

Madras High Court

Verizon Communications ... vs The Income Tax Officer on 7 November, 2013

In the High Court of Judicature at Madras
Dated: 07.11.2013
Coram
The Honourable Mrs.JUSTICE CHITRA VENKATARAMAN
and
The Honourable Mr.JUSTICE T.S.SIVAGNANAM

Tax Case (Appeal) Nos.147 to 149 of 2011 and 230 of 2012
& connected Miscellaneous Petitions

Verizon Communications Singapore Pte Ltd.,
(formerly MCI Worldcom Asia Pte Ltd.)
having its registered office at
20 Raffles Place
16-01/08 Ocean Towers, Singapore 049315,
and Address in India for correspondence
only at
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.... Appellant in T.C.(A)Nos.147 to 149/2011

Verizon Communications Singapore Pte Ltd.,
(formerly MCI Worldcom Asia Pte Ltd.)
C/o S.R.Batliboi & Co.
6th & 7th Floor, A Block
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No.4, Rajiv Gandhi Salai,
Taramani, Chennai 600 113.

.... Appellant in T.C.(A)No.230/2012

Vs.

The Income Tax Officer
International Taxation I,
Aayakar Bhawan,
No.121, Nungambakkam High Road,
Chennai 600 034.

.... Respondent in the above T.Cs

APPEAL under Section 260A of the Income Tax Act against the order dated 7.1.2011 in I.T.A.Nos.

For Appellant : Mr.N.Venkataraman, SC
For M/s.Mohammed Shaffiq

For Respondent: Mr.Mohan Parasaran
Solicitor General of India
assisted by Mr.T.Ravikumar
Senior Standing Counsel for Income Tax
Mr.Arun Kurien Joseph
Standing Counsel for Income Tax

C O M M O N J U D G M E N T

CHITRA VENKATARAMAN, J.

The above Tax Case (Appeals) arise out of the order of the Income Tax Appellate Tribunal relating to the assessment years 2002-03, 2003-04, 2007-08 and 2008-09. T.C.(A)Nos.147 to 149 of 2011 were admitted by this Court on the following substantial questions of law:

"1. Whether the Tribunal was right on facts and in law in holding that the payments received by the appellant from the Indian customers for provision of Bandwidth/Telecom Services outside India is royalty for the 'use of, or the right to use equipment' under Section 9(1)(vi) of the Act?

2. Whether the Tribunal was right on facts and in law in holding that the payments received by the appellant from the Indian customers for provision of Bandwidth/Telecom Services outside India is royalty for the 'use of, or the right to use equipment' under Article 12(3)(b) of the Tax Treaty?"

2. The assessee seeks admission of T.C.(A)No.230 of 2012 on the following substantial questions of law:

"1. Whether the Honourable Tribunal was right in fact and in law in holding that the payments received by the appellant from its Indian customers for provision of Bandwidth Services outside India is a royalty for the use of or the right to use equipment under Section 9(1)(vi) of the Act?

2. Whether the Honourable Tribunal was right in fact and in law in holding that the payments received by the appellant from its Indian customers for provision of Bandwidth Services outside India is a royalty for the use of or the right to use equipment under Article 12(3)(b) of the Tax Treaty?

3. Whether the Honourable Tribunal was right in fact and in law in holding that in the alternative, the payments received by the appellant from its Indian customers for provision of Bandwidth Services outside India is royalty for the use of process under Section 9(1)(vi) of the Act?

4. Whether the Honourable Tribunal was right in fact and in law in holding that in the alternative, the payments received by the appellant from its Indian customers for provision of Bandwidth Services outside India is royalty for the use of process under Article 12(3) of the Tax Treaty?

5. Whether the order of the Honourable Tribunal is unsustainable since it has been passed in complete disregard to the judicial discipline and not following the decision of Honourable Chennai High Court in the case of Skycell Communications Ltd. Vs. DCIT (2001) 251 ITR 53 other decisions of Honourable Authority of Advanced Rulings in the case of Dell International Services (India) Private Limited (2008) 218 CTR 209, Cable & Wireless Network India Private Limited (2009) 315 ITR 72, the decisions of the Bangalore Tribunal in the case of Wipro V. Income Tax Officer (2003) 80 TTJ 191, Infosys Technologies Limited V. DCIT (2011) ITA No.1140/Bang/2009 and Software Technology Parks of India V. ITO (2005) 3 SOT 529 and the binding decision of the Honourable Supreme Court in the case of BSNL V. Union of India (2006) 282 ITR 273(W)?

6. Whether the Honourable Tribunal was right in fact and in law, in the alternative, that the payments received by the appellant from the Indian customers for provision of Bandwidth Services outside India are in the nature of FTS under Article 12(4) of the Tax Treaty and under Section 9(1)(vii) of the Act?

7. Whether the Honourable Tribunal was right in fact and in law in not considering and deciding on the grounds related to levy of interest under Section 234D of the Act?

8. Whether the Honourable Tribunal was right in fact and in law in not considering and deciding on the grounds related to levy of interest under Section 234B of the Act despite the fact that the matter has already been decided in favour of taxpayers by various Honourable Courts in India, including the recent decision of Honourable Delhi High Court in the case of DIT V. Ericsson A.B. (2012) 204 Taxman 192 (Del) and this Honourable Court in the case of Madras Fertilizers Ltd. (149 ITR 703) which held that no interest is levied where tax was deductible at source on the income chargeable to tax?"

3. The assessee company, Verizon Communication Singapore Pte Limited originally called as MCI Worldcom Asia Pte Limited, and part of the global telecommunication conglomerate of MCI, USA is a non-resident company engaged in the business of providing international connectivity services (bandwidth services or telecom services in the Asia Pacific region including customers in India for transmission of data and voice. Being a point to point private line used by an Organisation to communicate between offices that are geographically dispersed through out the world, the assessee provides a private link that can transport voice data and video traffic between the offices in different Countries. Thus, IPLC is an end to end managed dedicated bandwidth service that provides internet service to customers for various applications. The international leg of the telecom services provided outside India is provided by the assessee. Since in India, under the Indian Telecom Regulations, only the licensed service provider could provide international long distance communication services on the Indian leg, and the assessee is not a licensed service provider under the Indian laws, Videsh Sanchar Nigam Limited (VSNL) a public sector undertaking provides the Indian leg of the international service to the customers. Thus, a customer interested in taking a lease connection between its office in India and an overseas location enters into an arrangement with the assessee for the provision of international connectivity in the overseas leg and with VSNL for Indian half of the connectivity. VSNL transmits the traffic of the customer in India from the customer's office in India and transmits the traffic to a virtual point outside India and the assessee transmits it upto the

customer location outside India. It is stated that the assessee uses its telecom service equipment situated outside India in providing the international half circuit. It is stated that the gateway/the landing station in India used in transmitting the traffic within India belonged to VSNL and is used by VSNL for providing Indian end services pursuant to its contract with the customer. On the analysis of the facts, the Assessing Officer came to the conclusion that the payment received by the assessee in providing IPLC was taxable as 'royalty' for use of or right to use of commercial and scientific equipment under Section 9(1)(vi) read with Explanation 2 of the Income Tax Act and Article 12(3) of the Double Taxation Avoidance Agreement (hereinafter referred to as 'DTAA') between India and Singapore. The Assessing Officer also held that VSNL and MCI Wordcom Asia Pte Ltd are partners in providing IPLC and related services to various customers; the assessee has business connection in India on account of the source of income and location of the business assets and software in India. Thus the Assessing Officer held that the payments were in the nature of 'royalty', taxable under Section 9(1)(vi) read with Explanation 2(iva) and (vi) as also under Article 12(3)(b) of DTAA with Singapore.

4. The assessee objected to this and pointed out that the revenue earned by the assessee could not be considered as 'royalty' paid for the use of the equipment under the Income Tax Act, as the customers have no knowledge of the equipment/network used by the assessee for the provision of the service; that the customers do not have the control with reference to the usage of the equipment/network used for rendering the service. The assessee contended that no part of the international network is exclusive for any Indian customer or customers as a whole. The agreement between the assessee and the customers being one for rendering of service by the assessee, the payment could not be termed as 'royalty'. The collection of fee for the usage of standard facility would not amount to payment made for providing technical services. Thus the assessee contended that the question of any liability to pay advance tax or interest under Section 234B of the Income Tax Act did not arise.

5. The Assessing Officer rejected these contentions holding that the receipt of consideration for rendering of services to the end user is workable only when the assessee and the VSNL are considered to be rendering the service jointly to the end user in India. The agreements between the assessee and the end user and the VSNL are part of one transaction, but executed through several agreements/arrangements. The payments made by the customers for the offshore services rendered by the non-resident assessee are part of one single agreement to provide IPLC and hence, the receipts are taxable as 'royalty' under Section 9(1)(vi) read with Explanation 2 of the Income Tax Act. He held that by reason of the amendment to Section 9(1) with effect from 01.04.1976, under Finance Act 2010, the reliance on the decisions reported in (2006) 282 ITR 273 (Bharat Sanchar Nigam Ltd. and another V. Union of India and others), 218 CTR 209 : (2008) 172 Taxmann 418 (AAR) (Dell International Services India (P) Ltd., In re) and (2009) 315 ITR 72 (AAR) (Cable and Wireless Networks India (P) Ltd., In re) are not of any relevance to the assessee. Thus, payments received for providing communication bandwidth in the form of IPLC to customers came to be treated as 'royalty'. The transmission cables and hightech instruments providing a seamless circuit are 'equipment' and the income earned by permitting the use of or right to use of equipment fell within the meaning of 'royalty', both under the Income Tax Act and under the DTAA between India and Singapore.

6. Aggrieved by this, the assessee went on appeal before the Commissioner of Income Tax (Appeals), who confirmed the order of the Assessing Officer for the assessment years under consideration. The first Appellate Authority pointed out to the various clauses in the agreement between the assessee and the customer, customer and VSNL, the Master Service Agreement, technology agreement between the assessee and VSNL and MCI Global Access Corporation (WCom), the support services agreement with the assessee affiliates and held that the circuit created/developed by MCI, comprising of transmission cables and sophisticated instruments, amounted to 'equipment'. The payment made for the lease of this circuit, which expressed the quantity of dedicated bandwidth, would be taxable as 'royalty' under Section 9(1)(vi) Explanation 2 as well as under DTAA. Thus, the first Appellate Authority rejected the appeals.

7. On further appeal before the Income Tax Appellate Tribunal, the assessee reiterated the stand taken before the Authorities. The assessee contended that it used telecom service equipment which is situated outside the territory of India to provide international connectivity service and that they do not utilise any landing station in India for providing international half circuits. The gateway in India used in transmitting the traffic within India belonged to VSNL. This is used by VSNL for providing Indian end services pursuant to the contract it has with the customers. According to the assessee, its associates MCI Worldcom India Pte Limited (MCI India) has no authority to negotiate or bind the assessee in any manner vis-a-vis a potential customer. Hence, the assessee has no permanent establishment in India. MCI India provided marketing support to the assessee for which it is remunerated at an arms length basis. Considering the nature of services rendered, the consideration received could not be termed as 'royalty'. The Tribunal found that as per the agreement, the customer acquired significant, economic or possessory interest in the equipment of the assessee to the extent of the bandwidth hired by the customer. This was made available to the assessee on a dedicated basis. The agreement with VSNL for split billing is only to overcome the telecom regulatory regime prevailing in India. VSNL was a sub-contractor and a provisioning entity on behalf of the assessee and the IPLC is a hightech circuit comprising transmission cables and sophisticated equipment. The Tribunal held that even if the payments are not treated as not relating to the use of the 'equipment', they should be considered as payment for the use of the 'process'. Thus, referring to the ITAT Special Bench order in the case of New Skies Satellites N.V. Vs. ADIT (Int. Tax) reported in 319 ITR 269; in the case of ACIT Vs. Grandpix Fab (P) Ltd. reported in 34 DTR 248, and in the case of Ansaldo Energia SPA V. ITAT & Others reported in 310 ITR 2237, the Tribunal held that the payments made are for the use of tangible equipment and hence could be considered as payment for the use of or right to use of industrial, commercial and scientific equipment. The dedicated bandwidth is set aside by the service provider for the exclusive use of the customer. Referring to the decision reported in 42 SOT 165 (eFunds Corporation V. Asst. DIT), the Tribunal confirmed the views of the Assessing Officer. Thus, the appeals were rejected. Aggrieved by this, the present appeals have been filed by the assessee.

