IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'C' NEW DELHI

BEFORE SH. H.S. SIDHU, JUDICIAL MEMBER
AND
SH. O.P. KANT, ACCOUNTANT MEMBER

ITA Nos. 1927/Del/2008 & 127/Del/2011
Assessment Years: 2002-03 & 2003-04

M/s. Geo Connect Ltd., Room No. 110, Indraprakash, 21, Barakhamba Road, New Delhi	**Vs.**	Dy. CIT, Circle 12(1), New Delhi
PAN : AAECS2401C		
(Appellant)		**(Respondent)**

And
ITA Nos. 2088/Del/2008 & 5851/Del/2011
Assessment Year: 2002-03

DCIT./ACIT, Circle 12(1), New Delhi	**Vs.**	M/s. Geo Connect Ltd., Room No. 110, Indraprakash Building, 21, Barakhamba Road, New Delhi
PAN : AAECS2401C		
(Appellant)		**(Respondent)**

Appellant by	Sh. Ajay Vohra, Sr. Advocate & S/sh. Gaurva Jain & Bhavita Kumar, Advocates.
Respondent by	Sh. Amrit Lal, Sr.DR

Date of hearing	26.10.2016
Date of pronouncement	17.01.2017

ORDER

PER O.P. KANT, A.M.:

These four appeals of the Revenue and the assessee emanates from separate orders of the learned Commissioner of Income-tax

(Appeals). The appeals having ITA Nos. 2088/Del/2008 and 1927/Del/2008 are cross appeals of the Revenue and the assessee respectively, which pertain to assessment year 2002-03. The appeal having ITA No. 127/Del/2011 is the appeal filed by the assessee for assessment year 2003-04. The appeal having ITA No. 5851/Del/2011 for assessment year 2003-04 is in respect of penalty under section 271(1)(c) of the Income-tax Act, 1961 (for short "the Act"). Since all the appeals are in respect of the same assessee and issues involved are interconnected, the appeals were heard together and disposed of by this consolidated order for sake of convenience and brevity.

2. The grounds of Revenue's appeal in ITA No. 2088/Del/2008 for assessment year 2002-03 are as under:

"1. On the facts and in the circumstances of the case and in law, the CIT(A) erred in deleting the addition of Rs.95,33,520/- on account of deferred revenue expenditure, ignoring that the expenditure which were incurred before the commencement of business can be allocated to cost of fixed assets, if it was directly required for the purpose of bringing the asset to put to use situation.

2. On the facts and circumstances of the case and in law the CIT(A) erred in deleting the addition of Rs.76,43,892/- on account of capitalization of professional charges, ignoring the facts that the Assessing Officer had not restricted himself to disallowing the expenditure claimed under the head 'professional charges' but had taken all such expenditure which were in the nature of professional charges and which were incurred in lieu of professional services.

3. The Appellant craves leave to add, alter or amend any ground of appeal raised above at the time of the hearing."

3. The grounds of assessee's appeal in ITA No. 1927/Del/2008 for assessment year 2002-03 are as under:

"1. That on the law, facts and in the circumstances of the case, the learned Commissioner of Income Tax (Appeals) has erred in confirming the disallowance made by learned Assessing Officer in

respect of international private leased circuit (iplc) charges paid to M/s. Kick Communication Inc. USA and connectivity charges paid to M/s. IGTL Solution Inc. USA amounting to Rs.15,98,596/- and Rs.40,29,614/- respectively on the ground that no tax was deduction at source under Section 195 of the I.T. Act, 1961 before making such payment.

1.1 On the facts and in the circumstances of the case, the CIT(A) erred in upholding the action of the assessing officer in treating the payment of IPLC and connectivity charges as chargeable to tax in India under Section 9(1)(vii) read with Article 12(2) and 12(4) of DTAA between USA and India.

2. That all the above grounds and sub-grounds have to be read conjunctively and also independent of each other.

3. That the above gound(s) of appeal are to be considered separately and without prejudice to one another.

4. That the appellant assessee craves, leave to add, alter, amend, substitute, withdraw or forego any of the ground(s) of appeal before or at the time of hearing.

