (1998) 144 CTR (AAR) 90 : (1998) 230 ITR 206 (AAR), with respect, recognizes this position, though the decision was rendered vis-a-vis s. 9(1)(vii)(c) and s. 9(1)(vi)(c) of the IT Act. It was held that the statutory test for determining the place of the accrual of the royalty or fees for technical services "is not the place where the services, for which the payments are being made, are rendered but the place where those services are utilized". If this test is applied, the payments may be taxable as royalties in India under the Act on the footing that the services are utilized in India. But then when we come to cl. (b) of art. 12.7 of the Indo-US treaty, we find that the payment should relate to services "performed" in India in order to be taxed in India. The performance of the services is not in India and it is several thousand kilometers above the earth. The word "performed" is equivalent to "rendered". The word "utilised" connotes an idea in total contrast with the idea conveyed by the words "performed" and "rendered". A service could be "performed" or "rendered" in a place which is different from the place where it is "utilised". Whereas the Act uses the word "utilised" the treaty uses the word "performed".

36. Our views on the interpretation of art. 12.7 are only prima facie views, though the debate before us was quite interesting as well as illuminating. There was reference to the various treaties which USA had entered into with other countries such as Thailand, China and Australia and also to the internal documents of the US to show how the US Government have understood the provisions of art. 12.7 of the treaty. These arguments were presented before us with ability and learning, but we have refrained from giving our final views on the same as we consider it to be unnecessary in the light of our basic finding that the payments made to the assessee before us are not "royalties" within the meaning of art. 12.3(a) or "fees for included services" within the meaning of art. 12.4 (b). The source rule embodied in art. 12.7 would come into play only when we find that the payment is royalty or fees for included services.

37. Both sides referred to a number of authorities in the course of the arguments before us on the applicability of art. 12.3(a) and art. 12.4(b) of the treaty. We have however referred only to those authorities which we considered to be relevant and wherever there was no dispute as to the legal position we have omitted any detailed reference to the authorities cited as it would only burden the order. For instance, the learned special counsel for the Department had cited several authorities to support his argument that punctuation by itself cannot control the interpretation of the statute. The learned counsel for the assessee also cited a few authorities to show that punctuation has been held to be relevant in the context and setting of the provision. However since it was not seriously disputed on behalf of the assessee that punctuation by itself cannot normally control or dictate the task of interpretation, and the argument was that punctuation coupled with the setting and context would be relevant, we have not deemed it fit to refer to the authorities cited by both sides on this point. Similarly, on the meaning of the word "process" the learned special counsel for the Department had brought to our notice the dictionary meanings of the word and other relevant authorities, but we have refrained from discussing them since we have agreed with him that there is a "process" involved, following with respect the order of the Delhi bench of the Tribunal in *Asia Sat* (supra).

38. Ground No. 1 in the appeal is general and no decision is required. Ground Nos. 2 to 5 relate to the assessment of the amounts received by the assessee as "royalty". These grounds have been discussed in detail above and we have held that the amounts cannot be assessed as royalty under art. 12.3(a). The ground No. 6 which relates to the "source rule" and says that art. 12.7 of the treaty overrides the source rule contained in s. 9(1)(vi)(c) of the Act has only been touched upon by us in deference to the arguments addressed before us and since we have held that the amounts are not taxable as "royalty" we have not deemed it necessary to give our firm views thereon. Ground Nos. 7-8 relate to attribution of income. These grounds are academic and would arise for consideration only if the amounts paid to the assessee are held liable to tax as royalty. Ground No. 9 does not seek any specific relief and hence not adjudicated upon.

39. The levy of interest under s. 234B has been questioned in Ground No. 10. This issue is consequential to our decision that the amounts received by the assessee from the broadcasters (except doordarshan) cannot be considered to be royalty. Even otherwise, the issue stands covered by the order of the Delhi Bench of the Tribunal in the case of *Sedco Forex International drilling Inc. vs. Dy. CIT* (2000) 67 TTJ (Del) 670 : (2000) 72 ITD 415 (Del). The decision of the Special Bench of the Tribunal in the case of *Motorola Inc. vs. Dy. CIT* (2005) 96 TTJ (Del)(SB) 1 : (2005) 95 ITD 269 (Del)(SB) as also the decision of the Delhi Bench of the Tribunal in the case of *Asiasat* (supra) also support the assessee's grounds against the levy of interest. In these decisions, it has been held that if the tax was "deductible" at source from the payments made to the assessee, though not deducted, the assessee would be entitled to take credit for the tax so "deductible" and pay only the balance as advance-tax. The entire receipts of the assessee before us were subject to tax being deducted at source by the broadcasters assuming for the sake of argument that they were royalties. Therefore, tax was "deductible" from them by the broadcasters. The assessee was therefore not liable to pay advance-tax and hence the levy of interest under s. 234B is not legally correct.

40. ITA No. 1796/Del/2001 filed by the Department and C.O. No. 274/Del/2004 filed by the assessee go together. These relate to the assessee by name PanAmSat International Systems Inc., of Connecticut, USA. This company later amalgamated with PanAmSat International Systems LLC. The assessment year is the same, viz., 1997-98. The Department originally seems to have taken assessment proceedings against the amalgamating company. The CIT(A) vide order dt. 22nd Feb., 2001 held that the notice issued to the company under s. 142(1) is invalid and cancelled the assessment made under s. 144. The Department has filed the appeal against this decision of the CIT(A) and has raised the appropriate grounds though Ground No. 3 seems inappropriate since it erroneously assumes that the CIT(A) has held that the income received by the assessee is not royalty. The assessee in its cross-objection has challenged the decision of the CIT(A) to the effect that the amounts paid by the non-Indian broadcasters were taxable as amounts paid for the use of a secret process in the transponder and constituted royalty under Explan. 2 to s. 9(1)(vi) of the Act and further that they were taxable under art. 12.3(b) of the treaty as payments made as consideration for the use of a scientific equipment. Grounds have been taken against the rate of tax applicable and the attribution of the income to Indian operations. Both the appeal of the Department and the cross-objections of the assessee are dismissed as academic since the issue has been fully considered and decided by us in the case of the amalgamated company, viz., PanAmSat International Systems LLC in ITA No. 2041/Del/2004.

41. We place on record our appreciation for the well-prepared arguments advanced by both the sides.

42. In the result, ITA No. 2041/Del/2004 is allowed in part and ITA No. 1796/Del/2001 and C.O. No. 274/Del/2004 are dismissed. No costs.

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