8. Learned senior counsel appearing for the assessee took us through various clauses in the agreements and submitted that considering the fact that the contract between the assessee and the customer being one for providing services, the consideration received for rendering of services cannot be termed as 'royalty'. Referring to Explanation 2 to Section 9(1)(vi) of the Income Tax Act, he submitted that the enumeration in Explanation 2 clearly indicates that the royalty has to be given

a limited meaning only, it being with reference to tangible and intangible right, property or information. The Explanation says nothing about treating the consideration on rendering of services as 'royalty'. Statutorily, rendition of services is dealt with under sub-clause (vii) to Section 9(1) of the Income Tax Act. Even as per this, the receipt cannot fall under sub-Clause (vii). Thus, the assessee renders the service of transmitting the customer's information from one location to another and the customer does not make the payment for acquiring a process, but only for a facility to communicate. Further, the service rendered is on non-exclusive basis and half circuit in India is operated by VSNL. In this, the customer does not get any right to use any equipment or has any knowledge or interest in the process/technical equipment deployed by the assessee in providing the service. Thus, access to service is different from access to right to use the equipment. Thus the assessee places reliance on the decisions reported in (2001) 251 ITR 53 (Skycell Communications Limited and another V. Deputy Commissioner of Income Tax and others), 80 TTJ 191 (Wipro Ltd., V. ITO) and 2005 3 SOT 529 (Software Technology Parks of India V. ITO) and submitted that the payment could not be brought under the head of 'royalty'. The arrangement between the assessee and VSNL is a bona fide one based on domestic law. The assessee is not a party to the agreement between MCI Global Access Corporation (Wcom) and VSNL and MCI Global Access Corporation (Wcom) had sold the nodal equipment to VSNL. The provision for transfer back to WCom does not, in any manner, change the VSNL's ownership rights. As regards the role of MCI World Com India, it merely provides liaising and co-ordinating services and this could not be treated as permanent establishment. He submitted that IPLC services provided by the assessee could be compared with the goods transporter. There is no conversion of data or voice as in the case of the transponder services, as discussed in the case of New Skies Satellites N.V. Vs. ADIT (Int. Tax) reported in 319 ITR 269. In IPLC, there is only transmission of data and voice in the same form through fibre cables. The Revenue has misconstrued the facts and the sophisticated technology merely concerns transmission of the data without distortion and the VSNL provided independent services within the Indian territory and is paid for separately and directly by the customers.

9. Explaining the nature of services, the assessee submitted an affidavit through the Manager (designation) in the assessee's organisation giving the list of equipment owned by the customer and the operating entity in the transmission activity in this part of the World or elsewhere. The affidavit proceeds to explain how the system of transmission works. It states that a dedicated bandwidth is nothing but assuring an uninterrupted 24x7 provision of services at an agreed speed and efficiency to meet the conditions of the service order. It is stated that neither any capacity nor any network including the cables are earmarked or dedicated to any customer for his exclusive or sole use. Commenting on the customer equipment (CPE) and service equipment, the affidavit states "a customer equipment is nothing but equipment owned and operated by the customers such as computers and customer routers. A customer premises equipment is the interface equipment between the customer router and local loop in the nature of modem provided by the local loop provider. Lastly, a service equipment is nothing but a cabling facility and equipment installed by the local loop service provider in the nature of a virtual local exchange".

10. The Revenue has also filed an affidavit explaining what IPLC network is about by enclosing a detailed discussion by Dr.Nitin Chandrachoodan, Associate Professor, Department of Electrical Engineering, IIT, Madras. In the affidavit filed by the Revenue, it is stated that the IPLC diagram

given by the assessee was presented to and the technical description of the same was obtained from Dr. Nitin Chandrachoodan, annexed as Annexure I. The circuit developed by the assessee comprises of transmission cables and sophisticated equipment starting from the Data Circuit-Terminating Equipment (DCE) at the customer premises to the other end of the network DTE (Data Terminating Equipment), referred to as Customer Premises Equipment (CPE), and the Data Circuit Terminating Equipment (DCE) are referred to as 'Service Equipment' in the assessee's agreements. The assessee provided connectivity to the customer at its premises at both ends of the network and the connectivity is for a dedicated bandwidth capacity for the agreed time. The customer could now monitor the extent and quality of signal transmission at various nodes located all along the network pathway through 'Network Management Software'. The customer thus paid for the use of and the right to use of the equipment. It pointed out that the assessee engaged the services of VSNL as a provisioning entity for performing certain services in India for which the assessee did not have the license. Thus the Revenue contended that the receipt is nothing but royalty.

11. Learned Solicitor General appearing for the Revenue reiterated the above by taking us through the various clauses in the agreements and submitted that the character of the receipt clearly fits in with Section 9(1)(vi) read with Explanation 2 (iva) of the Income Tax Act for equipment royalty; alternatively, it can also be taxed as process, falling under Explanation 2(iii) to Section 9(1)(vi) of the Income Tax Act that receipt would nevertheless be held as 'royalty'. Contending that for tax purpose qua royalty there need not be a physical or right to use to the user, he submitted that so long as there is nexus between the user, the situs of the usage (in India) and the purpose of the use (for offering seamless internet facility), economic exploitation of the equipment gives rise to the income to be taxed as 'royalty'. Referring to the 2012 amendment adding Explanation 5, he submitted that Explanation 5 clearly pointed out that for treating a receipt as 'royalty', even possession or control need not be proved. He submitted that VSNL's services taken by the assessee was only part of the agreement that the assessee had with the customer; that VSNL, as a provisioning agent, cannot control the configuration of the equipment at the customer's premises, which connects the Indian hub to the network of VSNL which carries the traffic outside India as per the agreed terms. As network offered is a single continuous unified system, it cannot be bisected as onshore and offshore parts. Thus, when the assessee offered seamless connectivity from one end to the other, the same is separate logically and artificially because of the geographical factors. Thus the entire equipment provided for a seamless connection are one whole indivisible equipment towards exploitation of the connectivity offered to the end. Thus the payment is not for pro-rata basis, but towards the entire service offered.

12. Referring to Explanation 6 with reference to the Revenue's contention that payment is also with reference to the use of the process as falling under Explanation 2(iii), he submitted that cable is also treated as a commercial equipment. Thus for the equipment usage and the services utilised, the payment falls within the meaning of 'royalty' and Clause (iva) thus includes licence and lease.

13. Referring to the decisions reported in (2007) 289 ITR 355 (In Re Cargo Community Network Pte Ltd.); 12 DTR 131 (Frontline soft Limited and Call World Technologies Ltd. V. Deputy Commissioner of Income Tax) and (2013) 353 ITR 646 (In Re: Dishnet Wireless Ltd., Chennai), he submitted that a right to access and exploit a part of segment of a larger system to use the capacity

of the system and the consideration paid therefor clearly falls under Clause (iva) of Explanation 2 to Section 9(1)(vi) of the Income Tax Act and hence 'royalty'. Even otherwise, it is a right to use a process and a right to use equipment coming within Explanation 2 to Section 9(1)(vi) of the Income Tax Act.

14. Referring to the Board's circular on the amendment 2012, he submitted that the declaratory amendment now clears whatever doubts that were there on the scope of the Explanation. Referring to Article 12 of the DTAA, he submitted that there is no prohibition therein in assessing royalty in India. As per Article 3.2 of the DTAA, the term not defined in the agreement would be understood by the definition contained in the law of the contracting state. Thus, going by the Explanation giving the definition on 'royalty' and 'process', the receipts are rightly taxed herein.

15. As regards the levy of penalty under Section 234B of the Income Tax Act, he pointed out that unless there is actual deduction of tax as TDS, there can be no escapement from the provision of Section 234B levying penalty. In this connection, he relied on the decision reported in (2011) 2 SCC 408 (CIT V. Rolta India Ltd.), as well as the unreported decision of this Court in T.C.(A)No.202 of 2007 dated 23.7.2013 (Commissioner of Income Tax V. M/s.Fisher Sanmar Ltd.), the assessment itself herein made after the amendment.

16. Countering the stand of the Revenue, learned senior counsel appearing for the assessee replied that even though wide meaning is given under Section 9(1)(vi) read with Explanation 2 on 'royalty', yet, the transaction being one of pure rendering of service, the consideration could not be taxed as 'royalty'. In this connection, he placed reliance on the decisions reported in (2006) 282 ITR 273 para 62 (Bharat Sanchar Nigam Ltd. and another V. Union of India and others), (2013) 353 ITR 646 para 9 (In Re: Dishnet Wireless Ltd., Chennai), (2007) 289 ITR 355 (In Re Cargo Community Network Pte Ltd.) 12 DTR 131 (Frontline soft Limited and Call World Technologies Ltd. V. Deputy Commissioner of Income Tax), (2008) 172 Taxmann 418 (AAR) (Dell International Services India (P) Ltd., In re) and (2009) 315 ITR 72 (AAR) (Cable and Wireless Networks India (P) Ltd., In re).

17. On the question as to whether VSNL is a permanent establishment of the assessee, he referred to the decision reported in (2007) 292 ITR 416 (DIT V. Morgan Stanley). On the levy of penalty, he submitted that Section 209 proviso has relevance for calculating advance tax alone and not for TDS. Therefore, the decisions reported in (2012) 343 ITR 470 (Del) (DIT V. Ericsson AB. and others) and (1984) 149 ITR 203 (Mad) (Commissioner of Income Tax (Appeals) V. Madras Fertilizers Limited) would be of relevance.

18. Heard learned senior counsel appearing for the assessee and learned Solicitor General appearing for the Revenue and perused the materials placed before this Court.

19. The Scheme of Section 5 of the Income Tax Act is that all income received by a resident in India, irrespective of all income deemed to be received in India, irrespective of whether it accrued or arise within India; all income accruing or arising to him in India during the previous year and all income accruing or arising to him outside India during the previous year are assessable in India as per the provisions of the Income Tax Act. Section 9 of the Income Tax Act specifically deals with the

assessability of non-resident tax payer in respect of income from whatever source derived, received or deemed to be received in India or which accrues or arises or deemed to arise or accrue in India. Under Finance Act, 1976, a source rule was provided in Section 9 for taxing the income of a non-resident through insertion of Clauses (v), (vi) and (vii) in sub-section (1) of Section 9 for income by way of interest, royalty or fees for technical services respectively by creating a legal fiction in Section 9 that even in cases where services are provided outside India, it is the situs of the payer, or the situs of utilisation of service by the payer which would determine the taxability of such services in India.

20. After the decision reported in (2007) 288 ITR 408 (Ishikawajama-Harima Heavy Industries Ltd. V. Director of Income Tax) that there should be territorial nexus between such income and territory of India and that the services had to be rendered in India and utilised in India, an explanation was inserted below sub-section 2 of Section 9, with effect from 01.06.1976 under Finance Act, 2007 clarifying that when income is deemed to accrue or arise in India under Clauses (v), (vi) and (vii) of sub-section 1 to Section 9, such income shall be included in the total income of the non-resident regardless of whether the non-resident has a residence or place of business or business connection in India. Thus, while in the case of resident, irrespective of place of accrual or arising of income, it is taxable in India, in the case of non-resident, unless the place of accrual or arising is within India, he cannot be subjected to tax. Thus only to the extent of any income accruing or arising within India, income is fictionally deemed to arise or accrue in India, and the non-resident would be liable to be taxed by reason of Section 5(2)(b) of the Income Tax Act. By Finance Act, 2010, with effect from 01.06.1976, the Explanation inserted by Finance Act, 2007 was substituted with retrospective effect from 01.06.1976 that income of a non-resident shall be deemed to accrue or arise in India under Clauses (v), (vi) and (vii), irrespective of the fact whether the non-resident has a residence or a place of business or business connection in India or non-resident has rendered service in India.

21. Thus Section 9 of the Income Tax Act deals with taxation on income of the non-resident on accrual basis. In contrast to the residence being the focus in the case of the assessee falling for consideration under Section 5(1), Section 9 lists out income arising or accruing in India in cases of (i) non-residents directly or indirectly 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; (ii) income which falls under the head "Salaries" earned in India; (iii) income chargeable under the head "Salaries" payable by the Government to a citizen of India for service outside India; (iv) a dividend paid by an Indian company outside India; (v) income by way of interest payable by the Government or by a resident or non-resident in the stated circumstances and (vi) income by way of royalty.

22. In the background of Section 9, considering the conflicting claim that may arise among nations to exercise jurisdiction to tax the entity by reason of choosing to emphasise on one or more connecting reasons such as the location of the source residence of the taxable entity, maintenance of permanent establishment and so on to exercise their fiscal jurisdiction to tax that entity and that some income of the same entity might become liable to taxation in different countries leading to harsh consequences, to avoid such jarring results, incongruous and anomalous situation and to foster economic development among nations, different Countries enter into bilateral treaties

convention, agreements for getting relief against double taxation called Double Taxation Avoidance Treaties or Convention Agreements. The power to enter into a treaty is held as an inherent part of the sovereign power of the State. By Article 73 of the Constitution, subject to the provisions of the Constitution, the executive power of the Union extends to matters with respect to which the Parliament has power to make laws. In the decision reported in (2003) 263 ITR 706 (SC) (Union of India v. Azadi Bachao Andolan), the Apex Court pointed out "the power to legislate in respect of treaties lies with parliament under Entry 10 and 14 of List I of 7th Schedule." As regards fiscal treaties, since the same would have to be translated into an Act of Parliament, a special procedure is evolved by enacting Section 90 of the Income Tax Act enabling the Central Government to enter into agreements with the Government of any country outside India for granting relief in respect of income on which both income tax under the Act and income tax in that country under the corresponding Act in that country had been paid.