5. That the order of learned Commissioner of Income Tax (Appeals) is bad in law and wrong on facts of the case and is in violation of the principels of natural justice without providing reasonable opportunity to the appellant assessee to meet the merits of its case."

ITA No. 2088/Del/2008 for AY: 2002-03

4. First we take up the appeal of the Revenue in ITA No. 2088/Del/2008.

5. Briefly stated facts of the case are that the assessee filed return of income declaring loss of Rs.5,05,43,809/- on 31/10/2002, which was revised declaring loss of Rs.4,96,43,421/- on 21/08/2003. The case was selected for scrutiny and notice under section 143(2) of the Act, was issued and complied with. In the assessment completed under section 143(3) of the Act on 30/03/2005, the Assessing Officer made following additions:

S.No.	Addition/disallowance	Amount in Rs.
1.	Deferred revenue expenditure	95,33,520/-

2.	Non-deduction of TDS on international private leased circuit payment to M/s. Kick Communications	15,98,596/-
3.	Non-deduction of TDS on connectivity agreement with IGTL Solutions	40,29,614/-
4.	Certain items expenditure treated as capital expenditure	76,43,892/-
	Total	2,28,05,622/-

5.1 Aggrieved with the above additions/disallowances made, the assessee filed appeal before the learned Commissioner of Income-tax (Appeals), who allowed relief to the assessee in respect of additions at Sr. No. 1 and 4 of the above table and sustained the additions at serial No. 2 and 3 of the above table. Aggrieved with the order of the learned Commissioner of Income-tax (Appeals), both the Revenue and the assessee are in appeal before the Tribunal, raising the grounds as reproduced above.

6. In ground No. 1 of the appeal, addition of Rs.95,33,520/- on account of deferred revenue expenditure deleted by the learned Commissioner of Income-tax(Appeals), has been challenged. The facts in respect of issue in dispute are that in the computation of income, the Assessing Officer observed claim of deferred revenue expenditure amounting to Rs.95,33,520/-. The Assessing Officer further observed that in the books of accounts maintained for the purpose of companies Act, the assessee amortized above sum for a period of 36 months. It was contended by the assessee that deferred revenue expenditure which was allocable to fixed asset, incurred during the pre-commencement period was capitalized and which was not applicable to the fixed asset directly or indirectly, was written off or amortized to be written off in the financial books of the company over a period of 36 months. On the other hand, the Assessing Officer was of the view:

(i) that for allowability of an expenditure under section 37(1) of the Act, it should be wholly and exclusively incurred during the year for the purpose of business.

(ii) that the expenses claimed were purely revenue in nature and incurred before the commencement of the business.

(iii) that the expenses incurred before the commencement of the business can be allocated to cost of the fixed assets (if it was directly required for the purpose of bringing the asset to put to use) and all other expenses which are not allocable lost permanently.

(iv) that the expenses which could be amortized are provided in section 35A to 35E of the Act and apart from that there is no provision under the Act under which deferred revenue expenditure could be allowed to the assessee .

6.1 In view of above observations, the Assessing Officer disallowed the claim of deferred revenue expenditure.

6.2 Before the learned Commissioner of Income-tax (Appeals) the assessee submitted detail of deferred revenue expenditure of Rs.95,33,520/- as under:

1. Salaries Rs.37,89,276/-
2. Other staff and welfare expenses Rs.47,04,808/-
3. Other expenses Rs.2,16,480/-
4. Miscellaneous expenses Rs. 7, 51, 278/-
5. Professional charges Rs. 71, 678/-

6.3 In support of its claim of allowability of deferred revenue expenditure before the ld. CIT(A), the assessee submitted as under:

(i) that the deferred revenue expenditure upto the date of commencement of the business operations as on 19/12/2001, was a revenue expenditure admissible under section 37(1) of the Act.

(ii) that the entire expenditure was allowable in the relevant assessment year though the assessee had spread it over a period of three years in the books of accounts. The entries made in the books of account was not relevant for the purpose of allowability under the Income-tax Act as laid down in Amar Raja batteries Ltd Vs. ACIT 85 TTJ 20(Hyd.)

