

CTR ENCYCLOPAEDIA ON INDIAN TAX LAWS

ASIA SATELLITE TELECOMMUNICATIONS CO. LTD. vs. DEPUTY COMMISSIONER OF INCOME TAX *

ITAT, DELHI 'C' BENCH

K.C. Singhal, J.M. & R.S. Syal, A.M.

ITA No. 166/Del/2001; Asst. yr. 1997-98

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(2003) 78 TTJ (Del) 489 : (2003) 85 ITD 478 (Del)

*Also Dy. CIT vs. Asia Satellite Telecommunications Co. Ltd. (ITA No. 861/Del/2001; Asst yr. 1997-98).

Income deemed to accrue or arise in India—Business connection—Lease of transponder capacity to TV channels—Assessee, a foreign company, making available programmes of TV channels directly in India through transponder on its satellite by amplifying and relaying the signals after uplinking by TV channels—Assessee would acquire the right to receive the lease income only when these programmes are made available in India—It is a continuous process through which the TV channels are showing their programmes in India by the medium of the assessee—Thus, assessee has business connection in India—However, the process of amplifying and relaying the programmes is performed in the satellite which is not situated in the Indian airspace—Except for the fact that the footprint includes India, no operation is done by the assessee in India—No man, material or machinery or combination thereof is used by the assessee in the Indian territory—Therefore, provisions of s. 9(1)(i) are not attracted despite assessee's business connection in India

Held

The assessee is amplifying and relaying the signals in the footprint area after having been uplinked by the TV channels. The essence of the agreement of the TV channels with the assessee is to relay their programmes in India. If India is not in the footprint then the entire exercises become futile. The responsibility of the assessee is to make available programmes of the TV channels in India through transponder on its satellite. Assessee would acquire the right to receive the income only when these programmes are made available in India. So the crux of the contacts with the TV channels is to ensure that the assessee provides the signals in India after carrying out certain processes in the space. Similarly all the TV channels approach the assessee only because it has India in its footprint. Had India been not in its footprint, no customer interested in showing their programmes in India would have availed the services of the assessee. If the assessee had only amplified the programmes and passed over to its customer outside India, who in turn had made arrangement for sending the same to cable operators for use in India, it would have been the case of no business connection of assessee in India. Since the signals are provided by the assessee for direct use in India, it is certainly the case of assessee having business connection in India. In the present case it is not merely the user of any goods sold by the TV channels in India but a continuous process through which the TV channels are showing their programmes in India by the medium of the assessee. As such the assessee has business connection in India.—[CIT vs. R.D. Aggarwal and Co. & Anr.](#) (1965) 56 ITR 20 (SC), [CIT vs. Fried Krupp Industries](#) (1980) 19 CTR (Mad) 297 : (1981) 128 ITR 27 (Mad) and [ITO vs. Shriram Bearings Ltd.](#) (1987) 164 ITR 419 (Cal)

distinguished.

(Para 5.5)

Explanation (a) to sub-cl. (i) of s. 9(1) provides that in the case of a business of which all the operations are not carried out in India, the income of the business deemed under this clause to accrue or arise in India shall be only such part of the income as is reasonably attributable to the operations carried out in India. The effect of this Explanation is that unless the operations are carried out in India, no part of income arising from business connection can be said to be covered in cl. (i). In other words, if all the business operations are carried out in India then the income arising from business connection in India would be taxed in entirety under cl. (i). If no operations are carried out in India then no income from business connection in India can be taxed in India. If some operations are carried out in India then income only to that extent resulting from the business connection in India can be taxed in India by virtue of cl. (i). The key words used in Expln. (a) are the "operations" and "carried out in India". In order to establish that the business operations are carried out in India it is necessary to point out any part of the assessee's operations which were being carried out in the territory of India. No office or agent or subsidiary of the assessee is situated in India which acts between it and the cable operators in facilitating the receipt of the signals. No machinery or computer, etc. is installed by the assessee in India through which the programmes are reaching India. The process of amplifying and relaying the programmes is performed in the satellite which is not situated in the Indian airspace. Except for the fact that the footprint includes India, and the payment to the assessee is only for relaying signals in India, the Department has not pointed out any operation which is done by the assessee in India. The act of relaying the signals in the footprint area is also done outside India. The tracking, telemetering and control (TTC) operations are also performed outside India. No man, material or machinery or any combination thereof is used by the assessee in the Indian territory. The assessee has not entered into any contract with cable operators or viewers for reception of signals in India. In the light of these facts no part of the operations of the assessee's business is carried out in India and as such the provisions of s. 9(1)(i) are not attracted despite the fact that the assessee has business connection in India.

(Paras 5.6 & 5.7)

Conclusion

Although the assessee, a foreign satellite company had business connection in India as it was making available programmes of TV channels directly in India through transponder on its satellite by amplifying and relaying the signals after uplinking by TV channels, provisions of s. 9(1)(i) were not attracted as no part of operations of assessee's business was carried out in India.

Income deemed to accrue or arise in India—Royalty—Rental charges for transponder capacity—Assessee making available transponder capacity to TV channels—It was receiving signals from its customers, i.e., TV channels, by way of uplinked beam, changing its frequency, amplifying the same and relaying it from the transponder of the satellite to cable operators in India—Signals sent by the customers come into contact with the process in transponder—Thus, the TV channels were clearly 'using' the transponder capacity for carrying on their business in India—Word 'secret' occurring before the word 'formula' in cl. (iii) of Expln. 2 to s. 9(1)(vi) cannot be prefixed to 'process' as well—What the TV channels were using was the process made available by the assessee through its transponder—Transponder, which is a part of satellite, cannot be termed as an equipment and hence leasing out of transponders cannot be equated with the leasing out of any equipment—Therefore, the contention that the rental income could be charged to tax only after cl. (iva) of the Explanation came into effect is not acceptable—Merely because the lease rentals were fixed on annual basis it cannot be said that the payment is for any consideration other than rendering of said services—

Activity which is resulting into income in the hands of TV channels who are non-residents is the ultimate viewership of programmes transmitted by them in the footprint areas including India—Thus, these TV channels were not only carrying on their business in India but were also earning income from the source in India—Accordingly lease rent paid by the TV channels to the assessee was 'royalty' within the meaning of s. 9(1)(vi) r/w Expln. 2

Held

The word "use" is not defined in s. 9. Under these circumstances the meaning which is understood in common parlance should be adopted. The physical connection with the item to be used is not necessary in each circumstances. In the present age of modernization where numerous developed applications of science have become part of life and the extent of development of technology is so fast, it would really be unfair to restrict the meaning of the word "use" to only "physical use". The plain construction of the word "use" refers to the deriving advantage out of it by employing for a set purpose. That apart there was physical contact of the signals of the TV channels with the process in the transponder provided by the assessee. It is only when those signals come in contact with the process in the transponder that the desired results are produced. It is not necessary that the process must be used by the customers. The only requirement is that the process must be used. In the present case the signals sent by the customers come into contact with the process of the assessee in the transponder. Amplification of the signals is not possible unless the same come in contact with the process. When the TV channels were using transponder capacity so as to enable the cable operators to catch their programmes, they were clearly 'using' the transponder capacity. All the items referred to in cl. (iii) of Expln. 2 such as patent, invention, model formula and process, etc. are intellectual properties. These cannot be used by taking their possession physically. The only way of using them is by taking advantage from them. Therefore, using such properties refers to taking advantage out of them. It is noted that the non-resident customers derived advantage by utilizing the process in the transponder facilitating relay of their programmes to the viewers in India. As such the process in the transponder was 'used' by the customers for carrying on their business in India.

(Para 6.17)

The word 'secret' cannot be read before the word 'process' as well for the reason that there is no comma after the use of the word 'secret' till the end of cl. (iii) and if the intention had been to apply the word 'secret' before the word 'process' also, a comma would have been used after the word 'formula'. It is true that the commas and semi-colons, etc. play an important role in interpreting a provision but the same are not the only criteria. Law is trite on the point that the interpretation which leads to absurdity has to be avoided. The foremost principle of interpretation is that the construction should be done in such a way which validates the provision. If the contention of the authorised representative that the word 'secret' prefixed to "formula" in Expln. 2, cl. (iii) should be prefixed to "process" as well, is accepted in that case it will also have to be read before the subsequent words used in Expln. 2, cl. (iii) namely, "trademark" and 'similar property'. Obviously the trademark can never be 'secret'. If one cannot employ the word 'secret' before 'trademark', by natural implication it cannot be prefixed to "process" also. Therefore, the legislature has confined the application of the word 'secret' only before the word 'formula' and not 'process' or 'trademark' or 'similar property'. What the TV channels are using is the process made available by the assessee through its transponder. The function of the satellite in the transmission chain is to receive the modulated carrier that earth stations emits as uplinking, amplify them and retransmit them and downlink for reception at the destination earth stations. The word "process" means a "series of actions or steps taken in order to achieve a particular end". Considering the role of the assessee in the light of meaning of the term 'process' it becomes evident that the 'particular end' namely, viewership by the public at large is achieved only through the 'series of steps taken' by receiving the uplinked signals, amplifying them and relaying them after changing the frequency in the footprint area including India. The 'particular end' is achieved only through the 'series of

steps taken' in this regard. It was not the using of any facility but the using of process as a result of which the signals of the TV channels after being received in the satellite were converted to a different frequency and after amplifying the same were relayed down in the footprint. As the TV channels were utilising the process made available by the assessee in its satellite for the purposes of their business, so the customers were using the process embedded in the satellite for the purpose of their business. Therefore, what the TV channels in the entire cycle of relaying their programmes in India are doing, is that they are using the 'process' provided by the assessee. Whether any process is used or any services in connection with process are provided the same falls within the meaning of term royalty as defined in Expln. 2. Thus, whether the TV channels used the process provided by the assessee or services in connection with the process, the same falls within the definition of "royalty".—[Skycell Communications Ltd. & Anr. vs. Dy. CIT & Ors.](#) (2001) 170 CTR (Mad) 238 : (2001) 251 ITR 53 (Mad) **distinguished**.

(Paras 6.18, 6.20, 6.22, 6.23 & 6.25)

The transponder is not an equipment in itself. In other words, it is not capable of performing any activity when divorced from the satellite. It was fairly conceded by the authorised representative that the transponder in itself without other parts of satellite is not capable of performing any functions. Rightly so because satellite is not plotted at a fixed place. It rotates in the same direction and speed as the earth. If it had been fixed at a particular place or the speed or direction had been different from that of earth, it could not have produced the desired results. Transponder is part of satellite, which is fixed in the satellite and is neither moving in itself nor assisting the satellite to move. Therefore, the satellite is an equipment and the transponder, namely, a part of it, playing howsoever important role, cannot be termed as equipment. Hence, the leasing out of transponders to various customers in a satellite cannot be equated with the leasing out of any equipment. Therefore, the contention of the authorised representative with reference to the applicability of cl. (iva) of Explanation to the present case is not acceptable for the reason that the assessee has not leased out any 'equipment' (satellite) but has only made available the process (in the transponder) to its customers. Therefore, the consideration paid by the TV channels to the assessee has no connection with cl. (iva) and falls within the cl. (iii) r/w cl. (vi) of the term 'royalty' as explained in Expln. 2.

(Para 6.26)

The duty of the assessee is to catch the signals containing programmes from the customers and after routing these signals through various processes make them fit for viewership. To put it differently the TV channels are utilising the services of the assessee for their business and it is only with the help of such services that the carrying on of the business by them can be conceived. But for the services provided by the assessee the entire business of the TV channels would be paralysed. As such the customers were utilising the services of the assessee for the purposes of their business. As regards the other contention raised on behalf of the assessee that the rent payable by the TV channels was fixed irrespective of actual user, this submissions is not correct in this context. Merely because the lease rentals were fixed on annual basis one cannot say that the payment is for any consideration other than rendering services by amplifying and relaying the programme to its customers. Moreover, it is also not the case of the assessee that the customers had not actually utilised the transponder capacity made available to them at any point of time and that naturally cannot be so because the airing of the programmes by the TV channels is a continuous process. Therefore, the lease rent received by the assessee is on account of utilising of services rendered by the assessee to its non-resident customers for the purposes of their business in India. The source of income of TV channels are the Indian advertisers who make payment for advertising their products during the course of the relay of the programmes in India. Similarly, the cable operators in India who catch the signals and distribute it to public are the other source of income of the TV channels. It, therefore, follows that the essence of the activities is the making available the programmes of the TV channels in India. All other activities except the relaying of signals in India would be meaningless and no customer would approach the assessee unless the

footprint of its satellite includes India. Therefore, the non-residents, namely, the TV channels, were using the process of the assessee for the purpose of carrying on their business in India.—[Steffen, Robertson & Kirsteen Consulting Engineers and Scientists, In re](#) (1998) 144 CTR (AAR) 90 : (1998) 230 ITR 206 (AAR) **applied**.

(Para 6.27)

The source does not refer to the person who makes the payment but it refers to the activity which gives rise to the income. In the present context the activity which is resulting into income in the hands of non-resident customers, namely, the TV channels is the ultimate viewership of the programmes transmitted by them through the assessee in the footprint areas including India. Therefore, the activity which actually produces the income is not the uplinking or downlinking of the signals but of the actual viewership. If the programme signals are only uplinked but are not provided to the viewers, no activity capable of earning any profit would result. The cable operators are making the payments to the TV channels namely, the customers of the assessee only for the reason that the programmes are made available to public at large in India. Similarly, the advertisers are paying for inserting the advertisement in the programmes for the reason that these can be viewed in India so as to result in the acceleration in their sales because they have India as their commercial territory. Hence, the source of the income of the TV channels is the activity of showing programmes in India to the viewers. Therefore, it is clear that the activity which gives rise to income in the hands of non-resident customers, being the TV channel operators is the showing of their programmes in India and hence it is only this source which is resulting into income. Therefore, the TV channels, being the non-residents, are utilising the services of the assessee for earning income from advertisers and cable operators being the source in India by ultimately relaying the programmes in the Indian territories. The contention of the authorised representative in this regard, therefore, fails.—[CIT vs. Lady Kanchanbai & Anr.](#) (1970) 77 ITR 123 (SC) **applied**.

(Para 6.28)

In view of the above discussion the CIT(A) was justified in holding that the lease rent paid by the TV channels to the assessee falls within the ambit of the word "royalty" used by the legislature in s. 9(1)(vi) r/w Explan. 2. However, cl. (c) of s. 9(1)(vi) is attracted if (i) such process is utilised by the non-resident for the purpose of business carried on in India, or (ii) for earning any income from any source in India. On the facts of the present case the earning of income may be in any form such as receipts from advertisers or from cable operators, etc. The possibility of any channel(s) not earning income from any source in India cannot be ruled out. In such a case the lease rent earned by the assessee from such channel(s) cannot be taxed under s. 9(1)(vi). The order of the CIT(A) is, therefore, modified pro tanto and consequently the AO is directed to determine the income under s. 9(1)(vi)(c) in the light of above discussion after allowing a reasonable opportunity of being heard to the assessee.—[ABC, In re](#) (1999) 154 CTR (AAR) 246 : (1999) 238 ITR 296 (AAR) **relied on**.

(Para 6.30)

Conclusion

Lease rent received by assessee, a foreign satellite company, for leasing out transponder capacity of its satellite to non-resident TV channels was 'royalty' within the meaning of s. 9(1)(vi) r/w Explan. 2 as these TV channels were using the process made available by the assessee through its transponder for carrying on their business of transmitting programmes to India and the ultimate viewership of these programmes, which was the source of income of these TV channels, was in India.