23. Touching on the scope of tax treaty, in the case of Union of India v. Azadi Bachao Andolan reported in (2003) 263 ITR 706 (SC), the Apex Court pointed out that no provision of the Double Taxation Avoidance Agreement can possibly fasten a tax liability where the liability is not imposed by the Act. If a tax liability is imposed by the Act, the Agreement may be resorted to for negating or reducing it; and, in case of difference between the provisions of the Act and the Agreement, the provisions of the Agreement would prevail over the provisions of the Act and can be enforced by the appellate authorities and the Court. The provisions of such an agreement, with respect to cases to which they apply, would operate even if they are inconsistent with the provisions of the Income-tax Act. If it was not the intention of the Legislature to make a departure from the general principles of chargeability to tax under Section 4 and the general principle of ascertainment of taxable income under section 5, then there was no purpose in making those Sections as subject to the provisions of the Act. The Apex Court further pointed out that when the requisite notification has been issued under Section 90, the provisions of sub-section (2) of Section 90 spring into operation and an assessee who is covered by the provisions of the Double Taxation Avoidance Agreement is entitled to seek the benefits thereunder, even if the provisions of the Double Taxation Avoidance Agreement are inconsistent with those of the Act.

24. Touching on the principles adopted for interpretation of treaties, the Apex Court pointed out "the interpretation of provisions of an international treaty, including one for double taxation relief, is that treaties are entered into in a political level and have several considerations as their bases". "The court cannot judge the legality of "treaty shopping" merely because one section of thought considers it improper."

25. Keeping these principles in the background as far as the present case is concerned, we are concerned about the treatment of income under the head 'royalty'. As per Clause (b) of sub-clause (vi) to Section 9(1) of the Income Tax Act, where, income by way of royalty is payable by a person, who is a resident, to a non-resident, the same shall be taxable as income under the provisions of the Act. Explanation 2 to sub-clause (vi) gives the definition of 'royalty'. As is evident from the reading of the provision, 'royalty' means the consideration for transfer of intellectual property rights; for imparting of any information regarding the working of, or the use of the intellectual property rights, use of any intellectual property, imparting of any information concerning technical, industrial,

commercial, scientific knowledge, experience or skill; use or right to use any industrial, commercial or scientific equipment but not including the amounts referred to in Section 44BB; transfer of all or any rights including the granting of a licence in respect of any copyright, literary, artistic or scientific work including films or video tapes for use in connection with television or tapes for use in connection with radio broadcasting, but not including consideration for the sale, distribution or exhibition of cinematographic films or rendering of any services in connection with the activities referred to in sub-clauses (i) to (iv), (iva) and (v).

26. The said amendment relating to 'royalty', particularly with reference to use or right to use any industrial, commercial or scientific equipment, etc. was inserted with effect from 01.04.2002 under the Finance Act 2001. The said expression came up for consideration before the Authority for Advance Ruling in the decision reported in (2005) 305 ITR 37 (Dell International Services (India) Pvt. Ltd., In re), a decision strongly relied on by the appellant in support of its contention that the payment to the assessee herein is not 'royalty'. The applicant company before the Authority for Advance ruling was Dell International Services (India) Private Limited engaged in the business of providing call centre, data processing and Information technology support services to its group companies. It entered into an agreement with BT America - a non-resident company formed and registered in USA under which BTA provides the applicant with two-way transmission of voice and data through telecom bandwidth. While BTA would provide the international half-circuit from the US/Ireland, the Indian half circuit is provided by Indian telecom company, namely, VSNL with whom BTA has a tie-up. The bandwidth so provided by BTA would give full country coverage in both the countries of delivery, i.e. USA and India. The fixed monthly recurring charge for the circuit between America and Ireland and for the circuit between Ireland and India is payable to BTA.

27. The assessee sought for a decision from the Authority for Advance Ruling as to whether the amounts payable by the applicant under the terms of the Agreement would be in the nature of royalty within the meaning of the term in Explanation to clause (vi) of section 9(1) of the Act, or not?; whether the amounts payable by the applicant under the terms of the Agreement would be in the nature of royalty within the meaning of the term in Article 12 of the Treaty, or not?; whether the amounts payable by the applicant under the terms of the agreement would be in the nature of Fees for technical services within the meaning of the term in Explanation 2 to clause (vii) of section 9(1) of the Act, or not?; whether the amounts paid by the applicant are for the purposes of making or earning any income from any source outside India and hence covered within the exception carved out in Section 9(1)(vii)(b) or 9(i)(vi)(b) of the Act?; whether the applicant is required to withhold taxes under Section 195 of the Income-tax Act on payments made to BT Americas as per the Agreement or not? and finally whether the U.S. Company had a permanent establishment in India as defined in Article 5 of the Indo-US Treaty?

28. In considering the said issue, the Authority for Advance Ruling considered the meaning of 'circuit' as given in the various dictionaries on science and technology as well as given in the agreement and considered the meaning of the expression 'use or right to use', vis-a-vis the equipment used and the service agreement between the assessee and the U.S company. It pointed out that the service was an unbroken thread running through the entire fabric of agreement between the parties. The Authority further pointed out that the provision of telecom bandwidth facility by

means of dedicated circuits and other network installed and maintained by the BTA or its agent does not, in the absence of specific and clear indication, amount to a lease of equipment and that the expression 'rental' used here and there in the Agreement was not used in its legal sense nor can it be treated as a decisive factor.

29. Referring to the decision reported in (1990) 77 STC 182 (Rashtriya Ispat Nigam Ltd. V. Commercial Tax Officer, Company Circle, Visakhapatnam) affirmed in 126 ITR 114; (1999) 113 ITR 317 (Aggarwal Brothers V. State of Haryana and another), the Authority for Advance Ruling viewed that the ratio of these decisions therein would not be pressed into service to conclude that the right to use of equipment did not carry with it the right of control and direction, whereas the phrase 'right to use' implies the existence of such control. As to the meaning of the word 'use', the Authority viewed that the said expression in relation to equipment occurring in Clause (iv.a) was not to be understood in the broad sense of availing of the benefit of an equipment. The Authority observed "the context and collocation of the two expressions 'use' and 'right to use' followed by the words 'equipment' suggests that there must be some positive act of utilization, application or employment of equipment for the desired purpose. If an advantage is taken from sophisticated equipment installed and provided by another, it is difficult to say that the recipient/customer uses the equipment as such. The customer merely makes use of the facility, though he does not himself use the equipment." The Authority for Advance Ruling pointed out that the expression 'use' in the relevant provision did not simply mean taking advantage of something or utilizing a facility provided by another through its own network. The Authority observed "What is contemplated by the word 'use' in clause (iv.a) is that the customer comes face to face with the equipment, operates it or controls its functioning in some manner, but, if it does nothing to or with the equipment (in this case, it is circuit, according to the Revenue) and does not exercise any possessory rights in relation thereto, it only makes use of the facility created by the service provider who is the owner of entire network and related equipment. There is no scope to invoke clause (iv.a) in such a case because the element of service predominates. "

30. The Authority further held that the predominant object of the entire agreement was concept of service. The Authority, however, observed that even where an earmarked circuit is provided for offering the facility, unless there is material to establish that the circuit/equipment could be accessed and put to use by the customer by means of positive acts, it does not fall under the category of 'royalty' in Clause (iv.a) of Explanation 2. Referring to Klaus Vogel's commentary on Double Taxation Convention, the Authority held that the nature of transaction was only a service and there was no use or right to use the equipment to regard the consideration as 'royalty'.

31. Learned Senior Counsel appearing for the assessee placed reliance on yet another decision reported in (2009) 315 ITR 72 Cable & Wireless Networks India Private Limited V. Director of Income-tax International Taxation, Bangalore). once again, the Authority for Advance Ruling considered the scope of Explanation 2 to Section 9(1)(vi) and (vii) of the Income Tax Act. The facts were that the Indian Company which was part of cable and wireless group of companies was engaged in the business of providing long distance and domestic long distance telecommunication services in India. It entered into an agreement with M/s Cable and Wireless UK (C &W UK) with a view to providing end to end international long distance telecommunication services to its Indian

customers of the applicant Cable and Wireless Networks India Private Limited. As per the agreement, the said company was to provide the Indian leg of service by using its own network and equipment and the international leg would be provided by the UK Company using its infrastructure and equipment. In respect of the services rendered by the UK company, the Indian company would pay the fee to the UK company. On the question as to whether the said payment would be 'royalty' within the meaning of Explanation 2 to Section 9(1)(vi) of the Income Tax Act and whether the amount would be fee for technical services under Article 13 of the agreement for avoidance of double taxation between India and UK, where there was a permanent establishment, the applicant sought for a decision before the Authority for Advance Ruling.

32. The Authority noticed from the draft agreement that there was neither a stipulation for provision of any equipment nor payment of any fee for the same and there was nothing to presume that any equipment was to be installed. The Authority further referred to the decision reported in (2005) 305 ITR 37 (Dell International Services (India) Pvt. Ltd., In re) and held that the payment did not answer the description of 'royalty'; that the payments were in the nature of business profits and in the absence of any permanent establishment in India, the said income would not be taxable in India. He further pointed out that there was no transfer of technology, no technical service rendered and the payment was not one for technical services.

33. Faced with the decisions of the Authority for Advance Ruling, Explanations 4 and 5 were inserted under Finance Act, 2012, with effect from 01.06.1976. Under Explanation 5, the Legislature sought to clarify the definition of 'royalty' to include the consideration in respect of any right, property or information whether or not possession or control of such right, property or information is with the payer; such right, property or information is used directly by the payer; the location of such right, property or information is in India. Explanation 6 further clarifies that the expression 'process' included transmission by satellite (including up-linking, amplification, conversion for down-linking of any signal), cable, optic fibre or by any other similar technology, whether or not such process is secret. Thus, after the amendment introduced in the year 2012, with effect from 01.06.1976, irrespective of possession, control with the payer or use by the payer or the location in India, the consideration would nevertheless be treated as 'royalty'. The decisions cited, hence, cannot be pressed into service to understand the scope of the expression 'royalty'.

34. In the decision reported in (2007) 289 ITR 355 (In Re Cargo Community Network Pte Ltd.), relied on by the Revenue, the Authority for Advance Ruling considered the scope of right to use equipment and the consideration paid thereon in the case of the applicant company incorporated in Singapore engaged in the business of providing access to an Internet based Air Cargo Portal known as Ezycargo at Singapore. An agent who books cargo through various airlines could subscribe for the portal - Ezycargo which enables him to access the data bank of the airlines like flight schedules, availability of cargo space etc. It also gave further details like the status of booking to the agent, creating database for various bookings by furnishing the status of the shipment etc. It is stated that the portal transmits data from the agent to the airlines by transmitting from simple English language to Cargo IMP data and on receiving the reply of the airlines converts the Cargo IMP into simple English language and transmits the same to the agent. For this service, the applicant charged subscription fee, system connects fee and help desk support fee etc. On the question as to whether

the payment made by the Indian subscriber to the Cargo Community Network Private Limited at Singapore for providing a password to access and use the portal hosted from Singapore was taxable in India and subjected to deduction of tax at source, the Authority for Advance Ruling held that the use of the commercial equipment was made in India and the payments also arose in India. The portal on the C.C.N. Server Platform is scientific equipment, authorized to be used for commercial purposes. Therefore, payments made for concurrent access to utilize the sophisticated services offered by the portal, hence, covered by the expression 'royalty', as used in Article 12 of the DTAA. The Authority also pointed out that the use of portal was not possible without the use of server that provides Internet access to the cargo agents/subscribers on the one hand and to different airlines on the other hand for to and fro communication. Therefore, the portal and the server together constitute integrated commercial-cum-scientific equipment and for obtaining Internet access to airlines, the use of portal without server was unthinkable. The Authority observed that the portal performs complex functions of providing access to different airlines and translation of messages from English to IMP language, the server provides connectivity and Internet access for processing requests for booking of cargo and subsequent multi-carrier trace and track facility etc. Thus, payments made for concurrent access to utilize the sophisticated services offered by the portal, would be covered by the expression royalties as used in Article 12 of the DTAA. The Authority held that the decision of this Court reported in (2001) 251 ITR 53 (Skycell Communications Ltd. and another V. Deputy Commissioner of Income tax and Others) and that of the decision of the Income Tax Appellate Tribunal reported in 80 TTJ 191 (Wipro Ltd., V. ITO) were distinguishable on facts. As in the case on hand, the training and the help desk support was being given by the applicant in India for the use of a complex portal- a commercial- cum scientific equipment for access to different airlines for booking of cargo. Thus the payment made by the Indian subscriber to the Singapore Company for providing the password to access and use the portal hosted from Singapore were taxable in India and subject to deduction of tax at source.