(iii) that in the case of Madras industrial investment Corporation limited versus CIT 225 ITR 802 (SC) it was held that though the assessee has written off the expenditure in its books of accounts over a period of five years, it must be allowed in entirety in the year in which it is incurred, if it is a revenue expenditure and if it is wholly and exclusively incurred for the purpose of business.

(iv) that once the business is set up and ready for commencement of business operations, whatever expenditure is incurred after setting up but before commencement of business operations and commercial sale, is an allowable expenditure.

(v) that the international call Centre commenced business operation on 20/12/2001 and yielded loss for the period under consideration relevant to assessment year 2002-03 but it does not mean that deferred revenue expenditure not directly allocable to fixed assets would be treated as dead expenditure and expenditure incurred for the purpose of business of the company, be it after setting of the business but before commencement of its business operation on commercial scale, is to be construed as allowable expenditure under the Act.

(vi) that expenditure was treated as deferred revenue expenditure in the financial books over a period of 36 months so as not to distort profit or loss for the purpose of disclosure to the shareholders of the company.

6.4 The learned Commissioner of Income-tax (Appeals) observed that the assessee company raised share capital and received share application money during the immediately preceding year and out of which substantial amount was incurred towards capital work in progress. During the immediately preceding year, an amount of Rs. 3.79 crores was also obtained by way of current liabilities and provisions for operating the call Centre. According to the learned Commissioner of Income-tax(Appeals), the business of the assessee was already set up in the immediately preceding year and nature of those expenses being revenue , he allowed the ground raised in respect of the issue in dispute.

6.5 Before us, the learned Senior Departmental Representative relied on the order of the Assessing Officer and submitted that business of the assessee commenced on 19/12/2001 and, therefore, expenses in the nature of revenue and incurred prior to commencement of the business, are not allowable to the assessee.

6.6 On the other hand, learned counsel of the assessee reiterating the submission made before the learned Commissioner of Income-tax (Appeals) submitted that business of the assessee was already set up in immediately preceding year. He referred to page 54 of the paper book, which contained detail of fixed assets acquired at the beginning of the relevant financial year. The learned counsel also referred to page 58 of the paper book containing details of training and development expenses of Rs.6,24,669/-incurred in immediately preceding year. The learned counsel submitted that agreements for õPrivate Leased Line Serviceô were also executed in the immediately preceding year, which also established that the business was setup in the immediately preceding year. In this connection, he relied on the decision of the Hon'ble Delhi High Court in the case of CIT Vs. Samsung Electronics Ltd., reported in 356 ITR 354. The learned counsel also referred to the decision of the

Delhi High Court in the case of Omniglobe Information Tech India Ltd. Vs. CIT in ITA No. 257/2012, wherein it is held that in case of BPO business, the moment employees recruited & enrolled and infrastructure to use their services was in place, set up was complete. In view of the submissions, the learned counsel requested to uphold the finding of the learned Commissioner of Income-tax (Appeals) on the issue in dispute.

6.7 We have heard the rival submissions and perused the relevant material on record including the order of the lower authorities on the issue in dispute. We find that the expenses in dispute are in the nature of salaries, staff and welfare expenses, miscellaneous expenses etc. In the books of accounts, the assessee has amortized expenses and spread the claim over a period of three years, whereas for the purpose of income tax, the assessee claimed entire expenses in the year under consideration. The Assessing Officer has not disputed the nature of the expenses as revenue. The objection of the Assessing Officer is that the business of the assessee was commenced on 20/12/2001 i.e. during the year under consideration and, therefore, any expenses which are revenue in nature and incurred prior to commencement of the business, can either be claimed under section 35A to 35E of the Act or cannot be allowed under the provisions of the income tax Act. The assessee is also agreed that on 20/12/2001 the company installed and put to commercial use 50 seats of the call centre and the remaining 92 seats were still under installation/implementation and thus business commenced on 20/12/2001. However, the contention of the assessee is that the business was already set up in the immediately preceding year and the revenue expenditure incurred after setting up of the business is allowable in terms of section 37 of the Act. The learned Commissioner of Income-tax (Appeals) relying on the case laws cited in the impugned order held that business of the assessee was already set up in the immediately

preceding year and the expenses in dispute are of revenue nature, hence, same are allowable.