Appeal (Tribunal)—Additional ground—Ground not raised before CIT(A)—If all the necessary facts are available on record and it is only the question of applicability of the

correct section to those facts no party can be debarred from raising such a question of law before the Tribunal even if it was not raised earlier or was not subject-matter of consideration by the lower authorities—Main issue under consideration in the appeal is the taxability of income realised by the assessee-company by leasing out transponder capacity—Only controversy relates to applicability of the relevant sub-clause of s. 9(1)—All facts necessary for adjudication of issue under the alternative clauses are available on record—Revenue entitled to raise the issue of applicability of s. 9(1)(vii) to the facts of the case even though it was not subject-matter of appeal before the CIT(A) and no specific ground was raised in this regard

Held

Normally the grounds are set out in the memorandum of appeal before the Tribunal. However, the parties are not prohibited from taking additional grounds at the time of hearing subject to the leave of the Tribunal. The acceptability of a ground urged originally or permitted to be urged by way of additional ground is a matter for determination by the Tribunal at the time of final hearing. There is no precedent or rule which prohibits the parties from taking an additional ground before the Tribunal which is not set out in the original memorandum of appeal. As such the Revenue is entitled to raise additional ground for consideration before the Bench.—[Maruti Udyog Ltd. vs. ITAT](#) (2001) 169 CTR (Del) 366 : (2001) 252 ITR 482 (Del) **followed**.

(Para 7.2)

The purpose of the assessment proceedings before the authorities is to correctly assess the tax liability of an assessee in accordance with law. Determining the correct tax liability in accordance with law refers to the application of correct provision of the Act to the subject-matter. If all the facts are available on record and it is only the question of applicability of the correct section to those facts there is no reason to debar any party before the Tribunal from raising such a question of law even if it was not raised earlier or was not the subject-matter of consideration by the lower authorities. However, it is important that before taking up any such issue for consideration the affected party must be given due opportunity to represent its case. Both the assessee as well as the Revenue are entitled to raise a legal ground before the Tribunal for the first time. If it is a legal ground and does not require consideration of fresh facts, it is not only the right of the parties but the duty of the Tribunal to admit it for consideration. Adverting to the facts of the present case the main issue under consideration in both the appeals is the taxability of income realised by the assessee-company for providing the transponder capacity to its customers. The only controversy relates to the applicability of the relevant sub-clause of s. 9(1) to the case. The AO held that s. 9(1)(i) was applicable whereas the CIT(A) held that it was s.9(1)(vi) which was applicable to the facts of the case. The subject-matter of challenge in both the appeals remains the taxability or otherwise of the income under consideration. All the facts necessary for adjudication of the issue either under sub-cl. (i) or sub-cl. (vi) or sub-cl. (vii) are available on record. The only question is the applicability of correct clause of s. 9(1) to the facts of the case. The additional ground so raised by the Revenue does not enter into the field of new facts which were not considered by the authorities below nor it is the case that the ground now solicited to be raised is not germane to the issues involved in both the appeals. Under these circumstances the Revenue is entitled to raise this ground.—[National Thermal Power Co. Ltd. vs. CIT](#) (1999) 157 CTR (SC) 249 : (1998) 229 ITR 383 (SC) and [CIT vs. Dhanalakshmi Mills Ltd.](#) (1999) 157 CTR (Mad) 252 **followed**.

(Para 7.2)

Conclusion

Both, the assessee as well as the Revenue, are entitled to raise a legal ground before the Tribunal by way of an additional ground for the first time if it does not require consideration of fresh facts.

Non-resident—Computation of income from lease of transponder capacity—Applicability of ss. 28, 44D or 115A—Lease rental received by assessee, a foreign company, for relaying the programmes of foreign TV channels to India through transponder on its satellite was royalty within the meaning of s. 9(1)(vi) r/w Expln. 2—Secs. 44D and 115A cannot be applied for the reason that such payment of royalty was made by non-resident companies (TV channels) and not by the Government of India or an Indian concern—Sec. 9(1) nowhere states that the income deemed to accrue or arise in India would fall only under the residuary head of income—Income derived by assessee would fall under Chapter IV-D and has to be computed accordingly—AO directed to compute the assessee's chargeable income de novo by calculating the gross receipts relatable to India and deducting the expenses in relation to income attributable to India—Depreciation allowable on the satellite has to be apportioned appropriately—CIT(A) justified in holding that the actual cost has to be considered for this purpose and not the WDV since no depreciation was actually allowed to the assessee in the past—Further, s. 44C is not attracted as assessee has no office in India—AO directed to apply the telegraphic transfer buying rate of Hongkong dollar as on the last day of the relevant previous year for conversion of Hongkong dollars into Indian rupees for calculating income attributable to India

Held

Secs. 44D and 115A cannot be applied to the facts of the present case for the reason that the payment of royalty to foreign companies is made by non-resident companies and not by Government or Indian concern. Probably such a situation was not visualised by the legislature at the time of enactment of the above referred provisions. In the absence of any special provision for computing the income by way of royalties, etc., recourse will have to be taken to the normal provisions of the IT Act, 1961.

(Para 9.2)

Sec. 9(1) deems certain income to accrue or arise in India. It nowhere states that the income so deemed to accrue or arise in India would fall under the last head of income, namely, "Income from other sources". It, therefore, follows that the nature of income is not effected by s. 9 and if the activity otherwise qualifies as business then the income derived therefrom has to be taxed under the head "Business income". The relevant factor in deciding the head under which a particular income would fall is the nature of the activity carried on by the assessee. The business of the assessee is to receive the signals from the earth stations and then after amplifying, relay them in its footprint. This is the sole activity which the assessee is carrying on as its business. Ergo there remains no doubt that the income from such operations falls under Chapter IV-D. Therefore, the contention of the Departmental Representative is not correct that the income should be considered under the head "Income from other sources". Resultantly the assessee is entitled to deductions available under this Chapter.

(Para 9.3.a)

The computation made by the authorities below is set aside and the entire exercise of the computation will be done de novo by the AO. The fresh computation would involve basically two steps. First would relate to the calculation of gross receipts relatable to India and the second would deal with the expenses deductible in relation to income attributable to India. The resultant figure would be the total income chargeable to tax.

(Para 9.4.c)

The claim of the assessee for entitlement of depreciation on the total cost of Asiasat-II against the income attributable to India is not justified for the reason that only the income relatable to C Band

is falling within the scope of total income whereas the income of other bands namely Ku Band, Ku Lease, Ku sales is outside the scope of total income in India. Under these circumstances the depreciation allowable to the assessee on Asiasat-II has to be apportioned. As regards the cost of the satellite eligible for depreciation, the CIT(A) was justified in holding that the actual cost would be considered for this purpose and not the written down value as computed by the AO for the clear reason that the written down value refers to the actual cost minus depreciation actually allowed. Since it is not the case of the Revenue that any depreciation was actually allowed to the assessee in the past, therefore, no cognizance can be taken of the notional depreciation as done by the AO. Therefore, the claim for depreciation should be considered in the light of the foregoing discussion.—[Rajasthan State Warehousing Corporation vs. CIT](#) (2000) 159 CTR (SC) 132 : (2000) 242 ITR 450 (SC) **distinguished.**

(Para 9.4.e)

The CIT(A) was justified in holding that s. 44C was not attracted. It is patent that this section is applicable only in the cases of those non-residents who carry on business in India through their branches. In other words, this section presupposes the existence of a branch office or other sub-office, by whatever name called, in India for whose income the deduction on account of head office expenses situated outside India is granted as stated in s. 44C. If there is no branch in India naturally there will not arise any question of allowing any deduction towards head office expenses. The assessee does not have any office in India, therefore, the provisions of s. 44C would not be applicable.—[Rupenjuli Tea Co. Ltd. vs. CIT](#) (1991) 92 CTR (Cal) 37 : (1990) 186 ITR 301 (Cal) **relied on.**

(Para 9.4.g)

Rule 115 clearly stipulates that for computing income in Indian rupees, the rate of exchange for the conversion of the value in rupees shall be made at the telegraphic transfer buying rate of the currency of the other country as on the specified date. According to a certificate from the State Bank of India the TT buying rate of Hongkong dollar as on 31st March, 1997, was Rs. 4.61. In these circumstances the AO is directed to apply this rate for conversion of Hongkong dollars into Indian rupees for calculating income attributable to India.

(Para 9.5)

Conclusion

Lease rental received by assessee, a foreign company, for relaying the programmes of foreign TV channels to India through transponder on its satellite which was royalty within the meaning of s. 9 (1)(vi) r/w Explan. 2 was assessable as business income under Chapter IV-D; AO directed to compute the assessee's chargeable income by calculating the gross receipts relatable to India and deducting the expenses in relation to income attributable to India.

Interest under s. 234A—Chargeability—Return not filed in time—Liability towards interest under s. 234A is mandatory—When the assessee non-resident did not file the return in time, interest under s. 234A was attracted

Held

The liability towards interest under s. 234A is mandatory and arises on account of failure to file the return within the time as prescribed under s. 139(1). As the assessee was under obligation to file return on or before 30th Nov., 1997, which was actually not filed in time, the liability to pay interest under s. 234A was rightly attracted and the CIT(A) was justified in holding so.

(Para 10.1)

Conclusion

Assessee non-resident having not filed its return in time liability to pay interest under s. 234A was attracted.

Interest under s. 234B—Chargeability—Tax deductible at source—Word used in s. 209(1) (d) is "deductible" and not "deducted"—Therefore, if any tax is deductible from any income paid to the assessee during the year, no interest under s. 234B can be charged on the said tax irrespective of the fact whether it has been actually deducted or not—Liability to deduct tax at source from payments made by TV channels to the assessee, a foreign company, existed by reason of the provisions of s. 195—Amount of such tax is liable to be excluded from the tax computed under cls. (a) to (c) of s. 209(1) though admittedly no tax was actually deducted—Matter of computation of assessee's income stands restored to the AO for fresh determination—Only if the amount of tax deductible by the TV channels by virtue of the provisions of s. 195 is found to be lower than the tax payable by the assessee, the balance amount would be considered for the purpose of charging interest under s. 234B, and not otherwise

Held

The charge of interest for default in payment in advance tax is covered under s. 234B. This section is attracted only when the assessee is liable to pay advance tax under s. 208. The later section in turn provides that the advance tax shall be payable during a financial year in every case where the amount of such tax payable by the assessee during that year is Rs. 5,000 or more. Clause (d) of s. 209(1) provides that the income-tax under cl. (a) or cl. (b) or cl. (c) shall in each case be reduced by the amount of income-tax which would be "deductible" or collectible at source during the said financial year under any provisions of this Act. It is an admitted position that no tax was actually deducted by the customers of the assessee. But it is important to bear in mind that the word used in s. 209(1)(d) is "deductible" and not "deducted". It, therefore, boils down that if any tax is deductible from any income paid to the assessee during the year, no interest under s. 234B can be charged to the extent irrespective of the fact whether it has been actually deducted or not. The opening words of s. 195(1) cast obligation on 'any person' for deduction of tax at source who is responsible for paying to a foreign company, any amount chargeable to tax in India. "Any person" referred to herein, may be a resident or a non-resident. Therefore, the liability to deduct tax at source from the payments made by the TV channels to the assessee is fastened on them by virtue of the provisions of s. 195. That being the position the receipt of income by the assessee is such on which tax is "deductible". Once the tax is held to be deductible the amount of such income-tax which is deductible is liable to be excluded from the income-tax computed under cls. (a) to (c) of s. 209(1). As the matter of computation of income has been restored to the file of AO for fresh determination, naturally the amount of income-tax thereon can be calculated only thereafter. If on such calculation the AO finds that the amount of tax deductible by the TV channels, by virtue of the provisions of s. 195, is equal to or more than the tax payable by the assessee then no liability under s. 234B would arise. If, however, the former figure is found to be lower than the latter figure, the balance amount would be considered for the purposes of charging interest under s. 234B. Under these circumstances the issue of determination of interest under s. 234B is also restored to the file of the AO.

(Para 10.2)

Conclusion

Amount of tax which was liable to be deducted from the payments made to the assessee is to be excluded from the tax computed under cls. (a) to (c) of s. 209(1) though admittedly no tax was

actually deducted, and it is only if the said amount of tax is found to be lower than the tax payable by the assessee, the balance amount would be considered for the purpose of charging interest under s. 234B, and not otherwise.

Legislation referred to

Sections 5(2)(b), 9(1)(i), 9(1)(vi), 9(1)(vii), 28(i), 44C, 44D, 115A, 209(1)(d), 234A, 234B, 253, RULE 115,

Cases referred to

CIT vs. Cilag Ltd. (1968) 70 ITR 760 (Bom)

CIT vs. Gilbert & Barker Manufacturing Company 1977 CTR (Bom) 347 : (1978) 111 ITR 529 (Bom)

ITO vs. Shriram Bearings Ltd. (1997) 138 CTR (SC) 169 : (1997) 224 ITR 724 (SC)

Jute Corporation of India Ltd. vs. CIT (1990) 88 CTR (SC) 66 : (1991) 187 ITR 688 (SC)

Mohd. Shabir vs. State of Maharashtra (1979) 1 SCC 568

Rahul Kumar Bajaj vs. ITO (1999) 64 TTJ (Nag)(SB) 200 : (1999) 69 ITD 1 (Nag)(SB)

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

Seth Shiv Prasad vs. CIT (1972) 84 ITR 15 (All)

Counsel appeared

S.E. Dastur with P.J. Pauliwak & S.D. Shah, for the Assessee : G.C. Sharma with Anoop Sharma, R.K. Raghan & M. Malik, for the Revenue

Order

R.S. SYAL, A.M. :

These two appeals—one by the assessee and the other by the Revenue emanate from the order passed by the CIT(A) on 4th Dec., 2000, in relation to asst. yr. 1997-98. As both the appeals are emerging out of the same order, we are, therefore, proceeding to dispose of both these appeals by a consolidated order for the sake of convenience.

2. Factual Matrix

Briefly stated the facts of the case, as collected from the orders of the authorities below, statement of facts and other material before us, are that the assessee-company, incorporated in and a resident of Hongkong was deriving lease income from lease of transponder capacity. It was engaged in operating telecommunication satellites located in US stationary orbit of 36,000 kms above equator in accordance with the regulatory requirements of the International Telecommunication Union under the United Nations. In the year under consideration it operated two satellites available at its disposal, namely, Asiasat-I, taken by the assessee on lease located at 105.5 degree east and Asiasat-II, owned by it located at 100.5 degree east. It is an admitted position that the satellites are used for telecommunications and broadcasting services throughout the region. The company leased out its transponder capacity to various customers listed at pp. 481

to 483 of the paper book for broadcasting and telecommunication so that their signals could be delinked to various locations. One of such agreements, copy placed at pp. 9 to 261 of the paper book, was entered into on 21st Feb., 1995, with Satellite Television Asian Region Ltd. owning TV channels like Star Plus, Star News, etc. to make available transponder capacity for a period of 12 years with the rental income from the lease of such transponder capacity starting from US dollars 27,50,000 in the utilisation period of 1995 onwards. The AO found that the geographical area within which the signals can be received (called as footprint) included India amongst other countries. It was observed that the Revenue of the TV channel companies was mainly from advertisements which originated from India. In most of the cases programmes were shot in India, recorded in India and the viewers were in India i.e., the territory of commercial exploitation was in India and, therefore, for the broadcasting/downlinking these programmes the TV channel companies approached the assessee for the lease of transponders capacity with the help of which the programmes were viewed in India. The AO also discussed as to how the programmes are shown on TV and what is the role of satellite companies in this regard by observing that the waves of the customers carrying voice and/or image are uplinked to the satellite and then these are downlinked to its footprint over India where the cable operators with the help of dish antennas receive the signals and distribute it to viewers. It was further noted that the assessee-company facilitated the transmission and broadcasting of various programmes by the channel operators to India. On being called upon to explain as to why the provisions of s. 9(1)(i) be not applied, it was submitted on behalf of the assessee that it was taxed in Hongkong and was not liable to pay any tax in India for the reason that no agreement was entered into with any company resident in India for leasing of transponder capacities on its satellites and the satellites of the assessee were also not located in the orbital slot allotted to India. It was also submitted that the lease rentals were recovered from the companies who were not resident in India and further no income was actually received in India. It was also explained that the assessee did not exercise any control over the signals of its customers uplinked by them and had no rights in the signals and as such had no business connection in India. It was further explained that in any event, the assessee did not carry out any business operations in India and hence no income could be said to have been deemed to accrue or arise in India. Not satisfied with the explanation given by the assessee, the learned AO held that the ultimate territory of commercial exploitation was in India and hence the assessee was liable to tax under s. 9(1)(i) and accordingly worked out the total taxable income of the assessee at Rs. 1,60,28,03,316 which resulted into total demand of about Rs. 200 crores. The assessee filed appeal against this order, which was attended both by the assessee and the AO. An additional argument was raised by the AO before the first appellate authority to the effect that the assessee's case was also covered under s. 9(1)(vi) and the payments received by it were in the nature of "Royalty". The learned CIT(A) accepted the assessee's contention and held that the provisions of s. 9(1)(i) were not applicable to the facts of the case. However, the AO was directed to compute the income in the light of the provisions of s. 9(1)(vi), as in the opinion of the CIT(A), it was the latter section which was rightly applicable to the facts of the case.