35. Again in the decision reported in (2013) 353 ITR 646 (In Re: Dishnet Wireless Limited, Chennai), relied on by the Revenue, the Authority for Advance Ruling had an occasion to consider the issue on 'royalty' and in particular the effect of the newly inserted Explanations 5 and 6 under the Finance Act, 2012. There, the facts were the applicant company was a subsidiary of another Indian company and engaged in the business of providing telecommunication services in a number of telecom circles in India. A company registered in Saudi Arabia, STC for identification, indirectly holds 10.5% shareholding in the applicant company. The foreign company owned and/or controlled and/or operated telecommunication paths, facilities and network infrastructure in the Kingdom of Saudi Arabia and elsewhere. A consortium of STC entered into a construction and maintenance agreement to plan and lay cable system, Europe India Gateway submarine cable, known as EIG, linking the Indian subcontinent and the United Kingdom with Terminal Stations at various Terminal points. The system was a high capacity fibre-optic submarine consortium cable system. The system would link the Terminal Stations in India, UAE, Oman, Djibouti, Saudi Arabia, Egypt, Libya, France, Monaco, Gibraltar, Portugal and U.K. As per the agreement, the terrestrial and submarine portions of the EIG cable system were divided into segments, connected through various Terminal Stations; the segment that terminates at the Terminal Station (T13) located at Mumbai was referred to as S4j and the allocation to each of the consortium members in respect of the portions of the EIG cable system was based on proximity to the country to which the consortium

member belongs. Pursuant to this arrangement, there was an agreement between SAT and EIG for transfer of part of the capacity out of the total allocated capacity of the EIG Cable system to the applicant. On the consideration paid for this, question arose as to whether the payments made by the applicant to STC in terms of BIG Capacity Transfer Agreement, towards acquisition of the EIG capacity, comprise income chargeable to tax in India; whether payments by the applicant to STC under the terms of the EIG Capacity Transfer Agreement, towards annual operation and maintenance charges, would be in the nature of FTS within the meaning of the term in Explanation 2 to Clause (vii) of Section 9(1) of the Act?

36. On a reading of the agreement, the Authority held that the agreement between STC and the applicant was as regards the right to participate in the use of the EIG system that was given to the applicant. Pointing out the difference between the transfer of a capital asset from the transfer of right to use exclusively a part or segment of a system, the Authority rejected the plea of the assessee that what was involved was transfer of a capital asset that generated capital gains. On the true consideration of the agreement, the Authority held that it was only a right to use that was granted to the assessee. On the question as to what is right to use, the Authority observed "What is right to use in this case? That is the right to access the particular segment of a larger system to use the capacity of the system powered by the equipments of the whole system. The consideration paid for this right to access and the right to use and exploit the system, is royalty according to the Revenue. It is pointed out that Explanations 5 and 6 to Section 9(1)(vi) of the Act introduced by the Finance Act 2012 with retrospective effect, makes it clear that the consideration being paid by the applicant to STC is royalty under the Act. Even otherwise, it was a right to use a process and a right to use equipment coming within Explanation 2 to Section 9(1)(vi) of the Act."

37. Referring to the clarificatory amendment to Section 9(1)(vi) by the introduction of Explanations 5 and 6, the Authority held that in view of the amendment, there could not be much doubt that what was paid by the applicant was for a right to use in the process and/or right to use a commercial or scientific equipment. Consequently, the payment was held to be royalty.

38. Recently, in the case of M/s.Poompuhar Shipping Corporation Ltd., V. The Income Tax Officer, Chennai in T.C.(A)Nos.2206 to 2008 of 2006 concerning the case of time charter, this Court, by order dated 09.10.2013, considered the meaning of the expressions 'right to use' and 'equipment' and held that payment made for taking ship on time charter constituted 'royalty' as defined under Section 9(1)(vi) of the Income Tax Act. This Court considered the issue on use or right to use, particularly with reference to the term 'royalty' as defined under Explanation 2 and held that the expression 'use or right to use' is intended to take its ordinary meaning and applied in the broader sense, to mean employing for any purpose. Referring to the amendments made through insertion of Explanations 4 and 5, this Court held that the retrospective amendment has thus removed all doubts in so far as the expression 'use or right to use' to be understood in the context of possession, control or location.

39. Section 9 as it stands today relevant to our purpose reads as under:

Income deemed to accrue or arise in India.

"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 1. 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 ;

.....

Explanation 2. For the removal of doubts, it is hereby declared that "business connection" shall include any business activity carried out through a person who, acting on behalf of the non-resident,

(a) has and habitually exercises in India, an authority to conclude contracts on behalf of the non-resident, unless his activities are limited to the purchase of goods or merchandise for the non-resident; or

(b)

(c) Provided that such business connection shall not include any business activity carried out through a broker, general commission agent or any other agent having an independent status, if such broker, general commission agent or any other agent having an independent status is acting in the ordinary course of his business :

Explanation 3.

Explanation 4. For the removal of doubts, it is hereby clarified that the expression "through" shall mean and include and shall be deemed to have always meant and included "by means of", "in consequence of" or "by reason of".

Explanation 5.

(ii)

(iii)

iv)

(v) income by way of interest payable by

(a)

(b)

(c)

(vi) income by way of royalty payable by

(a) the Government ; or

(b) a person who is a resident, except 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 outside India or for the purposes of making or earning any income from any source outside India ; or

(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 :

Provided Provided .

Explanation 1 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) the transfer of all or any rights (including the granting of a licence) in respect of a patent, invention, model, design, secret formula or process or trade mark or similar property ;

(ii) the imparting of any information concerning the working of, or the use of, a patent, invention, model, design, secret formula or process or trade mark or similar property ;

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

(iv) the imparting of any information concerning technical, industrial, commercial or scientific knowledge, experience or skill ;

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

(v) the transfer of all or any rights (including the granting of a licence) in respect of any copyright, literary, artistic or scientific work including films or video tapes for use in connection with television or tapes for use in connection with radio broadcasting, but not including consideration for the sale, distribution or exhibition of cinematographic films ; or

(vi) the rendering of any services in connection with the activities referred to in sub-clauses (i) to (iv), (iva) and (v).

Explanation 3. Explanation 4. Explanation 5. For the removal of doubts, it is hereby clarified that the royalty includes and has always included consideration in respect of any right, property or information, whether or not

(a) the possession or control of such right, property or information is with the payer;

(b) such right, property or information is used directly by the payer;

(c) the location of such right, property or information is in India.

Explanation 6. For the removal of doubts, it is hereby clarified that the expression "process" includes and shall be deemed to have always included transmission by satellite (including up-linking, amplification, conversion for down-linking of any signal), cable, optic fibre or by any other similar technology, whether or not such process is secret;

(vii) income by way of fees for technical services payable by

(a) the Government ; or

(b) a person who is a resident, except where the fees are payable in respect of services utilised in a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India ; or

(c) a person who is a non-resident, where the fees are payable in respect of services utilised in 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 :

Provided Explanation 1. Explanation 2. (2).

Explanation.

40. The assessee herein has not disputed or made any argument on the aspect as to whether cable is an equipment or not nor on the width of the expression 'royalty', meaning of the term 'royalty'. Except to say that there was no use of any equipment and that there was rendering of service only, the assessee has not made any submission on the expression 'use or right to use'. The assessee has also not made any submission on the aspect of permanent establishment, even though the question as such has been raised in the substantial questions of law by the assessee and the written submission had touched on the issue on permanent establishment. Thus, the one and only question that arises for consideration as projected in the arguments of the learned Senior Counsel appearing for the assessee is as to whether the consideration paid for providing IPLC is towards service and not towards equipment; consequently, the consideration would not fall within the meaning of the

expression 'royalty'.

41. Before going into the details of the agreement and the arguments in this case, we may point out that the decisions reported in (2005) 305 ITR 37 (Dell International Services (India) Pvt. Ltd., In re). (2009) 315 ITR 72 (AAR) (Cable and Wireless Networks India (P) Ltd., In re) are not of any assistance to the assessee, considering the amendment that had come in the wake of those decisions under Finance Act 2012 by the insertion of Explanations 5 and 6 in particular having relevance to the issue on hand.

42. The decision relied on by the assessee, particularly with reference to the Delhi High Court reported in 332 ITR 340 (Asia Satellite V. DIT) is also distinguishable. This relates to a case of an assessee/lessee of a satellite called AsiaSat 1 which was launched in April 1990 and was the owner of a satellite called AsiaSat 2 which was launched in November 1995. These satellites were launched by the appellant and were placed in a geostationary orbit in orbital slots, which initially were allotted by the International Telecommunication Union to UK, and subsequently handed over to China. These satellites neither use Indian orbital slots nor are they positioned over Indian airspace. The footprints of AsiaSat 1 and AsiaSat 2 extend over four continents, viz., Asia, Australia, Eastern Europe and Northern Africa. It enters into an agreement with TV channels, communication companies or other companies who desire to utilize the transponder capacity available on the appellant's satellite to relay their signals. The customers have their own relaying facilities, which are not situated in India. From these facilities, the signals are beamed in space where they are received by a transponder located in the appellant's satellite. The transponder receives the signals and on account of the distance the signals have travelled, they are required to be amplified. The amplification is a simple electrical operation. Thereafter, the frequency on which the signals are to be downlinked is changed only in order to facilitate the transmission of signals so that, there is no distortion between the signals that are being received and the signals that are being relayed from the transponder. The transponder operations are commonly known, which are carried out not only in satellite transmission but also in the case of terrestrial transmission. There is no change in the content of the signals whatsoever that is carried out by the appellant in the transponder. Thereafter, the signals leave the transponder and are relayed over the entire footprint area where they can be received by the facilities of the appellant's customers or their customers. Its role is confined in space where the transponder which it makes available to its customers performs a function which it is designed to perform. It is claimed by the appellant that no part of the income generated by it from the customers to whom the aforesaid services are provided was chargeable to tax in India and for this reason no return income was filed in India. The Tribunal found that the transponder was not equipment and hence the payment made by the TV channels to the appellant could not be regarded as one for use of equipment. The Tribunal held that the appellant had not leased out any equipment but had only made available the process that was carried out in the transponder to its customers. Insofar as income earned by the appellant from its customers in India is concerned, the Tribunal held that this would qualify as 'royalty' as defined in Explanation 2 to Section 9(1)(vi) of the Act.

43. Therefore, issues which arose for consideration in the appeal before the Delhi High Court related to Clauses (i), (vi) and (vii) of sub-Section (1) of the Section 9 of the Act. The High Court held that even when the appellant had business connection in India, no part of the appellant's income was

chargeable to tax in India in terms of Section 9 (1)(i), as no operations to earn the income were carried on in India. The Delhi High Court held that carrying out the operations in India, wholly or at least partly, is sine qua non for the application of Clause (i) of sub-section (1) of Section 9 of the Act. Merely because the footprint area included India and ultimate consumers/viewers are watching the programmes in India, even when they are uplinked and relayed outside India, would not mean that the appellant is carrying out its business operations in India. No machinery or computer, etc. is installed by the appellant 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. The transponder functioned on its own. The High Court held that the terms 'lease of transponder capacity', 'lessor', 'lessee' and 'rental' used in the agreement would not be the determinative factors. It is the substance of the agreement which is to be seen. The High Court went through the various clauses of the said agreement and held that the control always remained with the appellant and the appellant had merely given access to a broadband available with the transponder, to particular customers. Merely because the transponder has its footprint on various continents, it would not mean that the process has taken place in India. Thus the Delhi High Court followed the decision of the Apex Court reported in (2007) 288 ITR 408 (Ishikawajama-Harima Heavy Industries Ltd. V. Director of Income Tax) and held that services rendered outside India would have nothing to do with the permanent establishment in India and hence there was no process carried out in India or was there any business in India which could be attributed to the Indian territory. Thus the High Court held that the income earned by the assessee would not qualify as 'royalty', as defined in Explanation 2 to Section 9(1)(vi) of the Income Tax Act. As seen from the facts, the said judgment was rendered in the year 2011, much before the amendment under Finance Act, 2012. Further after the decision reported in (2007) 288 ITR 408 (Ishikawajama-Harima Heavy Industries Ltd. V. Director of Income Tax) an explanation was inserted below sub-section 2 of Section 9, with effect from 01.06.1976 under Finance Act, 2007 to get over the decision of the Supreme Court. Hence this decision of the Delhi High Court is distinguishable and has no relevance to the case on hand which has to be considered on the strength of the law prevailing now.

44. Technological advancement in the field of communication has brought in sea change in public ability to connect and communicate seamlessly with people in different parts of the World. Computer and related services are considered as the basis of the modern information and communication sector. From a manual economy to automated economy, development of technology today has ushered in electronic commerce where business or trade is conducted over a network that uses computer and telecommunication.

45. Internet, in the most simplest of the term, is a group of millions of computers connected by networks. It is the size of each network connection that determines how much bandwidth is available. Bandwidth therefore is a measure in bits (0 to 1). Bits are grouped in bytes which form words, texts and other information that is transferred between the computer and the internet. Thus, an user having a particular server connection to the internet has a dedicated bandwidth between the computer and the internet service provider. But the internet service provider may have thousands of service connections to their location. The service provider has enough bandwidth to serve a person's computing needs as well as that of the other customers.

46. Bandwidth is the number of lanes as in the highway through which data at a speed designed is transmitted. Bandwidth is the capacity of transmission medium or amount of data, measured usually in bits per second that can be sent through a dedicated (leased) transmission circuit. Thus the equipment at the customer's premises must have the capacity to send and receive data at a required speed. Circuit is the complete path of an electric current, a communication link between two or more point.

47. A leased line is a service contract between a provider and a customer, whereby the provider agrees to deliver a symmetric telecommunication live connecting two or more location in exchange for a monthly rent, hence, the term 'lease'. Unlike a PSTN line, it does not have a telephone number, each of the line being permanently connected to the other. The lease line is always active. Typically, these lines are used in business to connect geographically distant offices. The connection does not carry anybody or everybody else's connection, and the carrier assure the customer a given level of quality and speed for carrying the data or voice. Thus, leased line is a private, high performance circuit leased by a common carrier between a customer and a service providers' network. It carries usually data, voice or both. It delivers dedicated guaranteed bandwidth straight to the internet backbone, for which, the customers pay a premium for the leased line and it is supported by a comprehensive service level agreement.

48. Leased lines are normally made up of the following equipments, viz., a router usually managed by the service provider and is installed into a customer room; the circuit is connected with a connector; Local loop circuit is usually provided by the carrier linking the router to the service provider's local point of presence (POP); Network Termination Equipment (NTE) is attached to the wall in the customer's room and is connected to either a fibre optic or copper local loop circuit. Depending upon location, a back haul circuit may be used to link a customer to the service provider POP and then on to the internet gateway. This takes place behind the scenes and may run over a third party' national network. CPE - the Customer Premises Equipment is the telecommunication equipment owned by an organisation and located on its premises. It refers to all types of routers, switches, PBXs (Private Branch Exchanges), telephones, key system facsimile products, modems, voice processing equipment and video communication equipment.

49. Thus IPLC is a point-to-point private line used by an organisation, providing bandwidth for global communication networks between offices that are geographically dispersed internationally. IPLCs are the basic building blocks for international communication. These point-to-point private line services are supported by an exclusive range of bandwidth option dedicated to the customers' exclusive use, providing quality reliable digital transmission seamlessly integrating data, voice and imaging services. To simplify, IPLC ordering and billing, a concept called, One Stop Shopping (OSS) was developed. It allows an organisation to place a single order with a single carrier for two private leased circuits for two offices in two different Countries. OSS consolidates the billing for both circuits into a single invoice, handles all currency issue and allows the organisation to report all problems from either circuit to one carrier.

50. Giving the diagram on the circuit layout for IPLC under sea cable, the affidavit filed by the assessee explains technical explanation to the IPLC services, that it is a point to point service with two

half circuits starting from one end of the customer and terminating to the other end. One half of the circuit is a mirror image of the other from the midpoint outside the Indian territorial waters. In the affidavit filed by the assessee, it is stated that neither any capacity nor any network including the cables earmarked or dedicated to any customer for his exclusive or sole use. It is also stated that it is a technological impossibility to dedicate or allocate any infrastructure or capacity to any customer. It is further stated that every operator and service provider need not own the entire infrastructure. Likewise, the owner of the infrastructure need not be a service provider and service provider need not necessarily own the infrastructure. They can as well hire or lease.

51. The Revenue has also filed an affidavit supported by the expert view by Dr. Nitin Chandrachoodan, Associate Professor, Department of Electrical Engineering, IIT, Madras and stated that the connectivity is provided by the service provider, in this case by the assessee company to the customer at the customer premises at both ends of the network. This connectivity is for a Dedicated Bandwidth capacity for the agreed time period. Thereafter, it is the customer who feeds the data/voice inputs into the IPLC network at the interface located at his place and also receives the data/voice inputs coming from the opposite direction. It is upto the customer whether he uses the hired Dedicated Bandwidth capacity fully, in part or not. In any case, the agreed charges are payable by the customer to the assessee company. The DCE is installed at the customer premises and is owned by the assessee company, MCI, since it is the point of connection between the customer and the carrier. It provides clock and switching services to the data from the customer to the carrier. The assessee owns the Data Circuit Termination Equipment (DCE) installed at the customer premises. The customer is given a choice only in respect of the Data Terminating Equipment (DTE). The DTE can be either supplied by the assessee or can be acquired and installed by the customer himself in accordance with the terms and conditions of the 'MCI Asia Pacific Master Services Agreement'.

52. The reply affidavit disputes certain statement in the affidavit filed by the Revenue on technical aspects that the Data Terminal Equipment equal to terminals, personal computers, routers and bridges are all owned by the customers and are not Customer Premises Equipment of the service provider. The transmission network involves various legs of operations involving multiple players. Like a passenger booking the ticket, a customer has to book for his service which can be 2mbps. Like an airline, a service provider after using the network and transmission equipment of multiple operators would provide or deliver the end service, namely, transmission of voice or data and the customer does not gain control in any manner either physically or economically either over the network or processes involved.

53. The case of the assessee, hence, has to be seen in the context of the agreement between the assessee and the customer, assessee and VSNL, VSNL and customer and Master agreement.

54. The agreement between the assessee and the customer, called Service Order Form, gives the nature of service contracted to by the customer and the terms subject to which services are given. The Data Service Order Form states that it shall be read in conjunction with the terms of Asia Pacific Master Terms and Conditions, which the customer is stated to have agreed prior to executing the service order. The Asia Pacific Master Terms and Conditions, the parent document, which govern the provision of services to the customers by MCI in Asia pacific region, requires immediate

attention. The Asia Pacific Master terms and conditions gives the scope of the agreement as concerning of a) Master Terms and Conditions (Master Terms), b) specific terms which apply to particular categories of service as attached in the schedule to the Master terms and c) the service order. It is stated that to the extent that there is any inconsistency between the terms set out in (a), (b) and (c), the service order will prevail over the schedule and Master Terms. It is stated that each service order issued and accepted pursuant to the terms of the agreement would create an individual contract relationship between the parties to such service Order. The relationship would be governed by the Master Terms and schedules together with relevant service order in addition to the provisions set forth in the agreement; the service would also be subject to all mandatory local law requirements, including but not limited to the regulatory and data protection requirements in the respective countries.

55. The Master Terms gives the definitions of various terms used. "Customer Equipment" is defined to mean equipment, systems, cabling and facilities provided by Customer and used in conjunction with the service equipment in order to obtain the service and includes CPE. "CPE" means equipment installed by MCI whether owned by the customer or not, which is located at the customer site for the purpose of receiving a service. "Service" is defined as specific service supplied by MCI or a Provisioning Entity to customer identified in a relevant service order and any related service equipment support or consulting provided. "Service Equipment" means the equipment, systems, cabling and facilities provided by or on behalf of MCI at Customer Site in order to make the Service available to customer. Ownership of the Service Equipment does not pass to customer from MCI and does not include the network. "Provisioning Entity" means the entity providing a Service to Customer and may include any MCI affiliate or sub-contractor, including licensed carriers or service providers in countries where MCI is not licensed. "Delivery of Service" is defined that MCI will determine the most appropriate means of providing the Service including using a Provisioning Entity to deliver all or part of the Service and the method, technology and route of delivery of the Service to Customer, MCI may vary the method, technology and route of delivery at any time without notice. MCI may utilise the services of one or more provisioning entities in connecting with the performance of its obligation under the agreement.

56. The Mater Terms also contains MCI termination and consequences of termination. It also refers confidentiality information, data protection and privacy. Schedule A relating to Additional Terms for Internet Services. It gives the lists of service description under the head of Managed Services Complete. It also states that if MCI consider it necessary, it shall conduct one initial survey at the customer site identified on the Service Order prior to receipt of the CPE to evaluate the accommodation for the CPE, the necessary wiring required, the compatibility of the CPE configuration, interfaces with the connecting equipment and to identify any potential deficiencies within the customer site. The customer site survey will also confirm the CPE configuration and all CPE interfaces will be compatible with the local PBX/telephone and data equipment to which it will be connected. Customer Site surveys shall be conducted between 9 am to 5.30 p.m. on a working day in the location in which the Customer Site is located ("Normal Business Hours"). Equipment vendors other than MCI may be consulted, in MCI's sole and reasonable discretion, to determine the compatibility of their equipment. All charges for such consultancy visits by third party vendors shall be borne solely by Customer.

57. As regards the installation of CPE, the agreement further states "MCI shall dispatch a technician to the Customer Site for the purpose of CPE installation upon receipt of confirmation that Customer Site preparation as described herein is complete; and verification has been obtained from the Customer that the required analogue and option ISDN lines, if applicable, have been delivered. Installations shall take place during Normal Business Hours. In the event that Customer requests an expedited installation at a Customer Site or requires installation at a Customer Site outside MCI's Normal Business Hours, Customer shall pay an additional expedited/non-business hours install fee, as determined by MCI and as applicable from time to time."

58. Clause 4.4 refers to CPE rental and Clause 4.5 refers to maintenance Services. The Clause further points out that MCI shall be released from its maintenance service obligations if customer or any other person (whether authorised or not) (i) alters, modifies or moves the CPE; (ii) uses the CPE for the purposes other than the intended purpose; (iii) attaches devices to the CPE not supplied by the original manufacturer without MCI's approval or not supplied by MCI; or (iv) performs or attempts to perform maintenance services on the CPE or any portion thereof.

59. As regards the customers' responsibilities, it is stated that the customer has to have the site prepared and ready for installation of the CPE by MCI or its designee on the delivery date specified by MCI. The clause further states that the customer is solely responsible for ensuring that the Customer Equipment is compatible with MCI's requirements and that it continues to be compatible with subsequent revision levels of MCI provided equipment and services. The customer has to maintain each analogue line and to ensure installation of the CPE proceeds as planned, The customer should provide details of the analogue line a minimum of 14 days prior to the installation of the CPE. Upon expiry of the service term or upon termination of service for any reason whatsoever including due to the default of MCI, the customer would return the CPE, freight pre-paid, to such location as MCI may designate in writing in good repair, condition and working order, ordinary wear and tear resulting from proper use thereof only excepted. It is stated that CPE must be returned to MCI from the termination of service and if the same is not returned within 15 days of the termination of service, the customer would be billed for the price of the CPE, such invoice will be payable in accordance with terms.

60. Schedule B is Additional Terms for Co-Location Service. Clause 2 speaks about the installation, delivery of equipment, removal of customer equipment on expiration or termination and re-location. Under the head 'delivery of equipment', it is stated that on customer's request, MCI may, in its sole discretion, accept delivery of customer equipment at the facility if MCI has the means to do so. Upon the expiration or termination of the relevant service order, the customer has to remove the customer equipment from the space and return the space to MCI in the same condition as it was originally delivered to the customer. The agreement further lists the customers' responsibilities and MCI's responsibilities.

61. As regards Equipment Sales in Schedule C, it is stated that MCI is only acting as a reseller with respect to the hardware and software offered for sale to Customer under the agreement, which was manufactured by a third party. It is stated that MCI would ship the current MCI-tested version of the equipment to customer. Customer's use of the equipment is subject to the terms and conditions

of the manufacturer's end user agreement for the equipment. 40% of the price of the equipment purchased by the customer would be paid by the customer upon execution of the service order and the remaining 60% of the price would be invoiced upon shipment of the equipment and title to the equipment would remain with MCI until the customer has paid for the equipment in full. It is stated that title in any software and associated documentation with the CPE (software) remain at all times with the licensor and use of such software must be in accordance with the accompanying licence agreement.