3. Validity of assessment

At the outset the learned counsel for the assessee did not press the validity of notice issued under s. 142(1) by the AO and the consequential assessment. Accordingly ground Nos. 2 and 3 of the assessee's appeal on this issue stand dismissed as not pressed.

4. Overall legal position

Before proceeding to deal with the merits of the case vis-a-vis the legal position, it is pertinent to mention that in the year under consideration there was no tax treaty in existence governing the avoidance of double taxation between Hongkong and India. As such the issue will be decided only on the basis of the provisions of the IT Act, 1961. It is not in dispute that the assessee is not a company resident in India. Sec. 5(2) dealing with the scope of total income of non-residents provides that subject to the provisions of the Act, the total income of non-residents includes income from whatever source which is received or deemed to be received in India or accrues or

arises or is deemed to accrue or arise to him in India. Sec. 9 is a deeming section which lists certain incomes which are deemed to accrue or arise in India. It is not the claim of the Department that any income was actually received or deemed to be received by the assessee in India in the present year. Nor it is the case that any income actually accrued or arose to the assessee in India. The Revenue is contemplating that the income falls under the latter part of s. 5(2)(b) namely "income deemed to accrue or arise in India". Hence we shall restrict ourselves to the applicability of s. 9(1) to the facts of the case, as is contested in the two appeals before us.

5. Applicability of s. 9(1)(i)

5.1. Ground No. 1 of the Revenue's appeal is directed against the finding of the learned CIT(A) that s. 9(1)(i) was not attracted. Before tendering any submissions in this regard, it was submitted by the learned Departmental Representative that no precedent, namely, any High Court or Supreme Court judgment was available on this issue and as such it was a novel case on its own facts. Referring to the cycle of business operations in this case it was submitted that briefly the business of the assessee was only to help the customers, namely, the TV channels, in relaying their programmes in the footprint area including India. It was stated that the TV channels were uplinking their programmes and after the receipt of the signals at the satellite and processing through various processes embedded in the transponders, the assessee was making available the signals in the footprint area including India. It was asserted that the only purpose for entering into a contact by the customers with the assessee was to ensure that the programmes are made available in India and it was the duty of the assessee to make available these programmes in India. As the very spirit of the agreement between the assessee and the TV channels was to make available their programmes in India, the learned Departmental Representative contended that it established a business connection in India as contemplated by cl. (i) of s. 9(1). It was pleaded that the chain of the activities involved in the entire process included four persons, namely, TV channels (customers), the assessee, the cable operators and the viewers in India. It was submitted that all these persons were working in a cycle and the main focus of the entire exercise was to show programmes in India. It was, therefore, urged that there was a direct business connection of the assessee in India. It was further stated that there was no requirement in the provisions of this section that the business connection should be that of the assessee only. If in the chain of events any business connection is found to have been established in India, the income accruing therefrom was liable to be considered in s. 9(1)(i). It was still further pointed out that the income which is received or is deemed to be received or accrues or arises in India is straightway covered in the later part of s. 5(2). If any income is directly accruing or arising in India there is no point in considering the applicability of s. 9(1) which deals with income deemed to accrue or arise in India. It was pleaded that s. 9(1) includes within its ambit only those incomes which are actually not accruing or arising in India but are deemed to accrue or arise in India. The deeming provision as contained in s. 9(1), as stated by the learned Departmental Representative, assumes a particular state of affairs which is actually not there. Referring to the words 'directly or indirectly' used in cl. (i) of s. 9(1) it was stated that the business connection in India was not only confined directly to the assessee but where the business connection was established indirectly or through someone else also the same did fall within cl. (i). As the viewers and the cable operators were located in India who were the customers of the TV channels with whom the assessee was directly connected, the learned Departmental Representative submitted that there was indirect business connection of the assessee in India. As the feeders to the TV channels were advertisers and the cable operators in India and these TV channels were in turn the feeders to the assessee-company, the learned Departmental Representative stated that there was a business connection of the assessee in India. It was still further pointed out if any link in the chain of the persons referred to above is missing there would remain no necessity for the customers to enter into agreement with the assessee for relaying the programmes from the satellite in the footprint including India. Referring to the decision of the Hon'ble apex Court in the case of CIT vs. R.D. Aggarwal & Co. & Anr. (1965) 56 ITR 20 (SC) the learned Departmental Representative submitted that in this case it was held that the expression 'business connection' postulated real and intimate relation between the trading activity carried on outside the taxable territories and the trading activity within the territories and the

relation between the two contributed to the earning of the income by the non-resident in his trading activity. Applying the ratio of this judgment to the facts of the present case it was pointed out that there was a business connection of the assessee in India and as such the income was taxable under s. 9(1)(i). It was also submitted that all the customers of the assessee, namely the TV channels were assessed in India and that was the biggest evidence to show that there was a business connection of the assessee in India.

5.2. In the opposition the learned authorised representative strongly supported the action of the learned CIT(A) in this regard. It was submitted that the assessee had no business connection in India. Referring to the judgment of R.D. Agarwal (supra) it was submitted that the business connection in India should be that of the non-resident, namely, the assessee in the present case, and not that of the TV channels. Further reference was made to Expln. (a) to s. (1)(i) to submit that in order to be covered under cl. (i), it was necessary to show that the business operations were also carried out in India. Only that proportion of the income which related to the operations carried out in India was taxable under s. 9(1)(i). It was, therefore, submitted that as the assessee had neither any business connection in India nor any operations were carried out in India, therefore, the learned CIT(A) was justified in holding that cl. (i) of s 9(1) was not attracted. In the rejoinder the learned Departmental Representative submitted that r. 10 of IT Rules, 1962, deals with the case of determination of income in the case of non-resident. According to him such rule would come into operation only when Expln. (a) of sub-cl. (i) was attracted. Still further it was submitted that the operations were carried out in India for the reasons that the assessee was under obligation to provide the signals in India itself.

5.3. We have considered the rival submissions in the light of material placed before us and precedents relied upon. In order to consider the applicability of s. 9(1)(i) it is important to note down its relevant part as under :

"9(1) The following incomes shall be deemed to accrue or arise in India :

(i) all income accruing or arising, whether directly or indirectly, through or from any business connection in India, or through or from any property in India, or through or from any asset or source of income in India, or through the transfer of a capital asset situate in India.

Explanation : For the purposes of this clause :

(a) in the case of a business of which all the operations are not carried out in India, the income of the business deemed under this clause to accrue or arise in India shall be only such part of the income as is reasonably attributable to the operations carried out in India;

(b)

(c)

(d)"

5.4. Admittedly, there is no quarrel over the proposition that the income to the assessee did not result from any property in India or through or from any asset or source in India or through the transfer of a capital asset situated in India. Therefore, we have to restrict ourselves to consider only the first part namely, the income accruing or arising whether directly or indirectly through or from business connection in India. "Business connection" has not been defined in the Act. It has been laid down in the catena of decisions that it is difficult to get a definition both exclusive and inclusive which will meet every mode or method of business connection. Clearly "business connection" is not equivalent to carrying on "business". The scope of the former is wider from that of latter. As both the sides have relied on the decision of R.D. Aggarwal (supra) at this stage we

shall examine the facts of that case vis-a-vis its applicability to the instant case. In that case the assessee obtained orders from dealers in Amritsar which were sent to non-residents. These were accepted by such non-residents, price was received by them and delivery was also given outside taxable territory. No operation such as procuring the raw materials, manufacture, sale of goods or delivery against price etc. took place in India. The ITO at Amritsar computed the income of the assessee by adding Rs. 54,558 towards 5 per cent of the net total value of yarn sold by the non-resident company to the Indian merchants in the previous year because in his view there subsisted business connections between non-resident and the assessee. When the matter finally travelled to the Supreme Court it was held that some commercial activity was undoubtedly carried on by the assessee in the matter of procuring orders in India but on this account no business connection of the assessee with a non-resident within the taxable territory resulted. It was laid down that the expression "business connection" postulates a real and intimate relation between trading activity carried on outside India and trading activity within India, the relation between the two contributing to the earning of income by the non-resident in his trading activity. We further, note that in the case of CIT vs. Fried Krupp Industries (1980) 19 CTR (Mad) 297 : (1981) 128 ITR 27 (Mad) it was held that where a person purchases machinery, as goods, from a foreigner and utilises it in commercial operations in India and earns income therefrom, the foreigner in such a principal to principal transaction has nothing to do with India. It was further observed that as there was no agent, therefore, no business connection resulted therefrom. It has been laid down by various Courts that in order to constitute a business connection there must be an activity in India of the non-resident having an intimate and real relation of a continuous character with the business of non-resident which contributes to the earning of profit by the non-resident in his business. It has also been laid down in various judgments that it is really impossible to define business connection. It depends on the facts of each case as to whether any business connection exists or not. That is the reason for which the legislature, in its wisdom, has not defined the expression "business connection". All the case law available on this subject lay down the proposition that there must be an activity of the non-resident in India having an intimate and real relation of a continuous character with business of non-resident which contributes to the earning of profit by the non-residents in his business. In ITO vs. Shriram Bearings Ltd. (1987) 164 ITR 419 (Cal) later affirmed by the apex Court in ITO vs. Shriram Bearings Ltd. (1997) 138 CTR (SC) 169 : (1997) 224 ITR 724 (SC), it was held that the business connection must undoubtedly be a commercial connection but every commercial connection will not necessarily constitute business connection unless the commercial connection was really and intimately connected with the business activity of the non-residents in the taxable territories and thus contributing to the earning of profits in the said trading activity.

5.5. Now we shall examine the applicability of the guidance gathered from the above case law to the facts of the present case to determine whether there was any business connection of the assessee in India or not. The assessee is amplifying and relaying the signals in the footprint area after having been uplinked by the TV channels. The essence of the agreement of the TV channels with the assessee is to relay their programmes in India. If India is not in the footprint then the entire exercises become futile. The responsibility of the assessee is to make available programmes of the TV channels in India through transponder on its satellite. It is not the mere user of any goods or information/technology in India, which is supplied by the assessee. The decisions in R.D. Aggarwal (supra) and other Cases referred to : before us and the authorities below are all confined to the situation where the goods/technology was sold outside India and when such goods or technology was utilised by the customers in India it was held to be not the case of any business connection of the non-residents in India. But the facts before us are distinguishable from all those cases because the duty of the assessee is to amplify the programmes and then pass over the same in India. Assessee would acquire the right to receive the income only when these programmes are made available in India. So the crux of the contacts with the TV channels is to ensure that the assessee provides the signals in India after carrying out certain processes in the space. Similarly all the TV channels approach the assessee only because it has India in its footprint. Had India been not in its footprint, no customer interested in showing their programmes in India would have availed the services of the assessee. If the assessee had only amplified the programmes and passed over to its customer outside India, who in turn had made arrangement for sending the

same to cable operators for use in India, it would have been the case of no business connection of assessee in India. Since the signals are provided by the assessee for direct use in India, it is certainly, in our considered opinion, the case of assessee having business connection in India. In the present case it is not merely the user of any goods sold by the TV channels in India but a continuous process through which the TV channels are showing their programmes in India by the medium of the assessee. As such we are of the considered opinion that the assessee has business connection in India.

5.6. Expln. (a) to sub-cl. (i) of s. 9(1) provides that in the case of a business of which all the operations are not carried out in India, the income of the business deemed under this clause to accrue or arise in India shall be only such part of the income as is reasonably attributable to the operations carried out in India. The effect of this Explanation is that unless the operations are carried out in India, no part of income arising from business connection can be said to be covered in cl. (i). In other words, if all the business operations are carried out in India then the income arising from business connection in India would be taxed in entirety under cl. (i). If no operations are carried out in India then no income from business connection in India can be taxed in India. If some operations are carried out in India then income only to that extent resulting from the business connection in India can be taxed in India by virtue of cl. (i). We have, therefore, to examine as to whether the assessee was carrying out any operations in India or not. Carrying out any operation at a particular place means doing some act at that place. At the cost of repetition we would briefly set out the steps in sequence starting from uplinking of the signals by the customers of the assessee and terminating with the ultimate viewership in India, to examine as to what operations are carried out in India.

(i) Programmes are uplinked by the TV channels (admittedly not from India).

(ii) After receipt of the programmes at the satellite (at the locations not situated in Indian airspace), these are amplified through complicated process (discussed infra).

(iii) The programmes so amplified are relayed in the footprint area including India where the cable operators catch the waves and pass them over to the Indian population.

5.7. There is no dispute that the first two steps are not carried out in India. The contention of the Department is that the third step namely, the relaying of the programmes in India amounts to the operations carried out in India. It is no doubt true that the footprint area of the assessee's satellite includes India and the programmes of the TV channels are ultimately viewed in India. The question arises that merely because the footprint area includes India and the programmes are viewed in India, is it sufficient enough to hold that the business operations are also carried out in India? The answer to this question, in our considered opinion has to be in negative. The key words used in Expln. (a) are the "operations" and "carried out in India". In order to establish that the business operations are carried out in India it is necessary to point out any part of the assessee's operations which were being carried out in the territory of India. No office or agent or subsidiary of the assessee is situated in India which acts between it and the cable operators in facilitating the receipt of the signals. No machinery or computer, etc. is installed by the assessee in India through which the programmes are reaching India. The process of amplifying and relaying the programmes is performed in the satellite which is not situated in the Indian airspace. Except for the fact that the footprint includes India, and the payment to the assessee is only for relaying signals in India, the Department has not brought to our notice any operation which is done by the assessee in India. The act of relaying the signals in the footprint area is also done outside India. The tracking, telemetering and control (TTC) operations are also performed outside India in Hongkong. No man, material or machinery or any combination thereof is used by the assessee in the Indian territory. The assessee has not entered into any contact with cable operators or viewers for reception of signals in India. In the light of these facts we are of the considered opinion that no part of the operations of the assessee's business is carried out in India and as such the provisions of s. 9(1)(i) are not attracted despite the fact that the assessee has business connection in India.