62. In the background of this Master Agreement, when we look at the Service Order Form, we find that from the additional terms and conditions of service attached to the order form that the customer has ordered for IPLC services and has appointed MCI as its agent with regard to the provision of direct supply services. The order form defines provisioning entities as the local licensed telecommunication supplier for any portion of the service not provided by MCI or its affiliates; MCI, if requested by the customer in the service agreement has to arrange the provisioning of direct supply services on the terms specified therein, namely, (i) the customer appoints MCI for the duration of the term; should be the customer's sole agent for the provisioning and continuing supply of the direct supply services described therein; (ii) MCI shall have authority to select the provider of the Direct Supply Services; (iii) the Customer shall contract as principal with the provider of the Direct Supply Services on the terms and conditions of supply notified by MCI to customer and (iv) MCI will act as the customer's agent to receive and pay invoices for the Direct Supply Services. The invoice issued by the MCI to the customer for IPLC clearly mentions that it is for Circuit billing from the originating A End - Chennai in India to terminating B end SanJose, USA. Direct Supply Services is defined as a circuit or service, including a local circuit or service directly connecting the customer's premises in a country or an international capacity connecting to circuits or services supplied by MCI, which by reason of regulatory requirements in the relevant country, MCI cannot supply direct to the customer. The order form says that MCI may appoint Direct Supply Services, Provisioning Entities as its debt collection agent for charges for Direct Supply Services.

63. Service form gives a single ID appointing MCI as its agent with regard to provision of Direct Supply Services. The initial service period is for one year. The monthly services, recurring charges are also given thereon. Attachment B(2) defines International Private Line (IPL), which is a bilateral Service - MCI is only responsible for its half circuit in terms of ordering, provisioning, billing and fault reporting. Customer has to liaise directly with the correspondent carriers for the distant half end circuit.

64. One Stop Shopping (OSS) is an IPL service that provides a single point-of-contact for the planning, ordering, billing, management and maintenance of a customer's IPL. OSS is an optional arrangement whereby, a single carrier handles the coordination between the customer and the other carrier(s) involved in the provision of the customer's IPL.

65. Clause 4 of the Service Terms and Conditions in Part B requires the Customer to furnish a copy of requirement layout diagrams at Indian end and foreign end. The diagrams shall also include make, model and type of terminal interface proposed to be used. The Indian end terminal equipments are required to be maintained by Customer where it is arranged by the Customer. The

Indian end terminal equipment interface unit, when not provided by VSNL should be in accordance to Telecom Engineering Centre (TEC), Department of Telecommunications, New Delhi-110 001 and this will be the responsibility of the customer. As regards the payment terms and conditions in the case of One Stop Shop Agreement for receiving and payments at the distant end, the Customer owes or shall be fully responsible for effecting payment for his portion of the International Private Leased Line including local lead charges to VSNL in the event of non-receipt of payment from distant end by VSNL.

66. There is also an agreement between MCI Worldcom Asia Pte Limited and Videsh Sanchar Nigam Limited on International Private Leased Circuit. One stop shopping service agreement specifically gives the details of the service description as OSS Service by which customers can order both of the half circuits comprising an IPLC Service through a single point of contact at either of the Administrations, with the option of requesting SEO(Single end ordering), SEB (single end billing) and SPFR (single point fault repairing). The agreement further states One Administration, selected in each case by the customer, shall be the single point of contact for the customer in respect of the IPLC Service and shall liaise in relation thereto with the customer and with the other Administration.

67. The provision of OSS Service is without prejudice to the contractual relationship that each Administration has or may have with its respective customers. Each Administration shall separately contract with customers to provide IPLC half circuits whether originating or terminating in its operating territory and each such customer will be liable to that Administration for all charges, fees and taxes billed under that contract.

68. Clause 4 of the agreement details the principles involved in One Stop Shopping. According to this, the Administrations shall use their respective Order Forms to enter into agreements with customers for provision of that Administration's half circuit of the IPLC Service to the customer. The Administrations will exchange information and any promotional literature relating to their respective IPLC services and keep each other informed of the terms and conditions for such services and any amendments thereto.

69. Where an Administration introduces the IPLC services of the other Administration to any customer, it shall notify the customer that such services will be provided under the relevant terms and conditions of the other Administration. The Administrations will exchange instructions on the method of completion of their respective Order Forms. Once the customer has signed Administration B's original Order Form, it must be returned to Administration B for approval. Administration B will notify Administration A immediately if Administration B's order documents are in any way incomplete or inaccurate. If Administration B does not provide Administration A with such notification, it will constitute that Administration B has accepted the order along with Administration B's order documents as complete. The overall provisioning interval for the IPLC Service will be the longer of the two lead times of each of the Administrations.

70. Clause 4.4 states that settlement between the Administrations will be via bank wire transfer. Administration A will pay Administration B in full the amount received from the customer in the

currency stated therein by the relevant Payment Due Date. Credit for service interruptions, if any, shall be given in accordance with each Administration's relevant terms and conditions of service and shall be indicated as a deduction on a subsequent invoice. Each Administration shall notify the other Administration of any rate changes through the normal billing cycle as outlined in Schedule 3 and Schedule 6.

71. In Clause 5.6, it is stated that a customer may request SEB at any time. If the customer requests SEB, Administration A will communicate this to Administration B. On receipt of Administration B's invoice, Administration A will convert Administration B's charges into the local currency of Administration A at the appropriate prevailing exchange rate as at the date of Administration A's invoice and present these together with the charges of Administration A to the customer for payment. The invoice to the customer shall show clearly that it represents charges on behalf of both Administrations and shall set out each Administration's charges separately.

72. The Provisioning Phase is given in Clause 5.3 of the agreement. According to this, Administration A will schedule end-to-end testing with Administration B. End-to-end testing will be inclusive of local loops to both customer locations. Upon satisfactory completion of the end-to-end testing, Administration A will advise the customer that the service has been satisfactorily established. Billing will commence after the satisfactory completion of the end-to-end testing. As regards the relationship of the Administrations, it is stated that the Administrations are independent business entities and it shall not be construed so as to constitute the parties as principal and agent, partners, joint venture participants, or employer and employee.

73. Clause 6.2 states that each Administration appoints the other, on a non-exclusive basis, as its representative in the other Administration's country, to market and co-ordinate the provision of the IPLC Service. The activities of each Administration in the course of such representation shall be by way of introduction only to a prospective customer. Neither Administration shall be obliged or required to provide the Service to a customer in its country until it has accepted a customer's Order Form in accordance with the other Administration's IPLC Terms and countersigned its Order Form for the service. Neither Administration shall assign, transfer, convey, license or otherwise disposed of, wholly or partially the rights and obligation under this Agreement, except with the prior written consent of the other Administration.

74. Schedule I gives the obligation when VSNL is the Administration A and Schedule II when VSNL is Administration B. VSNL shall get the relevant documents, including the MCI Warranty of Agency, filled by the customer at Indian end as per the customer order form made available to VSNL by MCI. This document has to be handed over to MCI at the earliest time possible, by courier and also communicated by facsimile/email to contacts of MCI as provided, for expediting the order. The charges or fees raised by MCI through its invoices will be the total charges to be paid by VSNL under the Agreement. When VSNL is Administration B, under SEO, MCI shall get the relevant documents filled by the customer at their end as per the customer order form made available to them by VSNL. This document shall be handed over to VSNL at the earliest time possible, by courier and also communicated by facsimile/email to contacts of VSNL as provided, for expediting the order. The charges or fees raised by VSNL through its invoices will be the total charges to be paid by MCI under

this Agreement.

75. There is also an agreement between the assessee and MCI WorldCom India Private Limited. MCI WorldCom India is a service provider. The agreement states that the assessee and the service provider are both members of the WorldCom group of companies and the assessee wish to avail of certain support services from the service provider on terms and conditions mentioned therein in the agreement. The nature of services to be provided are given in appendix (1) to the agreement, namely, Market Development, Providing information on potential customers, liaising with potential customers for dispersing information about the company' products and services, liaising with customers for obtaining feedback on behalf of the company and exploring new service lines/ventures for the company in India. The obligations of the service provider are given in clause 2 of the agreement. The service fee and payments are given in clause 5 of the agreement and the duration of the agreement at the initial term is for a period of two years. The agreement states that at all times, the service provider shall only provide marketing assistance, advice and other information to the company.

76. MCI Global Access Corporation and VSNL have also entered into agreement, called VSNL/WCom Global Network Services, on 8th February, 2001. The scope of services are given in Clause 3; the functions, practices and procedures required to enable WCom and VSNL are described in Appendix A. The intention of entering into the agreement is given in Clause 3.03. It states that the intention of the parties is to provide WorldCom Global Network Services by utilising the respective strength and capabilities of VSNL and Wcom. Clause 3.05 states that WCOM Global Network Services will be offered for VSNL customers to communicate internationally. Clause 3.06 states that the agreement is non-exclusive and shall not restrict either party from offering similar services independently or in combination with other organizations. Neither shall it create a partnership between VSNL and WCOM.

77. In the background of the service agreement with the customer, Service agreement with VSNL and the one between customer and VSNL, it is clear that these are part and parcel of one composite agreement split into four for the purposes of convenience and the nature of services to be offered through the different agencies having a bearing on each other. The ultimate aim however being to give the customer a point-to-point private line to communicate between offices that are geographically dispersed throughout the world for the purposes of accessing business data exchange, video conferencing or any other form of telecommunication. As is evident from the reading of the terms of all these agreements, parties have agreed to go for One Stop Shopping, which allows an organisation, namely, customer to place a single order with a single carrier for two private leased circuits for two offices in two different Countries, here the Indian half by VSNL and the other half by MCI. Nevertheless, this consolidation in a single invoice at the agreed currency enables the customer to report its problem from either circuit to one carrier. It fixes the responsibility on the parties herein for ensuring undisturbed enjoyment of the private leased line. There is a symmetric telecommunication facility permanently connecting one end to the other. Thus, the contract ensures that the customer has an active internet dedicated to that particular customer at a particular speed agreed upon, namely, 2 Mbps. VSNL is a provisioning entity whose services the assessee has to direct the customer to avail of, since as per the Indian law, the assessee is not the licensed operator

in the Indian half circuit. Thus, when the customer requires a seamless dedicated point to point IPLC service for transmission of voice and data, it requests the assessee's affiliate in India who arranges for the assessee MCI Singapore to enter into an agreement with the customer on the terms and conditions of the service provided by it.

78. Learned senior counsel appearing for the assessee submitted that even though the assessee provides end to end service, as far as the half of the leg upto the Indian sub-continent is concerned, it has nothing to do with the maintenance or providing service by VSNL. Whatever bandwidth is assured is again a shared one. There are no equipment strictly speaking of the assessee to process the data of the customer.

79. Learned senior counsel appearing for the assessee submitted that the aforementioned agreements showed that the consideration received is only for rendition of services and not for individual use or right to use any equipment/ process. As the assessee required to provide the bandwidth services to customers in India not having the necessary license under the regulatory laws of India, it entered into an agreement with VSNL for providing and ensuring the seamless performance/delivery of bandwidth services. Thus, the respective service provisioning entities, namely, the appellant outside India and VSNL within India provide the services in their respective areas. Consequently, the question of treating their receipts as 'royalty' did not arise. Network equipment remained under the possession, control, operation and use of the assessee and VSNL respectively and the same is never handed over at any point of time to the customers. Being in the nature of provision of services, the consideration for the service did not come within the scope of clause (iv)(b) of Explanation 2 to Section 9(1)(vi) of the Income Tax Act. He further pointed out that failure to render or any deficiency in service resulted in non-payment of the consideration. The assessee secures the information and the data and maintains confidentiality and provides mirror image of what is given by VSNL outside India. In the background of this process to provide high-quality service to the customers, the receipt could never be attributed with the character of 'royalty'.

80. Referring to the general principles on international taxation, he submitted that when a non-resident physically receives income in India either direct or on its behalf by somebody else, the transaction would fall within the ambit of income received in India. Referring to Section 9(1)(vi) of the Income Tax Act read with the Explanation on 'royalty' which included equipment royalty and process royalty, unless and until the Department showed that there is consideration for use of equipment or right to use the equipment/or a process, the nature of services rendered could not be brought under the definition of 'royalty'. He also took us through the Double Taxation Avoidance Agreement re-negotiated in 2005 and submitted Article 12(3) and 12(4) of the tax treaty deals with payments of royalties and fees for technical services. The payment does not answer the meaning of 'equipment royalty', since the common understanding is that rendering of service by the provider using the equipment under his possession, control or use would not constitute 'royalty'. Referring to Klaus Vogel and the OECD commentaries, he contended that the nature of services rendered providing access to service to many customer with the same equipment thus takes the case of the assessee outside the scope of the taxing provisions.

81. The above submission is countered by the Revenue by placing certain factual statement as contained in the Master agreement indicating that the assessee had provided the infrastructure and equipment to the customer; that the customers are promised certain bandwidth for their use at all times, the services provided to various customers of the assessee in India by affiliates of MCI, such as MCI India Private Limited, MCI Global Access Corporation USA, payments for these services are made on the account of MCI Singapore outside India. In a statement made by Mr. Mohan Ramaswamy, employee of MCI WorldCom India Private Limited, it is stated that he along with a team of Engineers are to attend to fault resolution service for various customers in India and for this purpose they co-ordinate with VSNL and MCI, USA. He reported directly to MCI USA and he is not reporting to any of the authorities of MCI India.

82. The Revenue further pointed out that the equipment is transferred to VSNL by MCI for a token payment of Rs.10,000/-, and the ownership remained only with MCI because VSNL does not have the right to sell the equipment and the equipment is to be handed over at any time to MCI on demand for payment of Rs.10,000/-. Payment by VSNL was only a token payment and hence not the actual consideration for the equipment. Pointing out the Commissioner's findings, learned Solicitor General submitted that to avoid tax liability, MCI had split the lease charges for IPLC into two non-existent circuits. The fact is MCI has provided the composite and indivisible circuit which constituted equipment. The appellant has to take the services of VSNL as the provisioning entity for providing that part of the services in India having regard to the Regulations of the Telecom Regulatory Authority of India. As the assessee did not possess the appropriate license for doing so in India, it had taken the services of VSNL as provisioning entity; that the assessee provided dedicated bandwidth for the use of its Indian customers from India to other countries through its sub-contractor or named provisioning entity VSNL who provided the connection in the Indian half. Thus the consideration made by the Indian customers is for obtaining an economic interest over the bandwidth under the terms of the agreement. In this, the assessee did not provide any service to its customers but only leased out equipment for use of its Indian customers.

83. Referring to the various documents filed by the assessee in the form of service agreements and Master agreement, learned Solicitor General appearing for the Revenue contended that the service order, the master agreement on IPLC service revealed the true nature of the transaction which is an end to end transmission facility partly serviced through the provisioning entity, that is, VSNL in Indian part and beyond that by the assessee. He pointed out that the service order form is a standard form agreement which is used by all customers of the assessee across the Asia-Pacific region. Even though the assessee stated that VSNL is not a partner or agent, yet the service agreement and the assessee's agreement with VSNL and the customer with VSNL show the integrated nature of all these documents as forming part of single transaction. Customer is required to make payment to the assessee net of taxes. Thus the assessee provided the Indian customer an integrated communication system, part of which is outside India and part of which is inside India for use by the Indian customer and such system is inseparable and incapable of vivisection for the purpose of taxation in India.

84. Referring to the meaning of IPLC service, learned Solicitor General submitted that the two administration exchange information between Indian half and outside India of the assessee showed

that the customers have to pay for both part; in addition to the above, service is defined as specific telecommunication service rendered by WorldCom outside India to the customer and as identified in the relevant service order. The service order is a request made by the customer, the service equipment at the configuration of the assessee is installed in the premises of the customer, the title to which is not passed on to the customer and the form prescribe the service charges payable. VSNL's role is only that of a provisioning entity and it cannot in any way control the use of the equipment by the customers outside India or determine the configuration at which the equipment is installed even within VSNL's premises and the services are mirror image of the other. Thus it is clear that the appellant would be responsible for setting up the network and connecting to the Indian half of the network. Clause 3.08 of the service agreement with the VSNL shows its role to carry on international traffic in and out of India. Thus, equipment and configuration provided by the assessee thus read in the context of various provisions of the agreement point out that the bandwidth capacity is dedicated for the use of the Indian customer irrespective of actual usage and after the insertion of the Explanation 5, it is immaterial whether the possession or control remained with the Indian customer or not at any point of time. When the Indian customer economically exploited the network to transmit data between locations for the purposes of its business and for the use of the equipment paid the consideration for the end to end service, what data goes over the bandwidth reserved for the customer is exclusively in the control of the Indian customer and not the assessee and the assessee cannot see the data that is passing through the network dedicated for the use of the Indian customer. Thus, the Indian customer does obtain an economic interest in the equipment which need not result in the ownership.

85. Learned Solicitor General further submitted that examined from all perspective, the consideration is only equipment royalty, as IPLC and bandwidth are used by the customer or the right to use the same has been given to the Indian customer by the assessee. In the background of this, learned Additional Solicitor General submitted that the order of the Income Tax Appellate Tribunal is unexceptionable.

86. The case of the assessee projected herein is that the agreement between the assessee and customer contemplated rendering of service only and hence the consideration paid would not partake the character of royalty and the agreement with VSNL could not be read into the agreement or the service order form that the assessee has with the customer.

87. We do not agree with the assessee principally for the reason that the decision of the Delhi High Court reported in 332 ITR 340 (Asia Satellite V. DIT) and the Rulings of the Authority for Advance Ruling reported in (2005) 305 ITR 37 (Dell International Services (India) Pvt. Ltd., In re). (2009) 315 ITR 72 (AAR) (Cable and Wireless Networks India (P) Ltd., In re) on which heavy reliance was made were all rendered prior to the insertion of Explanation 5 and that the decision of the Delhi High Court rested on the facts therein. The amendments by insertion of Explanation 5 gives a very expansive meaning to the term 'royalty' and this has a bearing on the issue' so too the various clauses in the agreements which are to be looked at in a holistic manner. The agreement entered into between the assessee and the customer herein is for providing of seamless point to point private line so as to enable the customer to communicate between its office that are geographically dispersed. The service order reveals that the parties had agreed for a particular bandwidth and in entering this

the assessee had provided the necessary equipment at customer premises, configured and customised to ensure that the customer gets the uninterrupted connectivity from one end to the other end in different geographical point.

88. A reading of the agreement with VSNL also shows that the configuration at the customer's end and at the VSNL end and in the other half managed by the assessee match with each other and compatible for ensuring the integrated service to the customer. The arrangement between the assessee and the VSNL has to be necessarily integrated and technically and financially viable having regard to the close functional relationship between the two. For this, the Indian customer pays through the single billing system called OSS for the integrated services. Thus the service agreement assuring the service is possible and workable only when the assessee and VSNL are considered as rendering the service jointly in their respective leg. Thus the two half being the mirror image of each other and going by the terms of the agreements, the assessee renders service in India and the consideration received attracts the incidence of taxation in India.

89. Bandwidth is defined as the amount of traffic that is allowed to occur between the customer website and the rest of the internet. Bandwidth is measured in bits a single 0 to 1 and are grouped in bytes which form words texts and other information transferred between the computer and the internet. It is stated that an user having a particular IPLC service connection has a dedicated bandwidth between the computer and the internet provider though the provider itself may have 1000 such service connection to other location. Evidently, service provider has to have enough bandwidth to serve a person's computing needs as well as all of its other customers. Thus, being high speed internet connection, to achieve this, the equipment at the customer's end must have the capacity to send and receive data at the required speed. In order that the contracted bandwidth is provided, the Master agreement read with the service order clearly gives the selected bandwidth for each customer which is assumed end to end and to this end, the equipment at the customer's end are delivered by the assessee itself.

90. In the Master agreement, Clause 4 deals with Managed Services Complete, Clause 4.1 stipulates Service Description, Clause 4.2 stipulates Customer Site Surveys, Clause 4.3 stipulates CPE Installation, Clause 4.4 stipulates CPE Rental, Clause 4.5 stipulates CPE Maintenance Services, Clause 4.6 stipulates Customer Responsibilities and Clause 4.7 Termination of Service stipulates the return of the CPE to the location specified by MCI. The Master Agreement specifically refers to the use of the equipment by the assessee and throughout the contract period, the assessee has the right to supervise its maintenance. The customer's responsibility as stated in the agreement thus points out that during the currency of the agreement, the customer cannot in any manner tinker with it or its rights in any manner alienated.

91. It is a matter of record that the terminal equipment with the VSNL has to have the compatibility to match to the mirror like operation in the other half of the leg to see that the end to end connectivity is really assured to the customer. Being an end to end dedicated telecommunication transmission for customers' exclusive use, leased line are available only to those who seek private circuits. The customers' premises equipment thus refers to routers, switches, private board exchange, installed in a customers' premises. Thus, in the bandwidth services for transmission of

data/voice through IPLC network, the data/voice are converted into signals at the customer's end which are then picked up by the local loop service provider and carried into the Indian carrier, namely, VSNL's half circuit. VSNL carries this to the international terminal which interconnects the domestic network to the international network. An international terminal is present in the appellant's side of half circuit performing identical function as in the Indian half circuit, where the steps in respect of Indian half circuit is replicated and the recipient receives the voice/data. The agreement is silent on what is involved in the ITOC in the current layout that interconnects the domestic network to the international network. Yet, looking at the various clauses in the agreement and the service order form, it is clear that the customer is assured of a particular bandwidth; to provide the assured bandwidth, the agreement ensures that the necessary equipment are placed at the customer's end in the Indian half that is compatible with the equipment in the other half outside India, so that the switching facility converts and receives the signal in the network and transmit through the transmission network cable to the ultimate destination.

92. In the background of the clauses in the agreement, the Customer Premises Equipment at the customer's location and Schedule- B on Additional terms for Co-Location Services also assume significance, particularly Clause 2 on Installation, Clause 2.2 on Delivery of Equipment, Clause 2.3 on Removal of Unauthorised Equipment, Clause 2.4 on Removal of Customer Equipment on Expiration or Termination, Clause 2.6 on Relocation of the Customer Equipment, Clause 3.3 on On-Site Technical Support at customer's request, Clause 4.5 on Technical Obligations of the customer, it is difficult to hold that there is no use of any equipment scientific/commercial. There is use of equipment and cable in the transmission of the data/voice from one end to the other and it is difficult to accept the case of the assessee that the nature of transaction is only that of service. The agreement provides an indefeasible right to the customer to use the facility of communicating the data/voice and has an internet in the matching half circuits for providing the required telecommunication services at the assured speed. Thus the efficacy of transmitting data/voice depends on the originating signal from the customer end which means there is the use of the equipment CPE by the customer installed by the assessee. In the circumstances, we reject the argument of the assessee that it merely provided the service to the customer and that the consideration could not be termed as royalty.

93. The service order-cum-agreement for International Private Leased Line Service between the customer and VSNL and between VSNL and the MCI WorldCom Asia Pte Ltd. on One Stop Shppint Service Agreement thus clearly point out that the payment to the assessee is for the online service from one point to the other as a whole and it is difficult to accept the case of the appellant seeking dissection of the same as two independent contract.

94. Learned senior counsel appearing for the assessee submitted that the Master Agreement is a template format used across all contracts globally and the service performance consideration would vary from Country to Country. Because of the Indian Regulatory restriction, the assessee is disabled in providing bandwidth services within India. He submitted that the agreement between the assessee and VSNL showed that they are independent parties and one cannot assist/represent on behalf of the other.

95. It is no doubt true that the agreement between the assessee and the VSNL states that one is not the agent or the representative of the other. This, however, does not mean that VSNL has provided its server independently without any connection whatsoever with the service order that the customer places with the assessee. A reading of the service agreement shows that parties agreed that the provisioning entities in the Indian half circuit shall be VSNL and in getting the seamless end to end connectivity, the customer enters into a further agreement with VSNL. If the agreement with VSNL has to have no relevance or reference to the customer agreement with the assessee, then, there is no need at all in the service agreement to refer to VSNL as the provisioning entity or for that matter to go for OSS. The Telecom Regulatory Laws thus can have no reference to the agreement that the assessee may have with the Indian customer except to the extent of providing of the connectivity in the Indian half circuit through VSNL. Thus, the end to end provisioning in one single circuit is assured by the assessee and if by reason of any regulatory laws of the Country the assessee is unable to extend its service by itself but goes for such other licensed authority, it does so only as a provisioning entity to make up for the gap caused by the statutory limitation on the license and thus it does not mean that these facilities are independent having no connection and relevance whatsoever to the connectivity offered by the assessee. The various contracts executed pursuant to the service contract with the customer are closely linked to the single transaction of providing end to end international private leased circuit facility to the customer and in order to execute the same, if the assessee has to enter into several sub- agreements/agreement, such agreements cannot be looked at in isolation having no relevance to the service agreement.