6. Applicability of s. 9(1)(vi)

6.1. Ground Nos. 4 to 10 of the assessee's appeal deal with the finding of the learned CIT(A) on the applicability of s. 9(1)(vi) of the Act. The learned counsel for the assessee opened his elaborate arguments on this issue by stating that the learned CIT(A) misdirected himself in holding that the provisions of s. 9(1)(vi)(c) were applicable. It was pointed out that in order to be covered within it, the right or property or information should be "used". Referring to different clauses of the agreement with M/s Satellite Television Asian Region Ltd., it was asserted that the assessee had agreed to make available to the customer the transponder capacity, against which it had received rental charges. It was pointed out that the purpose for which the transponder capacity was provided was to promote the customers to provide international television services and the delivery of all information required for operation and administration of such services within the footprint area. It was highlighted by the learned authorised representative that the assessee's provision of the transponder capacity under this agreement did not include the uplinking, downlinking or terrestrial transmission services. The only thing that the assessee was doing, according to the learned counsel, was that it was receiving signals mounted on a wave from its customers by way of uplinked beam; the signals so received were segregated from the wave in the satellite and after amplifying the same were mounted on assessee's wave which had different wave length from the wave length on which the signals, were received. It was stated that these signals, containing programmes of the TV channels were relayed from the transponder of the satellite and the downlinking was done by the cable operators who were catching the waves through dish antennas at their end and then passing them over to the viewers. It was urged that in this entire process the transponder was not used by the customers who were paying lease rental to it. It was emphasised that in order to "use" anything it was necessary that there should be physical contact between the user and the thing to be used. Our attention was drawn at p. 269 of a book "Words and Phrases Legally Defined" urging that the physical contact was necessary in order to constitute "use".

6.2. The learned counsel submitted that sub-cl. (iii) to Expln. 2 to s. 9(1)(vi) defining 'Royalty' stipulates amongst others, the use of "secret process". While inviting our attention towards the statutory provision it was vehemently argued that the word 'secret' is used before the word 'formula' and after the use of word 'or', the next word used is 'process'. It was, therefore, pointed out that what this clause contemplated was that there should be the user of the secret process and unless the process used by the non-resident was secret, the same could not fall within the scope of cl. (iii) to Expln. 2. Reliance was placed on the case of Mohd. Shabir vs. State of Maharashtra (1979) 1 SCC 568, to contend that the word 'secret' should be read before the word 'process' as well and it should not be confined only to word 'formula'. It was further pointed out that the learned CIT(A) has not brought on record any material to show that what the assessee provided to its customers was any 'secret process'. Unless the 'process' was established to be 'secret', the same could not be the subject-matter for consideration in terms of this clause. Referring to the list of books from the British Council Library, it was strenuously argued that there was nothing secret about the satellite transponder or any other related item and all processes with technical details in respect of these were available publicly through the medium of various books available on the subject.

6.3. It was next contended on behalf of the assessee that cl. (iii) to Expln. 2 referred to the use of 'secret process' whereas the assessee had leased out transponder capacity to its customers. It was categorically stated that there was a difference between leasing out an asset and the secret process. While citing the example of a bus taken on hire it was submitted that when the passengers travel in it what they use is not the process in the bus but the bus itself. Bringing this analogy to the facts of the present case it was submitted that the assessee had given on lease transponder to its customer and not technology within it and, therefore, the leasing of its transponder did not tantamount to the making available the secret process in the transponder. A reference to the decision of 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) was made by the learned counsel to plead that in that case the subscriber to a cellular telephone service, in order to have

the facility of being able to communicate with others, was held to be not receiving any technical service. Elaborating further it was stated that in that case it was held that every provider of every instrument or facility used by a person could not be regarded as providing technical service and the fact that the telephone service provider had installed sophisticated technical equipment in its exchange to ensure connectivity to its subscribers did not make it a provision of a technical service to the subscribers. Taking the aid of this judgment the learned counsel pleaded that the act of making available the transponder capacity to its customers, could not be regarded as the use of secret process by its customers. As the assessee in question had only given on lease the transponder capacities to its customers, the learned counsel stated that it could not be equated with the use of secret process by its customers. Reference was also made to the decision of Chennai Bench in the case of ITO vs. Raj Television Network Ltd. in ITA Nos. 1827 & 1828 in which it was held that Raj TV was not liable to deduct tax at source and accordingly s. 40(a)(i) could not be invoked. Throwing light on the details of this case it was submitted that the assessee was in the business of telecasting programmes in India and abroad, via, satellite, in the name and style of Raj TV and in order to enable telecasting of its programmes, it entered into an agreement with Reuter Television Ltd. (RTV) for availing the services of transponder and uplinking. A total sum of Rs. 3,04,66,500 was paid by Raj TV to RTV for this purpose without deducting tax at source. The AO treated the assessee in default under s. 201(1). The learned CIT(A) after considering the agreement for Avoidance of Double Taxation between India and United Kingdom of Great Britain opined that the proceeds of RTV were not liable to be taxed in India and hence no tax was deductible. In second appeal the Tribunal confirmed the action of the CIT(A) by holding that the payments made to RTV towards transponder hire charges could not be brought under the head "Fees for technical services" and accordingly there was no liability on the part of the assessee to deduct tax at source. Drawing support from this order, the learned authorised representative highlighted that the lease charges received by the assessee in question could not be subjected to tax in India as was held so in the aforesaid case.

6.4. It was emphatically stated that in the instant case the learned CIT(A) while deciding this issue against the assessee had drawn support from the order of the Authority for Advance Ruling reported in ABC, In re (1999) 154 CTR (AAR) 246 : (1999) 238 ITR 296 (AAR). Primarily, it was pointed out that s. 245S lays down that the advance ruling pronounced by the authority shall be binding only on the assessee in respect of the transaction in relation to which the ruling was sought and hence no support could be drawn by any authority under the IT Act from this ruling while deciding other cases. On merits it was submitted that in that case it was held that the use of the software developed for the purpose of processing raw data transmitted by Indian company would fall within the ambit of art. 12(3)(a) of the Double Taxation Avoidance Agreement between India and USA. It was pleaded that in that case the applicant-company received charges from Indian company for the use of CPU and CDN through software. As in the present case no software was handed over to its customers, the learned counsel submitted that the ratio of this decision could not be applied.

6.5. A great deal of stress was laid on the insertion of cl. (iva) to Expln. 2 to s. 9(1)(vi) by the Finance Act, 2001, w.e.f. 1st April, 2002. It was stated that this clause includes the use of any industrial, commercial or scientific equipment, in the scope of "Royalty". As the insertion was made w.e.f. asst. yr. 2002-03 and the effect of which was to include in the ambit of royalty the use of industrial, commercial or scientific equipment, it was pointed out that the case of the assessee was that of hiring of transponder being the equipment of this nature and at the maximum it could be covered only in this clause. The assessment year under consideration being 1997-98, it was stated that the said clause could not be applied. Our attention was drawn at p. 31 of the order of the Chennai Bench in the aforesaid case to this effect wherein it was held that before the insertion of cl. (iva), the hiring of equipment being the transponder was not covered in the definition of 'royalty' in the IT Act, 1961.

6.6. It was categorically stated that sub-cl. (c) to cl. (vi) was not applicable to the facts of the case. Even assuming that the payment made by the customers was royalty as contemplated in

Expln. 2, the learned counsel argued that the amount in question payable by the customers was not in respect of any right, property or information used. Giving transponder or transponder capacity to its customer on lease did not amount to giving of any right, property or information. It was pointed out that the learned CIT(A) had held that the income by way of royalties payable by the non-resident customers was for the purposes of business carried on by such persons in India. It was also pointed out that no business as such was carried on by any of its customers in India. All the lessees, being the non-residents, were situated outside India and their operations were confined only to some countries not including India. Relying on the decision of Grainger & Son vs. Gough (Surveyor of Taxes) by the House of Lords it was contended that in that case a French wine merchant appointed an English firm as his sole representative in England for sale of champagne, who obtained orders and was paid commission for that purpose. It was held that the French wine merchant did not exercise a trade within UK and was consequently not liable to income-tax on his profits and gains. The learned counsel contended that a distinction was drawn in this case between trading with a country and carrying on a trade within a country. In the light of the facts of that case it was argued that no business was carried on by the non-resident customers in India.

6.7. During the course of the proceedings, the attention of the learned counsel was invited towards the fact that the nature of job done by the assessee for its customers was that of rendering services to be utilised for the purposes of their business and why the amount received by the assessee should not be treated as compensation for providing these services. In reply it was stated that the lease charges received by the assessee were for hiring the transponder and it was immaterial whether the transponders were used by its customers or not and, therefore, the consideration was only for hiring of the equipment, namely, the transponder and not performing of any services for the business of its customers.

6.8. Attention of the learned counsel was further drawn towards the use of the expression "or for the purposes of making or earning any income from any source in India" used after the expression "utilised for the purposes of a business or profession carried on by such persons in India". The learned counsel was asked to explain as to whether the case was covered within the former expression. It was explained that no income was derived by its customers from any source in India. Elaborating the word "source", it was stated that it may encompass the payer of income or the activity which gives rise to the income. To be more precise it was stated that source could not refer to the payer but only to the activity which resulted in the income. It was explained that the source is the activity which results into the income. Citing an example of an advocate arguing in a Court in India on behalf of its foreign clients, it was stated that source could not be the foreign client who had made the payment but was the exercise of profession in arguing the case in India. Referring to the provisions of s. 3 of the IT Act, 1961, prior to the amendments carried on by the Finance Act, 1999, it was stated that first proviso to s. 3(2) allowed liberty to the assessee to adopt more than one period as the "previous year" for different sources of his income. Relying on the case of Seth Shiv Prasad vs. CIT (1972) 84 ITR 15 (All) it was stated that the Hon'ble Court has held that a source of income may be described as the spring or fount from which a clearly defined channel of income flows. It was explained that in that case it was held that the source of dividend income was not the company paying the dividends but the shareholding of that assessee. Further reliance was placed on the case of CIT vs. Lady Kanchanbai & Anr. (1970) 77 ITR 123 (SC) to contend that where the assessee had head office at Indore and branches at several places, it was held by the Hon'ble Supreme Court that the business of the assessee in Madhya Bharat constituted a separate source of income and as such the assessee was entitled to have a different previous year in respect of income arising therefrom. It was explained by the learned counsel that the ratio of this judgment was that different branches of a particular company may be considered as different sources of income and as such different previous years may be adopted in respect of particular set of branches. Coming back to the facts of the case it was asserted that in the present case the source of income of the non-residents, being the customers of the assessee, could not be taken as the persons who had advertised their products or the cable operators who had used their signals in India. The activity which resulted in the income, according to the learned counsel, was the uplinking of the waves and as such it could not be said that any specific and clearly identifiable

activity was carried out by the TV channels in India.

6.9. The sum and substance of the submissions advanced by the learned authorised representative was that there was no user of any right, property or information, etc. by the non-resident customers of the assessee. There was no process used by the customers for the reason that the signal uplinked from the earth station by the customers remained the same which was relayed by the assessee from the transponder. The assessee was merely acting as a transporter in receiving and relaying the signals in the footprint. The process, if any, was not secret. At the most it could be said that the royalty was in consideration for the use of equipment by the customers as appearing in cl. (iva) of Explan. 2. No business was carried on by such customers in India and further no income was earned from any source in India.

6.10. In the opposition the learned Departmental Representative, in his marathon submissions, supported the order of the CIT(A) on this issue by stating that the customers of the assessee were using the process in the satellite for their business. Explaining the process in the satellite, it was stated that after the signals are uplinked from the earth stations in the satellite these are amplified and the frequency of each signal is shifted which is done in the part of the satellite called transponder. Referring to literature contained in the paper book supplied by the learned authorised representative, it was stated on behalf of the Revenue that it was only with the help of the processes undertaken at the transponder in the satellite that the signals received from the customers become fit for relay in the footprint area. It was stated that the customers of the assessee, namely the TV channels were utilising the process contained in the transponders for the purposes of their business carried on in India and earning income from sources in India. While inviting our attention towards cl. (vi) of Explan. 2 it was tendered by the learned Departmental Representative that this clause has set to rest any controversy arising out of the submissions of the learned counsel on behalf of the assessee, inasmuch as the rendering of any service in connection with the use of process as envisaged in cl. (iii) has specifically been covered under cl. (vi) to the Explan. 2. In the light of cl. (iii) r/w cl. (vi) of the Explan. 2 it was tendered that the case of the assessee was squarely covered in Explan. 2. It was further stated that the word 'secret' used prior to the word 'formula' was confined only to the 'formula' and not to the 'process' or 'trademark' or 'similar property'. In nutshell it was stated that the case of the assessee was governed by the use of 'process' only and not any 'secret process' and the learned CIT(A) was not justified in holding that the customers were using the 'secret process provided by the assessee.

6.11. Referring to the words 'use of' in cl. (iii) of Explan. 2 to s. 9(1)(vi) it was stated that there was no necessity of physically using any process and "deriving advantage out of it" amounted to its user. The learned Departmental Representative canvassed the view that the services of the assessee were utilised by the customers for the purpose of their business or profession carried on by them in India. It was submitted that the ultimate aim of the TV channels was to make available their programmes in India along with other countries and as such the CIT(A) was justified in holding that the business was carried on by such customers in India.

6.12. Referring to the decision of Skycell Communications Ltd. (supra), it was stated that the same was not applicable to the facts of the present case. It was pointed out that in that case subscribers to the telephone service were held to be not utilising any technical service provided by the company by installing sophisticated technical equipment in its exchange. It was pointed out that in that case the reference was to the use of facility by the subscribers and not to the use of process. It was stated that if the facts of that case are considered in the context of present case the decision rendered should be construed to have been made with reference to the TV channels namely the subscribers using the facility and not to the assessee who is providing the facility.

6.13. The next argument of the learned. Departmental Representative was that the decision of the Chennai Bench of the Tribunal in the case of Raj TV heavily relied upon by the learned counsel for the assessee, was distinguishable. By way of a separate note, it was stated that in that case the appeals were filed by the resident company in India i.e., the telecasting company namely, the TV

channel claiming that it had no liability for deduction of tax at source under s. 201 with respect to certain sums paid to RTV, resident of London. The question that arose in that case was whether the RTV was in receipt of any income paid by the Indian company which India could charge to tax by the terms of DTAA. It was pointed out that in that case the Tribunal held that RTV was not receiving any income in the nature of fees for technical services or royalty within the terms of treaty. It was urged that in the case under consideration the only issue involved was the construction of s. 9(1). Explaining further it was urged that in that case RTV was providing uplinking services and downlinking services were provided by another foreign company namely, Intersputnik (a Russian company). It was stated that in the facts of the present case the uplinking services were being provided by the customer company itself and downlinking services were being provided by the assessee-company. It was also submitted that in that case the earth station uplinked to the origin company whereas it is not so in the present case where the earth station uplinked to the TV channels. It was further urged that no contention was raised in that case with regard to the term "use", "intellectual property", "process" and as such the Bench had no occasion to consider and decide these issues. It was still further explained that the Bench was influenced by the argument that the use of the transponder was the use of an equipment, which was factually not correct. It was, therefore, urged that the case of the Chennai Bench was inapplicable to the facts of the present case.

6.14. It was forcefully stated by the learned Departmental Representative that the contention of the assessee's counsel with regard to the fact that the signals uplinked from the TV channels remained the same as are down linked from the satellite, was not correct. It was pointed out that there was distinction between signal and the material in signal. Even though the material in the signal namely, the programme uplinked by the customers remains the same in the entire process from uplinking to the downlinking, but the signals which carry the material undergo drastic changes in the transponder. Frequency of the signals as is uplinked from the earth station is changed and after the process of amplification the magnetic waves originally received undergo complete transformation and the final output which is relayed from the transponder is on altogether different frequency. It was, therefore, stressed that the signals did not mean the material in the signals but referred to the frequency of signals and hence the contention of the learned counsel for the assessee in this regard was not correct. In rejoinder, the learned authorised representative apart from reiterating the earlier submissions stated that the transponder was an 'equipment' as referred to cl. (iva) of Explan. 2 to s 9(1)(vi) and the decision of Raj. TV (supra) was on all fours with the facts of the present case and hence applicable.

6.15. We have considered the rival submissions in extenso and perused the relevant material on record in the light of precedents cited before us. First of all we shall proceed to examine the applicability of s. 9(1)(vi) to the facts of the present case. The relevant portions of this section, concerning the dispute under consideration, are as under :

"9(1) The following incomes shall be deemed to accrue or arise in India :

(vi) income by way of royalty payable by

(a)

(b).....