96. In the background of this, we reject the plea of the assessee that the payment made is not in consideration of the use of the equipment by the customer. We also reject the argument of the assessee that what is provided is in the nature of service. In the decision reported in (2001) 251 ITR 53 (Skycell Communications Ltd. and another V. Deputy Commissioner of Income tax and Others), this Court considered the case of provision of cellular mobile telephone facility to subscribe. Holding that it is not a technical service, this Court pointed out as follows:

"Every instrument or gadget that is used to make life easier is the result of scientific invention or development and involves the use of technology. On that score, every provider of every instrument or facility used by a person cannot be regarded as providing technical service"

"When a person decides to subscribe to a cellular telephone service in order to have the facility of being able to communicate with others, he does not contract to receive a technical service, What he does agree to is to pay for the use of the airtime for which he pays a charge. The fact that the telephone service provider has installed sophisticated technical equipment in the exchange to ensure connectivity to its subscriber, does not on that score, make it provision of a technical service to the subscriber. The subscriber is not concerned with the complexity of the equipment installed in the exchange, or the location of the base station. All that he wants is the facility of using the telephone when he wishes to, and being able to get connected to the person at the number to which he desires to be connected. What applies to cellular mobile telephone is also applicable in fixed telephone service. Neither service can be regarded as "technical service" for the purpose of Section 194J of the Act."

"At the time the Income-tax Act was enacted in the year 1961, as also at the time when Explanation 2 to Section 9(1)(vii) was introduced by the Finance (No. 2) Act, with effect from April 1, 1977, the products of technology had not been in such wide use as they are today. Any construction of the provisions of the Act must be in the background of the realities of day-to-day life in which the products of technology play an important role in making life smoother and more convenient. Section 194J, as also Explanation 2 in Section 9(1)(vii) of the Act were not intended to cover the charges paid by the average house-holder or consumer for utilising the products of modern technology, such as, use of the telephone fixed or mobile, the cable T. V., the internet, the automobile, the railway, the aeroplane, consumption of electrical energy, etc. Such facilities which when used by individuals are not capable of being regarded as technical service cannot become so when used by firms and companies. The facility remains the same whoever the subscriber may be-individual, firm or company."

97. Thus, even going by the above decision, we hold that providing of service is not possible without the use of the equipment ensuring the assured bandwidth for transmission of data/voice which provides the internet access to the customer to and fro. After the insertion of Explanation 5, possession, control of such right, property or information usage directly by the payer, location of the right are not matters of concern in deciding the character of payment as 'royalty' and but for the use of the connectivity by the payer, the service agreement itself has no meaning. Thus the amendment introduced as a result of the decision of the Authority for Advance Ruling reported in (2008) 172 Taxmann 418 (AAR) (Dell International Services India (P) Ltd., In re) and (2009) 315 ITR 72 (AAR) (Cable and Wireless Networks India (P) Ltd., In re) clearly answer the question raised in this regard against the assessee.

98. It is rightly pointed out by the learned Solicitor General, the customer has a significant economic interest in the assessee's equipment to the extent of the bandwidth hired by the customer. The service order form shows the customer contracting for IPLC service and MCI is appointed as its agent as regards the provision of direct supply service. The OSS is a facility which the customer is provided with for availing of the economic interest in the services provided. The bandwidth capacity made available on a dedicated basis for the entire contract period, even if it does not involve a possessory interest, the amount received by the assessee in a way is also for the use of process. The service order form clearly points out that the assessee is at liberty to change the equipment, modify the configuration or change the routing of the network in providing the service. (Clauses 2.2, 2.3 and 2.7 of the Service agreement) and the assessee could provide the service either directly or through a provisioning entity (clause 2.1). Thus the assessee provides the Indian customer an integrated communication system called IPLC, the part of which outside India is taken care of by the assessee and the part inside India through VSNL, which cannot be dissected as two independent contract having no bearing at all on each other. In the light of the above, we reject the contention of the assessee.

99. Article 12 of the DTAA between India and Singapore is the relevant article on royalty which reads as under:

ROYALTIES AND FEES FOR TECHNICAL SERVICES

1. Royalties and fees for technical services arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.

2. However, such royalties and fees for technical services may also be taxed in the Contracting State in which they arise and according to the laws of that State, but if the recipient is the beneficial owner of the royalties or fees for technical services, the tax so charged shall not exceed:

a. in the case of royalties referred to in paragraph 3(a) and fees for technical services as defined in this Article (other than services described in sub-paragraph (b) of this paragraph), 15 per cent. of the gross amount of the royalties and fees;

b. in the case of royalties referred to in paragraph 3(b) and fees for technical services as defined in this Article that are ancillary and subsidiary to the enjoyment of property for which royalties under paragraph 3(b) are received, 10 per cent. of the gross amount of the royalties and fees.

3. The term "royalties" as used in this Article means payments of any kind received as a consideration for the use of, or the right to use:

a. any copyright of a literary, artistic or scientific work, including cinematograph film or films or tapes used for radio or television broadcasting, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience, including gains derived from the alienation of any such right, property or information;

b. any industrial, commercial or scientific equipment, other than payments derived by an enterprise from activities described in paragraph 4(b) or 4(c) of Article 8.

4. The term "fees for technical services" as used in this Article means payments of any kind to any person in consideration for services of a managerial, technical or consultancy nature (including the provision of such services through technical or other personnel) if such services:

a. are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 3 is received; or b. make available technical knowledge, experience, skill, know-how or processes, which enables the person acquiring the services to apply the technology contained therein; or c. consist of the development and transfer of a technical plan or technical design, but excludes any service that does not enable the person acquiring the service to apply the technology contained therein.

For the purposes of (b) and (c) above, the person acquiring the service shall be deemed to include an agent, nominee, or transferee of such person.

5. Notwithstanding paragraph 4, "fees for technical services" does not include payments:

a. for services that are ancillary and subsidiary, as well as inextricably and essentially linked, to the sale of property other than a sale described in paragraph 3(a);

b.for services that are ancillary and subsidiary to the rental of ships, aircraft, containers or other equipment used in connection with the operation of ships or aircraft in international traffic;

c.for teaching in or by educational institutions;

d.for services for the personal use of the individual or individuals making the payment;

e.to an employee of the person making the payments or to any individual or firm of individuals (other than a company) for professional services as defined in Article 14;

f.for services rendered in connection with an installation or structure used for the exploration or exploitation of natural resources referred to in paragraph 2(j) of Article 5;

g.for services referred to in paragraphs 4 and 5 of Article 5.

6.The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of the royalties or fees for technical services, being a resident of a Contracting State, carries on business in the other Contracting State in which the royalties or fees for technical services arise, through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the right, property or contract in respect of which the royalties or fees for technical services are paid is effectively connected with such permanent establishment or fixed base. In such case, the provisions of Article 7 or Article 14, as the case may be, shall apply.

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

8.Where, by reason of a special relationship between the payer and the beneficial owner or between both of them and some other person, the amount of royalties or fees for technical services paid exceeds the amount which would have been paid in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In such case, the excess part of the payments shall remain taxable according to the laws of each Contracting State, due regard being had to the other provisions of this Agreement."

100. The definition of 'royalty' under DTAA and the Indian Income Tax Act are in parimateria. As rightly pointed out by the Revenue, Explanation 6 defines 'process' to mean and include transmission by satellite (including uplinking, amplification, conversion for downlinking of any signal) cable, optic fibre, or by any other similar technology, whether or not such process is secret. Thus, apart from the relevance and applicability of Clause (iva) that the payment is for the use or

right to use of the equipment, the Tribunal held that payment for the bandwidth amounts to royalty for the use of the process. The Tribunal also pointed out that out by reason of the long distance, to maintain the required speed, boosters are kept at periodical intervals. Going by this too, in any event, the payment received by the assessee was rightly assessed as 'royalty' and would constitute so for the purposes of DTAA.

101. Although the assessee has submitted a voluminous paper book on case law, except for those that are discussed above, others were not touched by the assessee and hence we have not considered it necessary to discuss these decisions. We may also note that except for making the submission on the question that the transaction is only a service and hence the consideration is not royalty, no arguments are made on permanent establishment or on the effect of the amendments. The assessee had submitted a detailed written submission on the clauses in the agreement and on the legal submissions. After considering the same, with reference to the arguments made by the learned senior counsel on the issue of royalty, vis-a-vis the agreement terms, we hold that the order of the Tribunal does not call for any interference. Although in his reply, learned senior counsel appearing for the assessee pointed out to Article 5 on permanent establishment to contend that VSNL is not an agent and hence cannot be construed as a permanent establishment of the assessee, no arguments are advanced on this account. In any event, in a virtual world, the physical presence of an entity has today become an insignificant one; the presence of the equipment of the assessee, its rights and the responsibilities of the assessee, vis-a-vis the customer and the customers' responsibilities clearly show the extent of the virtual presence of the assessee which operates through its equipment placed in the customer's premises through which the customer has access to data on the speed and delivery of the data and voice sent from one end to the other. The Explanations inserted thus clearly point out that the traditional concepts relating to control, possession, location on economic activities and geographic rules of source of income recede to the background and are not of any relevance in considering the question under Section 9(1)(vi) read with Explanation 2. Thus, more so when it comes to the question of dealing with issues arising on account of more complex situations brought in by technological development by the use of and role of digital information, goods etc., the foreign enterprise does not need physical presence at all in a country for carrying on business. Hence, we do not think that we need to go in depth in this regard for the reason that we have already given herein before.

102. In the circumstances, we reject the case of the assessee holding that the receipts are liable to be treated as 'royalty' for the use of IPLC under Section 9(1)(vi) read with Explanation 2(iva) and correspondingly Article 12(3) of DTAA between India and Singapore. We also agree with the Tribunal that even if the payment is not treated as one for the use of the equipment, the use of the process was provided by the assessee, whereby through the assured bandwidth the customer is guaranteed the transmission of the data and voice. The fact that the bandwidth is shared with others, however, has to be seen in the light of the technology governing the operation of the process and this by itself does not take the assessee out of the scope of royalty. Thus the consideration being for the use and the right to use of the process, it is 'royalty' within the meaning of Clause (iii) of Explanation 2 to Section 9(1)(vi) of the Income Tax Act.

103. This leaves us with the last of the question, namely, the relevance of Section 234A, 234B and 234D of the Income Tax Act. As far as levy of interest under Section 234 B of the Income Tax Act is concerned, the assessee submitted that the said provision would be applicable only in cases where the tax payer is liable to pay advance tax but defaults in payment of advance tax. Thus, unless there is a liability to pay advance tax under Section 208 of the Income Tax Act, the question of invoking section 234B(1) will not arise. Learned Senior Counsel further pointed out that as per Section 209(1)(d), the advance tax liability has to be computed after reducing the tax deductible at source from the estimated total tax liability. When the tax deducted at source takes care of the entire liability, there would be no advance tax payable; consequently interest under Section 234B could not be levied. Apart from contending that the payment received would not partake the character royalty, he submitted that tax would be deductible at source, if at all there is a liability under Section 195 of the Income Tax Act on all payments made to the appellant. Consequently, there is no liability to pay any advance tax and hence, the assessee could not be subjected to interest under Section 234B of the Income Tax Act.

104. Learned Senior Counsel appearing for the assessee placed reliance on the decision reported in (1984) 149 ITR 703 (CIT V. Madras Fertilizers Ltd.) as well as other Tribunal orders and contended that where tax is to be deducted at source, the liability to pay advance tax did not arise. Learned Senior counsel further contended that the Tribunal has not considered the issue at all, even though it was raised in the grounds.

105. It is seen that in T.C.(A)Nos.147 to 149 of 2006, the assessee has raised a ground as regards the levy of interest under Section 234A, 234B and 234D of the Income Tax Act, as the case may be, even though the same has not been included in the substantial questions of law at the time of admission. The Tribunal has not considered the grounds on the levy of interest under Section 234A 234B and 234D inspite of grounds raised therein. We had perused the order of the Tribunal and we find nowhere the Tribunal had touched on this issue. In the circumstances, We feel the proper course herein would be to remand the matter back to the Tribunal to consider levy of interest alone under the above said Section.

106. In the circumstances, we affirm the order of the Tribunal holding that the consideration paid by the customer to the assessee is 'royalty' within the meaning of Explanation 2(iva) or in the alternative under Explanation 2(iii) of Section 9(1)(vi) of the Income Tax Act and Article 12(3) of the DTAA between India and Singapore. With regard to levy of interest under Section 234 A, 234B and 234 D of the Income Tax Act, as the case may be, we remand this issue alone to the Income Tax Appellate Tribunal for its consideration on merits and in accordance with law. Accordingly, the above Tax Case (Appeals) are disposed of. No costs. Consequently, connected Miscellaneous Petitions are closed.

Index:Yes/No
Internet:Yes/No
sl

(C.V.,J) (T.S.S.,J)
07.11.2013

To
The Income Tax Appellate Tribunal, Chennai Bench, A, C and D.

CHITRA VENKATARAMAN, J.
AND
T.S.SIVAGNANAM, J.

Sl

Pre-delivery Judgment in

T.C.(A) Nos.147 to 149 of 2011 and 230 of 2012
& connected Miscellaneous Petitions

Dated: 07.11.2013