(c) a person who is a non-resident, where the royalty is payable in respect of any right, property or information used or services utilised for the purposes of a business or profession carried on by such person in India or for the purposes of making or earning any income from any source in India;

Explanation 2 : For the purposes of this clause, "royalty" means consideration (including any lump sum consideration but excluding any consideration which would be the income of the recipient chargeable under the head 'Capital gains') for

(i)

(ii).....

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

(iv)

(iva) the use or right to use any industrial, commercial or scientific equipment but not including the amounts referred to in s. 44BB;

(v).....

(vi) the rendering of any services in connection with the activities referred to in sub-cl. (i) to (v)".

6.16. The factual position involved in this case rotates around the cycle of transmission of TV programmes. It starts with TV channels (customers of the assessee) uplinking the signals containing the TV programmes; thereafter the satellite receives the signals and after amplifying and changing their frequency relays it down in India and other countries where the cable operators catch the signals and thereafter distribute them to the public. If any person has got disk antenna he can also catch the signals relayed from these satellites. The role of the assessee in this cycle is confined to receiving the signals, amplifying them and after changing frequency relaying them on the earth. It is for this purpose that the TV channels make payment to the assessee which is the subject-matter of consideration in the present appeal. The learned CIT(A) held that the payment so made by the customers was in the nature of royalty liable to tax under s. 9(1)(vi). It is pertinent to note that the term 'royalty' has been specifically defined in Explan. 2, the relevant portion of which has been extracted above. We have to examine whether the ingredients of cl. (iii) of Explan. 2 as applied by the CIT(A) are satisfied in the present case or not.

6.17. The first submission advanced by the learned counsel was that there was no use of the properties as mentioned in this clause by the customers of the assessee. A view was canvassed that the term 'use' should be confined to the physical user and as in the present case nothing was physically used by the customers so there was no use of any properties as referred to in the cl. (iii) and resultantly the consideration paid by the customers was not royalty. Relying on the extracts from a book titled "Words and, Phrases-Legally defined" it was contended that the customers had not used the transponder for the reason that there was no physical connection between the customers and the transponder. On perusal of the extracts of the same book referred to above, it is noted that the emphasis placed by the learned Counsel "physical use is only with reference to that of vehicle". In this book the word 'use' has been explained with reference to various items such as "of land", "of road" and "of trademark", etc. in addition to "of vehicles". What is true "as used" for one item may be untrue for other items. Hence, applying the meaning of a word defined in the particular context to another context is not permissible. It is correct that the word "use" is not defined in s. 9. Under these circumstances the meaning which is understood in common parlance should be adopted. The first meaning assigned to the word "used" in Johnson's Dictionary is "to employ to any purpose". It, therefore, follows that the physical connection with the item to be used is not necessary in each circumstances. In the present age of modernization where numerous developed applications of science have become part of life and the extent of development of technology is so fast, it would really be unfair to restrict the meaning of the word "use" to only "physical use". The plain construction of the word "use" in our considered opinion refers to the deriving advantage out of it by employing for a set purpose. That apart we find that there was physical contact of the signals of the TV channels with the process in the transponder provided by the assessee. It is only when those signals come in contact with the process in the transponder that the desired results are produced. It can be illustrated by way of an example of extracting juice from fruits, etc. with the help of juicer. When the fruits are put in juicer, the process embedded in

it converts the fruits into juice by separating the leftover. Can we say that in the process of extracting juice there is no physical contact of juice with the process in juicer ? In our considered opinion the answer can be only in negative. In the like manner when a customer goes to a Atta Chakki (flour mill) for getting his wheat converted into flour and pays charges for the same. Even though the Atta Chakki is operated by the other persons but its process is used for the benefit of customers when the wheat provided by the customers come in touch with the process. It is not necessary that the process must be used by the customers. The only requirement is that the process must be used. In the present case the signals sent by the customers come into contact with the process of the assessee in the transponder. Amplification of the signals is not possible unless the same come in contact with the process. When the TV channels were using transponder capacity so as to enable the cable operators to catch their programmes, they were clearly 'using' the transponder capacity. All the items referred to in cl. (iii) of Expln. 2 such as patent, invention, model formula and process, etc. are intellectual properties. These cannot be used by taking their possession physically. The only way of using them is by taking advantage from them. We are at a loss to understand as to how these can be used at all except by taking advantage from them. Therefore, using such properties in our considered opinion refers to taking advantage out of them. It is noted that the non-resident customers derived advantage by utilizing the process in the transponder facilitating relay of their programmes to the viewers in India. As such the process in the transponder was 'used' by the customers for carrying on their business in India. As such we do not approve the view of the learned authorised representative in respect to the meaning of the word "use" in this Explanation.

6.18. The next contention of the learned authorised representative was that the user by the customers was not of any 'secret process' as held by the CIT(A). In contrast the submission of the learned Departmental Representative was that the word 'secret' was not to be read before the word "process" and it was confined only to the word "formula". Firstly, we will examine whether the legislature contemplated the word 'secret' before the word 'process' also. Clearly the word 'secret' is employed before the word 'formula' and the contention is that by implication it should be considered to have been used before the word 'process' as well because in between the words 'formula' and 'process' the conjunction "or" is used. We do not agree with this way of reading the word 'secret' before the word 'process' as well for the reason that there is no comma after the use of the word 'secret' till the end of cl. (iii) and if the intention had been to apply the word 'secret' before the word 'process' also, a comma would have been used after the word 'formula'. It is true that the commas and semi-colons, etc. play an important role in interpreting a provision but the same are not the only criteria. Law is trite on the point that the interpretation which leads to absurdity has to be avoided. The foremost principle of interpretation is that the construction should be done in such a way which validates the provision. If we accept the contention of the learned authorised representative that the word 'secret' prefixed to "formula" in Expln. 2 cl. (iii) should be prefixed to "process" as well, in that case it will also have to be read before the subsequent words used in Expln. 2, cl. (iii), namely, "trademark" and 'similar property'. 'Trademark' is a symbol legally registered for use as representing a company or a product. Generally trademark is the description of a particular product of the company which is used to distinguish it from similar products of other companies. It is affixed or placed on the product to convey it to the users that this product is of that company which has registered it as its trademark. Obviously the trademark can never be 'secret'. If we cannot employ the word 'secret' before 'trademark', by natural implication it cannot be prefixed to "process" also. We, therefore, hold that the legislature has confined the application of the word 'secret' only before the word 'formula' and not 'process' or 'trademark' or 'similar property'.

6.19. The question that looms large over the landscape of factual background is whether there is use of any 'process' by the customers of the assessee. The word 'process' has been defined in 'Webster's New International Dictionary' to mean "a progressive action or series of acts or steps especially in the regular course of performing, producing or making something". In the like manner the "process" is defined in Black Law Dictionary as "a series of actions, motions or occurrence, progressive act or transaction' continuous portions; method, mode or operation, whereby a result

or effect is produced". Similarly, in the Cambridge International Dictionary of English, this word has been defined as "a series of actions or event that are part of a system or continuing development, or a series of actions that are done to achieve a particular result." The meaning assigned to the word 'process' in the New Oxford Dictionary of English is "series of action or steps taken in order to achieve a particular end". In order to arrive at the conclusion as to what the TV channels are using is a process or not, it is important to understand the role of a satellite as mentioned in the paper book submitted on behalf of the assessee. Communication satellites are generally placed in special orbit i.e., 22,240 miles (35.79 x 10 meters) directly above the equator. Each satellite rotates in the same direction as earth at a velocity that matches the earth's rotation. Under these conditions the satellite appears to be stationary directly above a place on the equator. This special orbit which exists as a circular line around the earth is called geostationary. A satellite can be placed anywhere in the geostationary orbit. The satellite itself is an unmanned space vehicle or spacecraft that houses and powers the microwave repeater. Important elements of this spacecraft include the solar panels which contain solar cells to convert sunlight into electrical power, a battery system to store energy and power the satellite during periods when sunlight is blocked (eclipsed) by the earth or moon, gyros to stabilize the satellite to keep the footprint properly aligned on the ground and a structure to contain and protect the repeater during launch and after operations begin on orbit. The repeater section is designed according to the relay requirements and typically consists of an antenna system (two reflectors one for receiving and other for transmitting) and microwave electronics that are used to receive, modify in frequency, amplify, modify in polarization and retransmit the television or other signals. The path of each channel from receiving antenna to the transmitting antenna is called a transponder. The transponder is used to amplify and shift the frequency of each signal. The uplink signals emanate from the uplink earth station and enter the repeater through the receiving antenna. This antenna on the satellite transforms the wireless (electromagnetic) signals into an electrical form suitable for amplification in the low noise receiver (LNR). Due to the 36,000 kms distance from the ground all the transponder signals are at a very low power level and, therefore, can share a LNR. The signals are modified within the LNR in frequency to correspondent to the relay range, and then amplified again before the individual filters. A microwave type boosts the power of the signal within each transponder to a high power level such as 100 watts before applying it to the transmitting antenna. The latter will transform the electrical signals from all the transponders into an equivalent electromagnetic form for radiation into the footprint where the receiving terminals are located. The process of amplification is done by the travelling wave tube amplifiers (TWTAs). A TWT is a vacuum type device consisting of electron gun and associated permanent magnet system that fires on electron beam through a slow wave structure to a collector. The slow wave structure typically takes the form of a metallic helix. The radio emission requiring amplification is induced into the slow wave structure near the sources of the beam. The radio wave and the electron beam travel along the vacuum tube at about the same speed and electromagnetic interaction between them induces a velocity modulation of the beam. Bunching of the electrons of the beam follows, which increases with the distance travelled along the beam and this feeds energy back into the wave to be extracted near the collector. As an example of a satellite transponder, assume that the uplink carrier signal has a frequency of 5945 MHz \pm 18 MHz. This signal is amplified by the receiving antenna and the LNA and then mixed with a 2225 MHz signal. The output of the mixer is 3720 MHz \pm 18 MHz (5945-2225) and 8170 MHz \pm 18 MHz (5945+2225). The 3720 MHz \pm 18 MHz signals pass through a filter to the HPA. The HPA and the transmitting antenna amplify and concentrate the output signal from the filter to provide the effective power needed to radiate this 3720 MHz \pm 18 MHz downlink signal back to earth. It is pertinent to note that the earth station uplinking the signals has to conform to the mandatory requirements as set out in pp. 47 to 74 of the paper book. In other words, the earth station has to set EIRP levels; frequency agility, stability and monitoring; energy dispersal according to the requirements of the assessee. All the technical details mentioned in these pages need not be referred to here.

6.20. On going through the entire process as set out in the succeeding para it becomes palpable that what the TV channels are using is the process made available by the assessee through its transponder. The function of the satellite in the transmission chain is to receive the modulated carrier that earth stations emits as uplinking, amplify them and retransmit them and downlink for

reception at the destination earth stations. We have noted above the meaning of the word "process" as a "series of actions or steps taken in order to achieve a particular end". Considering the role of the assessee in the light of meaning of the term 'process' it becomes evident that the 'particular end' namely, viewership by the public at large is achieved only through the 'series of steps taken' by receiving the uplinked signals, amplifying them and relaying them after changing the frequency in the footprint area including India. The 'particular end' is achieved only through the 'series of steps taken' in this regard.

6.21. It is noted that p. 176 of the book Commercial Satellite Communication by Stephen C. Pascal and David J. Withers, placed in the paper book by the learned authorised representative shows that what the assessee was doing to its customers was providing them the process for their use. First para under the heading 'Satellite Communications Payload' reads as under :

"The function of the satellite in the transmission chain is to receive the modulated carriers that earth stations emit as uplinks, amplify them and retransmit them as downlinks for reception at the destination earth station. In the course of this process the carrier frequency of each emission is moved to a frequency band in which the satellite does not receive, in order that the downlinks should not cause interference to the reception of uplinks."

(emphasis, italicised in print, supplied by us)

6.22. It is seen that there is a marked distinction between the term "process" and the term "facility". It is found that the term "facility" is of a wider amplitude than the term "process". Every "facility" is the result of some process, but every process need not result into facility. In the context of the example of bus taken on hire argued by the learned authorised representative, when a person boards on a bus he does not utilise any process of the bus but avails the facility of the bus whereas in the case under consideration it was not the using of any facility but the using of process as a result of which the signals of the TV channels after being received in the satellite were converted to a different frequency and after amplifying the same were relayed down in the footprint. As the TV channels were utilising the process made available by the assessee in its satellite for the purposes of their business, so the customers were using the process embedded in the satellite for the purpose of their business. It is, therefore, clear that the example cited on behalf of the assessee is in the context of 'facility' but not 'process' as contemplated in cl. (iii) to Expln. 2 of s. 9(1)(vi).

6.23. We have, therefore, no hesitation in holding that what the TV channels in the entire cycle of relaying their programmes in India are doing, is that they are using the 'process' provided by the assessee.

6.24. The decision of Madras High Court in the case of Skycell Communications Ltd. (supra) was heavily relied upon by the learned authorised representative to bring home the point that there was no use of any process in the entire operations. The facts of that case are that the petitioners were engaged in the business of providing cellular mobile telephone facilities to the subscribers. The IT Department proceeded to treat the payments made to them by their subscribers as falling within the definition of "fees for technical services in s. 194J of the Act." In this case it was held that mere collection of a fee for use of standard facility provided to all those willing to pay for it did not amount to the fee having been received for technical services. It was further, held that the subscribers to a cellular telephone service were using the facility and had not entered into contact to receive a technical service. It was further held that the fact that the telephone service provider had installed sophisticated technical equipment in the exchange to ensure connectivity to its subscribers did not make its provision of technical service to the subscribers. When the facts of this case are analysed thoroughly it becomes patent that the subject-matter under consideration before the Hon'ble High Court was to consider the relationship between the subscribers who use the telephone facility and the provider of the service. So in the chain of entire process only two persons were involved viz., one the actual user and the other the provider. In contrast the facts in the

present case under consideration operate in different field in which the operation starts by uplinking the signals from the earth station by the TV channels to the assessee in satellite and then after undergoing various processes in the satellite, as noted above, the signals are downlinked so as to be made available to the cable operators who in turn provide these to the public. In the chain before us, first is the relation between the TV channels and the assessee, second is the relation between assessee and the cable operators and the third between cable operator and public. In the light of the difference between the use of 'facility' and 'process' as noted above, we find that the relation between the cable operators and the public is that of use of 'facility', whereas the first relation between the TV channels and the assessee is for the use of the 'process' as a result of which the programmes uplinked by TV channels become fit for being relayed. The decision of the Hon'ble Madras High Court is in the context of the third relation in the context of our facts namely, the cable operators and the public. It was explained at p. 58 of the Madras judgment in 251 ITR that satellite television has become ubiquitous and when a person receives such transmission of television signals through the cable provided by the cable operators, it can't be said that the home owner, who has such a cable connection, is receiving a technical service. No doubt the 'public' (analogous to the subscribers to the cellular phone in that case) use the facility provided by the cable operators (analogous to the petitioners in that case) but the payment made by the TV channels for receiving, processing and relaying the programmes is for the use of the process provided to them. In the present case, we are dealing with the payment made by the TV channels to the assessee for the use of the process and not for the payment made by the public to the cable operators. What the TV channels uplink has to undergo various processes provided by the assessee as noted above to become fit for relay in India. We, therefore, hold that the case law relied upon by the learned authorised representative is clearly distinguishable on facts and cannot be applied to the present case.

6.25. Having held that the TV channels were using the process provided by the assessee it is found that there remains no dispute when we further read cl. (vi) of Expln. 2 which provides that rendering of any services in connection with the activities referred to, inter alia, in sub-cl. (iii), namely, the use of any process, etc. is also covered in 'Royalty'. So whether any process is used or any services in connection with process are provided the same falls within the meaning of term 'royalty' as defined in Expln. 2. Reverting to the facts of the case we find that whether the TV channels used the process provided by the assessee or services in connection with the process, the same falls within the definition of "Royalty".

6.26. During the course of the arguments before us the learned authorised representative has placed great emphasis on the insertion of cl. (iva) to Expln. 2 by the Finance Act, 2001, w.e.f. 1st April, 2002. The case as made out was that the use or right to use any industrial, commercial or scientific equipment was brought within the scope of this Explanation only w.e.f. asst. yr. 2002-03. It was stated that as the lease rent was on account of use of transponder by the TV channels, therefore, it amounted to the user of a equipment by the customers of the assessee which could be the subject-matter for taxation only from asst. yr. 2002-03 onwards. In support of this argument the reliance was placed on the decision of Chennai Bench in the case of Raj Television Network Ltd. (supra). Apart from the distinguishing features pointed out by learned Departmental Representative, we find that no submission with regard to 'process' and other aspects of royalty as contained in s. 9(1)(vi), as considered in the preceding paras of the present order, was put forth before the Chennai Bench and as such there was no occasion for the Bench to appreciate the facts in this light. It is still further noted that the Tribunal in that case was influenced by the argument that the transponder was an equipment and as such cl. (iva) of Expln. 2 would govern the case. Finding to this effect is contained in paras 39 and 40 of the said order. It is an undisputed fact that the assessee in the present case had leased out transponder capacity to its customers. Relevant portion of the first page of the agreement with M/s Satellite Television Asian Region Ltd. states as under: "Whereas (A) Asia Sat has agreed to make available to the customer the transponder capacity on the satellite as defined below". Before examining the contention of the learned authorised representative w.r.t. the use of equipment by the customers, it is important to understand as to what is actually meant by the term 'equipment'. "Equipment" has been defined in

the Chambers 21st Century Dictionary to mean "the cloths, machines, tools or instruments, etc. necessary for a particular kind of work or activity". A bare perusal of this meaning reveals that equipment is an instrument or tool which is capable of doing some job independently or with the help of other tools. A part of a equipment incapable of performing any activity in itself cannot be termed as an equipment. We take an example of scissors which has two blades. This scissor is an equipment but when one blade is separated from the other blade it ceases to be an equipment. In other words, the blade in isolation cannot be termed as an equipment. Reverting to the facts of the present case we find that the transponder is not an equipment in itself. In other words, it is not capable of performing any activity when divorced from the satellite. It was fairly conceded by the learned authorised representative that the transponder in itself without other parts of satellite is not capable of performing any functions. Rightly so because satellite is not plotted at a fixed place. It rotates in the same direction and speed as the earth. If it had been fixed at a particular place or the speed or direction had been different from that of earth, it could not have produced the desired results. Transponder is part of satellite, which is fixed in the satellite and is neither moving in itself nor assisting the satellite to move.

We, therefore, find that the satellite is an equipment and the transponder, namely, a part of it, playing howsoever important role, cannot be termed as equipment. Hence, the leasing out of transponders to various customers in a satellite cannot be equated with the leasing out of any equipment. Therefore, the contention of the learned authorised representative with reference to the applicability of cl. (iva) of Explanation to the present case as supported by the Chennai Bench decision, is not acceptable for the reason that the assessee has not leased out any 'equipment' (satellite) but has only made available the process (in the transponder) to its customers. We, therefore, hold that the consideration paid by the TV channels to the assessee has no connection with cl. (iva) and falls within the cl. (iii) r/w cl. (vi) of the term 'Royalty' as explained in Explan. 2.

6.27. Now we will examine the applicability of sub-cl. (c) of main cl. (vi) to the present case. There is no conflict over the fact that the TV channels are non-residents. During the course of the proceedings before us, we required the learned authorised representative to explain as to why the case of the assessee be not treated as rendering of services to its customers as contemplated in sub-cl. (6). It was stated that the consideration payable by the TV channels was not for utilising any services of the assessee but was a lump sum payment in consideration of making available the transponder to them and further the amount of lease rent was payable by the customers irrespective of the fact whether the transponder capacity was utilised or not. At this stage we will examine the consideration for which the payment is being made by the customers. The duty of the assessee is to catch the signals containing programmes from the customers and after routing these signals through various processes make them fit for viewership. To put it differently the TV channels are utilising the services of the assessee for their business and it is only with the help of such services that the carrying on of the business by them can be conceived. But for the services provided by the assessee the entire business of the TV channels would be paralysed. As such we hold that the customers were utilising the services of the assessee for the purposes of their business. As regards the other contention raised on behalf of the assessee that the rent payable by the TV channels was fixed irrespective of actual user, we find that this submission is not correct in this context. It is well known that there are various modes for quantification of compensation for doing any job. Choice of any mode of quantification depends upon numerous factors. It may be illustrated by way of hiring a taxi for going to a destination in consideration of Rs. 500. There may be another situation where the person needs taxi daily for going to his destination and instead of paying Rs. 500 per trip he enters into an agreement with the taxi driver for paying Rs. 14,000 per month. Can we say that the lump sum monthly payment of Rs. 14,000 is not for using the taxi because the hirer has to pay this sum irrespective of the fact that the actual user may not be occasionally made by him ? The answer to this question can only be in the negative for the manifest reason that the consideration for monthly payment is only for the use of taxi and the settlement of monthly payment is only a way to fix the amount once for the month rather than settling it on the daily basis. Similarly, in the present case the payment of lease rent by the TV

channels is fixed in advance rather than settling the charges on monthly or weekly or daily or hourly basis. It is only a measure for making the payment in lieu of the rendering of the services by the assessee by making available its transponder capacity for a fixed period. Merely because the lease rentals were fixed on annual basis we cannot say that the payment is for any consideration other than rendering services by amplifying and relaying the programme to its customers. Moreover, it is also not the case of the assessee that the customers had not actually utilised the transponder capacity made available to them at any point of time and that naturally cannot be so because the airing of the programmes by the TV channels is a continuous process. We, therefore, hold that the lease rent received by the assessee is on account of utilising of services rendered by the assessee to its non-resident customers for the purposes of their business in India. The main plank of the submissions of the learned authorised representative was that the requirement of the latter part of sub-cl. (c) namely, "services utilised for the purpose of business carried on by such person in India or for the purpose of making or earning any income from any sources in India" was not satisfied. We observe that the carrying on of business or profession in India in this sub-clause is associated with the non-resident who is paying royalty. The case of the assessee was that its customers namely, the TV channels were not carrying on any business in India. The question arises that at which place a business is said to be carried on ? In simple terms the business is carried on at a place where some activity capable of producing income is carried on. In any transaction there are series of activities. First activity, in the present case, starts from uplinking the signals by the TV channels. After amplifying and changing the frequency in the transponder these are relayed down by the assessee to be made available in India. The real intent of contact by the TV channels with the assessee is to make available their programmes in India. Unless the assessee is capable of relaying the signals in India no contact can be conceived by the TV channels who have made programmes for the purposes of viewership in India. In the chain of activities we have to ascertain as to which is the main activity that results in the carrying on of business by the TV channels. The source of income of TV channels are the Indian advertisers who make payment for advertising their products during the course of the relay of the programmes in India. Similarly the cable operators in India who catch the signals and distribute it to public are the other source of income of the TV channels. It, therefore, follows that the essence of the activities is the making available the programmes of the TV channels in India. All other activities except the relaying of signals in India would be meaningless and no customer would approach the assessee unless the footprint of its satellite includes India. Various case law cited by the learned authorised representative in support of the contention that business is carried on at the place where the goods are sold and not where these are used in our considered opinion are not relevant to the facts of the present case. It is not a case of mere user of any goods sold by the TV channels in India. It is a continuous process through which the TV channels are showing their programmes in India through the medium of the assessee. Having purchased goods from a particular place and used it at different place does not match with the facts of present case to hold that no business was carried on in India for the simple reason that the only purpose of making programmes by the TV channels and then taking the assistance of assessee is to ensure that the signals containing the programmes are provided by the assessee in India itself. There is no need to consider the catena of judgments rendered in the context of sale of goods vis-a-vis the place of business, for the reason that sub-cl. (c) of s. 9(1) (vi), in no unambiguous words, refers to the royalty payable in respect of 'services utilised for the purpose of a business or profession carried on by such person in India.....' . It was laid down in *Steffen, Robertson & Kirsteen Consulting Engineers and Scientists, In re* (1998) 144 CTR (AAR) 90 : (1998) 230 ITR 206 (AAR) that the statutory test for determining the place of their accrual is not the place where the services, for which the payments are being made, are rendered but the place where the services are utilised. We, therefore, hold that the non-residents, namely the TV channels, were using the process of the assessee for the purpose of carrying on their business in India.

6.28 Be that as it may we will deal with other contention of the learned authorised representative that no income was earned by the non-residents from any sources in India. After referring to certain decisions it was contended that the source of the income of the TV channels in the present context was only the uplinking of the signals to the satellite. We are afraid that this contention is misconceived for the reason that sub-cl. (c) refers to and includes royalty payable by a person who

is non-resident where it is in respect of services utilised for earning any income from any source in India. If the source of any income is situated in India then it is irrelevant whether the business carried on by such non-resident is in India or elsewhere. We have to ascertain whether the income in the present circumstances can be said to arise from any source in India. We are agreeable that the source does not refer to the person who makes the payment but it refers to the activity which give rise to the income. In the present context the activity which is resulting into income in the hands of non-resident customers, namely, the TV channels is the ultimate viewership of the programmes transmitted by them through the assessee in the footprint areas including India. Therefore, the activity which actually produces the income is not the uplinking or downlinking of the signals but of the actual viewership. If the programme signals are only uplinked but are not provided to the viewers, no activity capable of earning any profit would result. The cable operators are making the payments to the TV channels namely, the customers of the assessee only for the reason that the programmes are made available to public at large in India. Similarly, the advertisers are paying for inserting the advertisement in the programmes for the reason that these can be viewed in India so as to result in the acceleration in their sales because they have India as their commercial territory. Hence, the source of the income of the TV channels is the activity of showing programmes in India to the viewers. Therefore, it is clear that the activity which gives rise to income in the hands of non-resident customers, being the TV channel operators is the showing of their programmes in India and hence it is only this source which is resulting into income. We take an example where a manufacturer of a product situated outside India gives advertisement to be viewed in India. Even if that manufacturer is situated outside India and also making payment outside India but the source of income of the TV channel is the advertisement which is relayed in India. The decision relied upon by the learned counsel in the case of Lady Kanchanbai (supra) is rather supporting the case of the revenue for the reason that in that case it was held that different branches of the assessee constituted separate sources of its income. If this analogy is applied to the facts of the instant case, it becomes clear that so far as the revenue of the TV channels from the advertisers and the cable operators in India is concerned, it is the relaying of programmes in India and hence constitutes a separate source of income which is earned in India. We, therefore, hold that the TV channels, being the non-residents, are utilising the services of the assessee for earning income from advertisers and cable operators being the source in India by ultimately relaying the programmes in the Indian territories. The contention of the learned authorised representative in this regard, therefore, fails. A perusal of s. 9(1)(vi)(c) reveals that it is attracted under either of the three situations viz., firstly for the use of right, property or information by the payer for carrying on his business or profession in India, secondly, for the utilisation of services by such person for carrying on the business or profession in India, and thirdly for the use of right or property, etc. or utilisation of services for the purposes of making or earning any income from any source in India. If the case falls in any one of these three situations, s. 9(1)(vi)(c) is attracted. We have held above that not only the TV channels were carrying on their business in India but also they were earning income from the source in India.

6.29. The learned CIT(A) drew support from the decision of Authority for advance ruling reported in (1999) 238 ITR 296 (supra) to reach the conclusion that the payment under consideration was covered within s. 9(1)(vi). The learned authorised representative, on the other hand, has tried to distinguish this case primarily on the ground that in view of the provisions of s. 245S this ruling has no applicability to the facts of the present case. It is true that the advance ruling rendered is binding only on the applicant who had sought it and that too in respect of the transactions in relation to which the ruling was sought. This is the prescription of s. 245S. Even if it is held that the advance ruling is not applicable to other cases still we find that it has got a persuasive value and the support can be drawn therefrom. The facts of that case are that the applicant "Y" was a company formed and incorporated in USA operating in the worldwide credit card and travel business. The international credit cards and travellers cheques were used/discounted and encashed all over the world by the travellers. Y maintained a centralised computer in USA. The central processing unit (CPU) was accessed and used by various group entities located world-wide through a consolidated data network maintained in Hongkong. The transactions done by a traveller in a particular country were reported to the centralized computer in that country. In India this was done by XT located at Delhi. The said Indian company received information on a computer through

telephone and microwave links about the use of credit card and travellers cheques all over the country. XT also serviced 13 group companies in Asia and Pacific in a similar manner. The information was then passed on to the Hongkong computer centre of the applicant. Y charged XT, the Indian company, for the use of its computer setup in Hongkong and in USA. On these facts applicant sought an advance ruling on the question whether the payment due to the applicant under the transactions with XT was liable to tax in India. It was held that the use of embedded secret software developed by the applicant for the purpose of processing raw data transmitted by XT would fall within the term 'royalty'. It was held that it was for the downloading of the software that the royalty was paid. It was held that from the facilities provided by the applicant to the Indian company, which were in the nature of online, analytical data processing, it would be clear that the payment so received as "consideration for use or right to use..... Design or model, plan secret formula or process....." fell within the meaning of term 'royalty'. When the facts of the instant case under our consideration are compared with those before the authority for advance ruling, it is seen that both fall almost on the same track. The assessee in the present case was providing process to its customers (similar to CPU in USA and Hongkong) as a result of which the information sent by the TV channels namely, the signals was processed in the satellite (similar to the processing of information in CPU at USA and Hongkong) and hence the consideration paid in lieu thereof is royalty falling under s. 9(1)(vi) as laid down in the ruling.

6.30. In view of the above discussion we hold that the CIT(A) was justified in holding that the lease rent paid by the TV channels to the assessee falls within the ambit of the word "Royalty" used by the legislature in s. 9(1)(vi) r/w Expln. 2. However, cl. (c) of s. 9(1)(vi) is attracted if (i) such process is utilised by the non-resident for the purpose of business carried on in India, or (ii) for earning any income from any source in India. On the facts of the present case the earning of income may be in any form such as receipts from advertisers or from cable operators, etc. The possibility of any channel(s) not earning income from any source in India cannot be ruled out. In such a case the lease rent earned by the assessee from such channel(s) cannot be taxed under s. 9(1)(vi). The order of the CIT(A) is, therefore, modified pro tanto and consequently the AO is directed to determine the income under s. 9(1)(vi)(c) in the light of above discussion after allowing a reasonable opportunity of being heard to the assessee.

7. Additional alternative ground for applicability of s. 9(1)(vii).

7.1. During the course of hearing before us it was strongly contended by the learned Departmental Representative that the case of the assessee was covered under s. 9(1)(vii) as well. It was tendered that this ground omitted to be raised at the time of filing appeal. It was pointed out that cl. (vii) refers to income earned by way of fees for technical services payable by the non-residents. On a query raised from the Bench it was stated that though the applicability of s. 9(1)(vii) was not the subject-matter of consideration by the CIT(A) and further that no specific ground was raised by the Revenue in this regard still the Revenue was entitled to raise this ground for the reason that it deals with the taxability of the amount received by the non-resident on account of making available its transponder capacity to the TV channels. It was submitted that the subject-matter for taxation was the same, namely, deemed accrual or arising of income in India and it was only the consideration of the correct sub-clause of s. 9(1) which was applicable to the facts of the present case. It was stated that this was a legal ground going to the root of the case and as such the Department was entitled to raise this ground for the first time before the Tribunal. It was explained that the subject-matter of consideration by the Bench was the same, namely, the taxability of income under s. 9(1) and the Department was only urging for examining the taxability of the income of the assessee under s. 9(1)(vii) also by way of an alternative submission, if the case was found to be not covered in s. 9(1)(vi). Referring to certain decisions it was contended that the Department was entitled to raise this additional ground for the first time before the Tribunal. In the opposition the learned counsel for the assessee strongly objected to the admission of this additional ground on the premise that it was never the case either of the AO or of the CIT(A) that the income was taxable under s. 9(1)(vii). During the course of arguments the attention of the learned counsel was drawn towards the decision of National Thermal Power Co. Ltd., vs. CIT (1999)

157 CTR (SC) 249 : (1998) 229 ITR 383 (SC), CIT vs. Dhanalakshmi Mills Ltd. (1999) 157 CTR (Mad) 252 and Maruti Udyog Ltd. vs. ITAT (2001) 169 CTR (Del) 366 : (2001) 252 ITR 482 (Del) in support of the view canvassed by the learned Departmental Representative as regards the admissibility of the additional ground. It was stated by the learned counsel for the assessee that in the case of NTPC Ltd. (supra) the earlier decision of Jute Corporation of India Ltd. vs. CIT (1990) 88 CTR (SC) 66 : (1991) 187 ITR 688 (SC) was also considered wherein it was held that there must be certain reasons for not having raised the ground earlier. It was also pointed out that in order to adjudicate upon this ground fresh investigation of facts was required for the reason that in Expln. 2 to cl. (vii) of s. 9(1) there is reference to "the rendering of services". It was stated that the rendering of services may take one shape or the other and hence it was necessary to examine the facts in this light. In the final analysis it was submitted by the learned counsel that this ground could not be admitted.

7.2. After considering the rival submissions in the light of material placed before us and precedents relied upon on the issue of admission of additional ground for the first time before the Tribunal we find that two questions are involved in the present context. First relates to the admission of additional ground during the course of hearing before the Tribunal and the second, to the admission of ground which does not arise out of the orders of the authorities below. Normally the grounds are set out in the memorandum of appeal before the Tribunal. However, the parties are not prohibited from taking additional grounds at the time of hearing subject to the leave of the Tribunal. The acceptability of a ground urged originally or permitted to be urged by way of additional ground is a matter for determination by the Tribunal at the time of final hearing. We do not find any precedent or rule which prohibits the parties from taking an additional ground before the Tribunal which is not set out in the original memorandum of appeal. As such we are of the considered opinion that the Revenue is entitled to raise additional ground for consideration before the Bench. Our view is fortified by the decision of the Hon'ble Delhi High Court in the case of Maruti Udyog Ltd. vs. ITAT & Ors. (supra). This takes us to the consideration of second question, namely, whether a ground can be raised before the Tribunal for the first time which is not emanating from the orders of the authorities below. There is no dispute about the fact that the purpose of the assessment proceedings before the authorities is to correctly assess the tax liability of an assessee in accordance with law. Determining the correct tax liability in accordance with law refers to the application of correct provision of the Act to the subject-matter. If all the facts are available on record and it is only the question of applicability of the correct section to those facts we do not find any reason to debar any party before the Tribunal from raising such a question of law even if it was not raised earlier or was not the subject-matter of consideration by the lower authorities. However, it is important that before taking up any such issue for consideration the affected party must be given due opportunity to represent its case. The Hon'ble Supreme Court in the case of NTPC Ltd. (supra) held that where the Tribunal was only required to consider the question of law arising from facts which were on record in the assessment proceedings there was no reason why such a question should not be allowed to be raised when it was necessary to consider that question correctly to assess the tax liability of an assessee. To similar effect is the decision of Dhanalakshmi Mills Ltd. (supra) wherein it was laid down that the view of the Tribunal that it has no jurisdiction to entertain a ground which was not the subject-matter of the appeal before the first appellate authority was not sustainable in law. It was further held that entire assessment is before the Tribunal and it is open to the assessee or to the Department to raise question arising out of the assessment proceeding though the question was not raised earlier. The view of the Tribunal in that case, that it had no powers to entertain a new ground urged before it by the Revenue which was not the subject-matter of appeal before the CIT(A), was held to be erroneous. In the light of these precedents it becomes manifest that both the assessee as well as the Revenue are entitled to raise a legal ground before the Tribunal for the first time. If it is a legal ground and does not require consideration of fresh facts, it is not only the right of the parties but the duty of the Tribunal to admit it for consideration. Adverting to the facts of the present case we find that the main issue under consideration in both the appeals is the taxability of income realised by the assessee-company for providing the transponder capacity to its customers. The only controversy relates to the applicability of the relevant sub-clause of s. 9(1) to the case. The AO held that s. 9(1)(i) was applicable whereas the CIT(A) held that it was s. 9(1)(vi) which was applicable to the facts of the

case. The subject-matter of challenge in both the appeals before us remains the taxability or otherwise of the income under consideration. All the facts necessary for adjudication of the issue either under sub-cl. (i) or sub-cl. (vi) or sub-cl. (vii) are available on record. The only question is the applicability of correct clause of s. 9(1) to the facts of the case. The additional ground so raised by the Revenue does not enter into the field of new facts which were not considered by the authorities below nor it is the case that the ground now solicited to be raise before us is not germane to the issues involved in both the appeals. Under these circumstances we are of the considered opinion that the Revenue is entitled to raise this ground. We, therefore, admit this ground.

8. In view of our decision on the applicability of s. 9(1)(vi) to the facts of the present case in the preceding paras we do not consider it expedient to deal with the facts and rival contentions on the applicability of cl. (vii) of s. 9(1). Our view finds support from the decision of Special Bench of Tribunal in *Rahul Kumar Bajaj vs. ITO* (1999) 64 TTJ (Nag)(SB) 200 : (1999) 69 ITD 1 (Nag)(SB).

9. Computation of Income

9.1. Ground Nos. 2 and 3 of the Revenue's appeal and 11 to 19 and 22 of the assessee's appeal deal with the determination of the quantum of income chargeable to tax in India. The AO held that the income of the assessee arose on account of business connection in India within the meaning of s. 9(1)(i) of the Act. When the question of determination of its quantum arose, he determined the quantum of assessable income by taking gross income at 90 per cent of the net revenue earned by the assessee from such channels as were popularly viewed in India and programmes directed for India and allowed deductions therefrom on account of expenditure incurred by way of lease rents, maintaining of satellites, depreciations, etc. and further 5 per cent of the total administrative expenses under s. 44C of the Act. It was claimed before him on behalf of the assessee that the quantum of the Revenue should be determined only by dividing its gross receipts with 47 and 82, respectively, representing the number of countries covered by the footprint of the concerned beams of Asiasat-I and Asiasat-II. The learned CIT(A) in the first appeal held that the provisions of s. 9(1)(i) were not applicable to the facts of the case and accordingly the income was taxable under s. 9(1)(vi) of the Act. By so holding it was further observed that no deduction for expenses was eligible from the gross revenue of the assessee. As regards the quantification of revenue it was held that the division factor of 47 and 82 countries was not appropriate. The learned AO was directed to recompute the business income according to another formula, namely, on the basis of ration of area of the country to the area of footprint of the beam. While working out the area of the footprint at a beam, the area of large water bodies like inland lake, sea and ocean, etc. was directed to be ignored. The learned CIT(A) further proceeded towards apportionment of expenses on the ground that if his view on the applicability of s. 9(1)(vi) was reversed by higher appellate authorities and that of the AO restored, then the AO may calculate income under s. 9(1)(i) by deducting expenses from the Revenue in the way as mentioned in the first appellate order. Both the assessee and the Revenue have challenged the finding of the learned CIT(A) on the issue of computation of income.

9.2. After carefully considering the rival submissions and perusing the relevant material on record it is observed that the learned CIT(A) did not allow any deduction from the royalty income under s. 9(1)(vi) probably for the reason that he might have s. 44D in his mind. This section deals with special provisions for computing income by way of royalty, etc. in the case of foreign companies. According to the prescription of this section, no deduction in respect of any expenditure is allowable in computing the income by way of royalty or fees for technical services received from Government or an Indian concern in pursuance of an agreement made by the foreign companies with Government or with the Indian concern after 31st March, 1976. The non obstante clause in this section excludes the operation of ss. 28 to 44C of the Act. Chapter XII of the IT Act dealing with the determination of tax in certain special cases, contains sec. 115A which deals with the tax on dividends, royalty and technical services fees in the case of foreign companies. Clause (b) of sub-s. (1) deals with rates on which income-tax is chargeable on the receipts of foreign companies on

account of royalty and fees for technical services, etc. It is pertinent to note that like s. 44D, this section also operates only when the technical services are received by the Government or an Indian concern. We find that both these sections namely 44D and 115A cannot be applied to the facts of the present case for the reason that in the case before us the payment of royalty to foreign companies is also made by non-resident companies and not by Government or Indian concern. Probably such a situation was not visualised by the legislature at the time of enactment of the above referred provisions. In the absence of any special provision for computing the income by way of royalties, etc. recourse will have to be taken to the normal provisions of the IT Act, 1961. Scope of total income is contained in s. 5 of the Act and the relevant provision applicable to the facts of the present case is s. 5(2)(b) which provides that the total income of any previous year of a person who is non-resident, includes income from whatever sources derived which is deemed to accrue or arise to him in India during such year. Clause (vi) brings royalty income within the sweep of s. 9(1), which in turn deals with the items of income which are deemed to accrue or arise in India. Therefore, by virtue of the provisions of s. 9(1)(vi) the royalty income in the present case comes within the purview of s. 5(2)(b) which is relevant for our purpose. Since s. 5 deals with the scope of "total income", s. 2(45) defines "total income" to mean "the total amount of income referred to in s. 5 computed in the manner laid down in this Act." Similarly s. 4, namely, the charging section provides that where any Central Act enacts that income-tax shall be charged for in assessment year at any rates or rate, income-tax at that rate or those rates shall be charged for that year in accordance with and subject to the provisions of this Act. Chapter IV of the IT Act containing different heads starts with s. 14, which provides that all incomes for the purposes of the charging to income-tax and computation of total income will be classified under the five heads enumerated therein. Then different sub-chapters of this chapter namely, A to F deal with the determination of income under the respective heads after allowing the expenses as contained therein. It, therefore, becomes clear that the view of the learned CIT(A) that no deduction is admissible from royalty income and the gross amount is taxable, is not correct for the reason that no special provision for computing income is there in the Act which can be applied to the facts of the present case. As such the computation of the income will necessarily have to be done in accordance with the provisions of the Act after making deductions for expenses as provided in the Act.

9.3. With reference to the computation of total income, it was contended by the learned Departmental Representative that before deciding the deductibility of expenses it was important to consider the head under which the royalty received by the assessee, would fall. It was pointed out that since it was the case of deeming income under s. 9(1), therefore, the income was rightly taxable under the head "Income from other sources" and only the deductions as provided under Chapter IV-F were to be allowed. In the opposition the learned authorised representative submitted that the business of the assessee was that of providing its transponder capacity to different customers on hire and, therefore, the exploitation of its assets was only in the capacity of businessman and hence the income was to be determined under Chapter IV-D namely, "Profits and Gains of business or profession". Placing reliance on the case of CIT vs. Cilag Ltd. (1968) 70 ITR 760 (Bom) and CIT vs. Gilbert & Barker Manufacturing Company 1977 CTR (Bom) 347 : (1978) 111 ITR 529 (Bom), it was pointed out by the learned counsel for the assessee that the royalty received was held to be taxable as business income, Similarly reliance was placed on an unreported decision of Bombay Bench in the case of Dy. CIT vs. Kraftwork Union A.G. in ITA No. 8358/Bom/1988 for the proposition that the royalty was taxable under the head "Business income".

9.3.a. After considering the rival submissions we are satisfied that the eligibility of deductions from the royalty income would obviously depend upon the head under which the royalty income is held to be includible. It is clear that the different heads of income as mentioned in s. 14, are mutually exclusive. If an item of income falls under any of the first four heads, the same has to be considered under that head alone. The residuary head namely 'Income from other sources' includes within its ambit income of every type which is not to be excluded from the total income but the same is not chargeable to tax under any of the specific heads as mentioned in s. 14, items A to E. Sec. 56(2) specifically lists out certain items of income which are to be included under the head

income from other sources. It is noted that the royalty income is not specifically covered in any of the clauses as mentioned in s. 56(2). 'Business' has been defined under s. 2(13) to include any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture. Sec. 28(i) provides that the profit and gains of any business or profession, which is carried on by the assessee at any time during the previous year are chargeable to tax under the head "Profits & gains of business or profession". It, therefore, reveals that the income resulting from the carrying on of the business is specifically taxable under Chapter IV-D. It is further observed from the assessment order that the AO himself treated the income as falling under the head "Business income" and allowed deductions accordingly. Sec. 9(1) deems certain income to accrue or arise in India. It nowhere states that the income so deemed to accrue or arise in India would fall under the last head of income, namely, "Income from other sources". It, therefore, follows that the nature of income is not effected by s. 9 and if the activity otherwise qualifies as business then the income derived therefrom has to be taxed under the head "Business income". The relevant factor in deciding the head under which a particular income would fall is the nature of the activity carried on by the assessee. Reverting to the facts of the present case we find that the business of the assessee is to receive the signals from the earth stations and then after amplifying, relay them in its footprint. This is the sole activity which the assessee is carrying on as its business. Ergo there remains no doubt that the income from such operations falls under Chapter IV-D. The decisions cited by the learned authorised representative fortify our view. We, therefore, hold that the contention of the learned Departmental Representative is not correct that the income should be considered under the head "Income from other sources". Resultantly the assessee is entitled to deductions available under this Chapter.

9.4. Now we are left with two aspects on this issue namely the apportionment of revenue earned by the assessee relatable to India and deductibility of expenses therefrom. As regards the apportionment of the net revenue the learned AO held that 90 per cent was attributable to India. However, no specific basis was given for arriving at this conclusion. On the other hand, the learned CIT(A) opined that the Revenue was to be apportioned in the ratio of area of the country to the area of the footprint of the beam after ignoring the water bodies like ocean, etc. For apportionment of expenses, it was held that if the income of the assessee was to be taxed as "Royalty", then no deduction was admissible and in case his view was changed by higher authorities and that of the AO restored then he laid down certain guidelines and directed the AO to recompute the income accordingly.

9.4.a. It is seen that the assessee submitted before the AO, statement of income attributable to India, copy of which has been placed at p. 7 of the paper book. As a result of this computation, the assessee had shown a total loss of 28,19,27,634 HK dollars attributable to India. As against this the AO worked out total taxable income at Rs. 1,60,28,03,316 as under :

	Asiasat-I	Asiasat-II
Net revenue	16,45,69,589	35,76,28,544
Less : Maintenance and satellite operation	37,29,792	42,95,818
Less : rentals	4,98,57,722	Nil
Net Profit	11,09,82,075	35,33,32,726
Total Income	46,43,14,801	
Less depreciation as discussed above	4,25,24,45	
Total adjusted income	= 42,17,90,346	
Less : 5 per cent as HO expenses under s. 44C	= 4,25,24,455	

Total taxable income = 40,07,00,829A

As total revenue received 80 per cent is apportioned to India as most of the channels are India specific and their advertisement revenue is from India.

Therefore, 80 per cent of A is attributable to Indian operations which is 32,05,60,63.2 converted into INR @ Rs. 5 per Hongkong dollar = Rs. 1,60,28,03,316

Total taxable income = Rs. 1,60,28,03,316

9.4.b. The computation made by the AO was challenged before the first appellate authority who varied the figures as briefly discussed by us in an earlier para.

9.4.c. We find that the starting point of computation of total income attributable to India by the assessee as well as the AO was the 'Net revenue' shown by the assessee at 1,64,56,579 HK dollars from Asiasat-I southern beam and thereafter certain deductions were claimed by the assessee including lease rentals of Asiasat-I southern beam at 1,66,192,408 HK dollars. The learned AO however, restricted the claim of lease rentals at 4,98,57,722 HK dollars. It is not understandable as to what is the meaning of 'Net revenue'. In other words, which deductions are claimed from the gross revenue to work out the net revenue. If it is really net revenue then there was no point in further deducting the expenses as claimed by the assessee in its computation placed at p. 7. It is also not understandable as to how only the payment of the lease rentals of Asiasat-I southern beam itself is more than the net revenue shown by the assessee. We further find that the computation was made by the assessee as well as the AO by restricting the net amount, after deduction of expenses from the net revenue, relatable to India. If the starting point of computation of total income was only the revenue relatable to India then only the proportionate expenses relatable to India should have been deducted rather than deducting the expenses in total from the net revenue relatable to India and thereafter, apportioning the net income of the southern beam to India. It is further noted that the assessee had claimed depreciation on the whole of the Asiasat-II, whereas apportionment of income was made only in the ratio of 47 and 82, namely, the total countries covered under the footprint of Asiasat-I and Asiasat-II. This method of computation by the assessee is not correct in as much as it is not reflecting the correct total income attributable to India. The AO also proceeded on the basis of computation given by the assessee at p. 7 of the paper book and determined the income arbitrarily by making certain adjustments. It was fairly submitted by the learned Departmental Representative during the course of proceedings before us that none of the authorities below had applied their mind to the correct method of computation of income of the assessee, which is taxable as attributable to India. We, therefore, set aside the computation made by the authorities below and hold that the entire exercise of the computation will be done de novo by the AO. The fresh computation would involve basically two steps. First would relate to the calculation of gross receipts relatable to India and the second would deal with the expenses deductible in relation to income attributable to India. The resultant figure would be the total income chargeable to tax under the IT Act, 1961. In the fresh proceedings the assessee will be at liberty to lead any evidence in support of its claim as it thinks appropriate. In the like manner the AO will be entitled to seek any information/details, etc. for the purposes of making the assessment and the assessee will provide the same. If the information/details, etc. as required by the AO are not supplied within reasonable time, he would be entitled to draw adverse inference against assessee.

9.4.d. However, we would like to separately deal with the question of deduction on account of depreciation on Asiasat-II. The assessee claimed 25 per cent depreciation on the total cost of Asiasat-II in its computation. The AO, however, did not consider the actual cost of the Asiasat-II for the purposes of depreciation on the ground that the amount eligible for grant of depreciation would be only the written down value and not the cost of satellite for the reason that the depreciation for earlier year namely, 1995-96 should be deemed to have been claimed. After

deducting the amount of deemed depreciation from the original cost, the net figure formed the subject-matter of consideration by the AO for applying the rate of depreciation. He did not vary the rate of depreciation at 25 per cent but restricted it to 16 per cent of 25 per cent on account of depreciation attributable to Indian income. Before the first appellate authority it was urged that the full amount of depreciation was admissible and there was no point in restricting it only to the C Band which was the producer of income relatable to India. For this proposition the reliance was placed on the decision of the Hon'ble Supreme Court in the case of Rajasthan State Warehousing Corporation vs. CIT (2000) 159 CTR (SC) 132 : (2000) 242 ITR 450 (SC). It was also urged that the AO was not justified in computing the written down value whereas no depreciation was claimed and allowed by the Department in any earlier year. The learned CIT(A) reversed the finding of the AO on the issue of original cost vis-a-vis the written down value, but however, held that depreciation on the total Asiasat-II was not deductible. He relied on s. 38(2) for this purpose. He, however, restricted it to 75 per cent as against 16 per cent computed by the AO. Before us the learned authorised representative reiterated the submissions as advanced before the first appellate authority and contended that depreciation was deductible on the total cost of Asiasat-II and not merely the portion which constitutes the basis for determining income attributable to India. In the opposition the learned Departmental Representative relied on the order passed by the CIT(A).

9.4.e. At this juncture we would examine the applicability of Rajasthan State Warehousing (supra) to the facts of the present case. In that case the assessee claimed deduction of expenditure of Rs. 38,13,555 under s. 37(1) of the Act in computing its income under the head "Profits & Gains of the business or profession". The ITO allowed only so much of expenditure as could be allocated to the taxable income and disallowed the balance which was relatable to the non taxable income being exempt under s. 10(29). Finally, it was held by the apex-Court that if a person was carrying on one indivisible business having both taxable and the exempt income therefrom, then the whole expenditure was deductible irrespective of the proportion of expenses which was relatable to exempt income. We find that this decision was rendered in year 2000. The Finance Act, 2001, inserted s. 14A with retrospective effect from 1st April, 1962, providing that for the purposes of computing the total income under this chapter no deduction shall be allowed in respect of expenditure incurred by the assessee in relation to income which does not form part of the total income under this Act. When the attention of the learned authorised representative was drawn towards this section during the course of proceedings, it was stated that this section was restricted only to the claim of deduction in respect of 'expenses' whereas the depreciation was an 'allowance' and hence this section was not applicable to the present case. We find that the case law relied upon by the learned authorised representative also deals only with the apportionment of the 'expenses' and not with the 'allowance' such as depreciation allowance under s. 32. In other words, the decision of the Hon'ble Supreme Court was nullified as it is by the Finance Act, 2001, with the insertion of s. 14A. That apart, we find that there is a difference between the income which is exempt from tax and the income which is outside the charging section. Sec. 4 provides that the 'total income' of previous year shall be charged to tax at the rates applicable. 'Total income' under s. 2(45) refers to the total amount of income as stated in s. 5. Sec. 5, deals with the scope of income. Resultantly all the incomes whether taxable or exempt have necessarily first to fall within the scope of s. 5. The incomes which are exempt by virtue of s. 10 are otherwise chargeable to tax and fall within the scope of total income. It is only as a result of the operation of s. 10 that these do not form part of total income and are excluded as being exempt. If, on the other hand, an income does not fall within the charging section itself there is no question of including, the same in the scope of total income or deducting expenses which gave effect to such income, from the income chargeable to tax in India. Therefore, there is a glaring difference between the exempt incomes and the income which falls beyond the charging section and the expenses incurred to earn such incomes. The decision rendered by the Hon'ble Supreme Court in the case of Rajasthan State Warehousing (supra) only concerns with the expenses which contribute to the incomes which are otherwise chargeable to tax but are exempt by virtue of the provisions of s. 10. On the other hand, we are discussing the deductibility of depreciation/ expenses that contributed to the earning of an income which is not at all includible in the scope of total income and hence is outside the ambit of ss. 4 and 5. Apart from the fact that the aforesaid decision of the apex Court has been rendered meaningless after insertion of s. 14A, its ratio was applicable only in respect of exempt income and

not the incomes which do not fall within the scope of total income. In the light of this discussion we hold that the claim of the assessee for entitlement of depreciation on the total cost of Asiasat-II against the income attributable to India is not justified for the reason that only the income relatable to C Band is falling within the scope of total income whereas the income of other bands namely, Ku Band, Ku Lease, Ku Sales is outside the scope of total income in India. Under these circumstances we are of the considered opinion that the depreciation allowable to the assessee on Asiasat-II has to be apportioned. As regards the cost of the satellite eligible for depreciation, we find that the learned CIT(A) was justified in holding that the actual cost would be considered for this purpose and not the written down value as computed by the AO for the clear reason that the written down value refers to the actual cost minus depreciation actually allowed. Since it is not the case of the Revenue that any depreciation was actually allowed to the assessee in the past, therefore, no cognizance can be taken of the notional depreciation as done by the AO. We, therefore, direct that the claim for depreciation should be considered in the light of the foregoing discussion.

9.4.f. In order to facilitate the computation of income, another important aspect, namely, the applicability of s. 44C also needs to be dealt with. The AO at the time of computing the total income of the assessee allowed deductions of maintenance and satellite operations expenses, lease rentals, depreciation and 5 per cent for all other expenses relying on the provisions of s. 44C. The learned CIT(A) held that the provisions of s. 44C were not applicable. Before us the learned Departmental Representative strongly objected to the finding of the CIT(A) on the non-applicability of the provisions of s. 44C. It was urged that the AO was justified in allowing expenses @ 5 per cent as head office expenses. In the opposition the learned counsel for the assessee supported the action of the CIT(A) in this regard.

9.4.g. After considering the rival submissions and perusing the relevant material on this point we observe that the learned CIT(A) was justified in holding that s. 44C was not attracted. It is patent that this section is applicable only in the cases of those non-residents who carry on business in India through their branches. In other words, this section presupposes the existence of a branch office or other sub-office, by whatever name called, in India for whose income the deduction on account of head office expenses situated outside India is granted as stated in s. 44C. If there is no branch in India naturally there will not arise any question of allowing any deduction towards head office expenses. Our view is fortified by the decision of Hon'ble Calcutta High Court in the case of Rupenjuli Tea Company Ltd. vs. CIT (1991) 92 CTR (Cal) 37 : (1990) 186 ITR 301 (Cal). Turning to the facts of the present case we find that the assessee does not have any office in India, therefore, the provisions of s. 44C would not be applicable.

9.4.h. In the final analysis on the aspect of computation of income, we hold that the AO would redo the exercise of computing the gross receipts and expenses relatable to India. In doing so he will keep into consideration our observations with regard to the depreciation on Asiasat-II and s. 44C.

9.5. Ground No. 20 of the assessee's appeal deals with the adoption of conversion rate of Hongkong dollars into Indian rupees for computing the income. The AO converted the income in Hongkong dollars into Indian rupees @ Rs 5 per Hongkong dollar. The learned CIT(A), however, directed the AO to adopt the conversion rate at Rs. 4.62 per Hongkong dollar. Rule 115 of the IT Rules, 1962, clearly stipulates that for computing income in Indian rupees, the rate of exchange for the conversion of the value in rupees shall be made at the telegraphic transfer buying rate of the currency of the other country as on the specified date. A certificate from the State Bank of India has been placed at p. 419 of the paper book, according to which the TT buying rate of Hongkong dollar as on 31st March, 1997, was Rs. 4.61. In these circumstances we direct the AO to apply this rate for conversion of Hongkong dollars into Indian rupees for calculating income attributable to India.

10. Chargeability of interest under ss. 234A and 234B

10.1. Ground No. 4 of the Revenue's appeal and No. 21 of the assessee's appeal relate to the charging of interest under ss. 234A and 234B. The AO charged interest under these sections. The learned CIT(A) held that the interest under s. 234A was chargeable and there was no liability of the assessee to pay interest under s. 234B. The assessee is in appeal against the levy of interest under s. 234A. After considering the rival submissions, we find that the liability towards interest under s. 234A is mandatory and arises on account of failure to file the return within the time as prescribed under s. 139(1). As the assessee was under obligation to file return on or before 30th Nov., 1997, which was actually not filed in time, we hold that the liability to pay interest under s. 234A was rightly attracted and the learned CIT(A) was justified in holding so. As regards the levy of interest under s. 234B it was contended on behalf of the assessee before the first appellate authority that no interest was chargeable because the assessee was not liable to pay advance tax. The learned CIT(A) relying on the decision of Delhi Bench in the case of Sedco Forex International Drilling Inc. vs. Dy. CIT (2000) 67 TTJ (Del) 670 held that the assessee was not liable for interest under s. 234B. Before us the learned Departmental Representative contended that the learned CIT(A) was not justified in holding so. It was urged that the decision in Sedco Forex (supra) rested on its own facts under which the assessee was a non-resident company and the sums paid by the ONGC had already suffered deduction of tax at source and that was why it was held that no advance tax was required to be paid under s. 234B. It was submitted that in the present case there is no conflict over the point that no customer had deducted any tax at source from the payments made to the assessee and that was why the said decision was not applicable. In the opposition the learned authorised representative strongly relied on the order passed by the CIT(A) on this issue and contended that there was no infirmity in it, warranting any interference.

10.2. After considering the rival submissions and perusing the relevant material on record we find that the charge of interest for default in payment in advance tax is covered under s. 234B of the Act. This section is attracted only when the assessee is liable to pay advance tax under s. 208. The later section in turn provides that the advance tax shall be payable during a financial year in every case where the amount of such tax payable by the assessee during that year as computed in accordance with the provisions of this Chapter is Rs. 5,000 or more. The next section in this Chapter is 209. Clause (d) of s. 209(1) provides that the income-tax under cl. (a) or cl. (b) or cl. (c) shall in each case be reduced by the amount of income-tax which would be "deductible" or collectible at source during the said financial year under any provisions of this Act. It is an admitted position that no tax was actually deducted by the customers of the assessee. But it is important to bear in mind that the word used in s. 209(1)(d) is "deductible" and not "deducted". It, therefore, boils down that if any tax is deductible from any income paid to the assessee during the year, no interest under s. 234B can be charged to the extent irrespective of the fact whether it has been actually deducted or not. Sec. 195 of the IT Act provides that any person responsible for paying to a non-resident, not being a company, or to a foreign company any interest (not being interest on securities) or any other sum chargeable under the provisions of this Act (not being income chargeable under the head "salaries") shall at the time of credit of such income to the account of the payee or at the time of payment thereof, whichever is earlier, deduct income-tax thereon at the rates in force. The assessee in question is a foreign company. The opening words of s. 195(1) cast obligation on 'any person' for deduction of tax at source who is responsible for paying to a foreign company, any amount chargeable to tax in India. "Any person" referred to herein, may be a resident or a non-resident. Therefore, the liability to deduct tax at source from the payments made by the TV channels to the assessee is fastened on them by virtue of the provisions of s. 195. That being the position the receipt of income by the assessee is such on which tax is "deductible". Once the tax is held to be deductible the amount of such income-tax which is deductible is liable to be excluded from the income-tax computed under cls. (a) to (c) of s. 209(1). It is important to bear in mind that s. 209(1)(d) deals with deduction of the income-tax deductible from the figure of income-tax calculated as per cls. (a) to (c) of s. 209(1) of the Act. The reference is not to the income on which the tax is deductible but to the amount of income-tax which is actually deductible. As we have noted supra that unlike ss. 44B, 44BB, 44BBA, 44BBB or 44D, containing special provisions for computing income of non-residents or foreign companies from different businesses or royalties, etc., there is no special provision in the Act for computing income by way of royalties, etc. payable by one non-resident to another non-resident, which is taxable in India, as are the

facts prevailing in the case under consideration. Probably such a situation was not visualised by the legislature. In such a situation income-taxable in India can only be computed by taking recourse to the normal provisions of the Act, which is a little difficult exercise. Be that as it may, the amount of income chargeable under the Act would vary from case to case and year to year even if other things are equal and accordingly the liability to pay tax in India can hardly match with the liability of payer of income to deduct tax at source. If for example the total income-tax liability of the assessee calculated under s. 209(1)(a) or (b) or (c) comes to Rs. 60 and the amount of income-tax 'deductible' comes to Rs. 50 then the assessee would be liable to pay interest under s. 234B on the balance amount of Rs. 10. If however, the liability of the payer to deduct tax at source is equal to or greater than the actual amount of income-tax payable by the assessee, then no liability to pay interest under s. 234B would arise. As the matter of computation of income has been restored by us to the file of AO for fresh determination, naturally the amount of income-tax thereon can be calculated only thereafter. If on such calculation the AO finds that the amount of tax deductible by the TV channels, by virtue of the provisions of s. 195, is equal to or more than the tax payable by the assessee then no liability under s. 234B would arise. If, however, the former figure is found to be lower than the latter figure, the balance amount would be considered for the purposes of charging interest under s. 234B. Under these circumstances the issue of determination of interest under s. 234B is also restored to the file of the AO.

11. In the result both the appeals are disposed of accordingly.

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