6.7.1 In the case of CIT Vs. Samsung India Electronics Ltd. (supra) the assessee incurred expenses like recruitment and training expenses, rent, printing and stationary etc. after 03/08/1995 and entered into technology license agreement dated 12/09/1995 and started its commercial operations on 01/10/1995. The Assessing Officer simply took the date 01/10/1995 i.e. the date of start of actual commercial sale transactions as the date of commencement of business and the expenses incurred prior to the said date were held as capital in nature and not allowable under section 37 of the Act. The Hon'ble High Court noted that before the first actual sale invoice to the customer is issued, the assessee was required to recruit employees, there training, establishment of showrooms by taking places on rent and, advertisements etc. The Hon'ble High Court referred to the decision of Hon'ble Bombay High Court in the case of Western India Vegetables Products Ltd. Vs. CIT, (1954) 26 ITR 151, wherein it is held that there may be an interregnum, i.e., there may be an interval between the business which is setup and a business which is commenced and before the commencement of the business all the expenses during the interregnum would be permissible deduction.

6.7.2 In the case of Omniglobe Information Tech India Ltd Vs. CIT (supra), the Hon'ble High Court held that in case of BPO Business, moment the employees recruited and enrolled and infrastructure to use their service was in place, the setup of business was complete. The relevant finding of the decision of the Hon'ble High Court is reproduced as under:

> *"12. This brings us to the moot question: whether the business of the BPO (Business Process Outsourcing) had been setup by the respondent-assessee on 1st April, 2004 or was it setup only on 1st June, 2004? We have already quoted factual position elucidated in*

the assessment order to the effect that the appellant had employed several employees and salary and wages were paid to them. However, these employees were given training in the months of April and May, 2004 and expenditure was incurred on various heads, during the months of April and May, 2004, the actual BPO services to the parent company were not rendered. When the said services actually were rendered or the assessee did start rendering of services to a third party, the business commenced. This, according to us, does not mean that business had not been setup by the appellant assessee. In order to determine whether business had been setup or not, we have to look at the factual matrix of the case, especially, the nature and character of the business activity with the activities actually undertaken. The appellant-assessee had entered into an agreement with their sister concern, M/s Agilis, to use their premises between 2000 hours to 0800 hours between 1.4.2004 and 30.6.2004. M/s Agilis was paid on pro rata basis for water, electricity, energy and power consumption charges. Further, the appellant assessee had to install a separate internet link from the Internet Service Provider. The appellant-assessee had a choice to use the personal computers of M/s Agilis or install their own. Break-up of the expenditure of Rs.59,02,448/-, incurred during this period included expenses for lease line charges of Rs.2,74,331/-, telephone expenses of Rs.68,182/-, computer hire charges of Rs.2,44,355/- and some small amounts towards computer maintenance. In addition, the appellant-assessee had paid a substantial amount of Rs.22,83,936/- as salary and wages to its employees. Keeping in view the nature of business activity of the appellant-assessee, we do not think that it can be held that training, imparting skills to employees recruited, or, testing their performance can be treated as a pre-setup expenditure. The appellant assessee had either employed or taken help of trainers/seniors for the said purpose. The moment employees were recruited and enrolled, and infrastructure to use their service was in place, setup was complete. It was indicative of the fact that business operations had been setup. In the BPO industry, training of employees is an important, essential and integral element of the business activities and when the assessee has the infrastructure in place, the business can be treated as set-up. As a service industry, the first step is to recruit right kind of employees, then to interact, train or check their performance. Unlike the manufacturing activity, where requisite plant and machinery has to be procured, installed and then business operations start, in the BPO industry, the process starts with the recruitment of employees, who are to work in the said industry.

Training or introduction after recruitment would be akin to the trial production or the first step in production undertaken by a manufacturer of goods. Of course it has to be seen, whether the infrastructure to utilize their services was in place or not. One may postpone actual rendering of services to be a zero error company. In CIT Vs. E-Funds International India, (2007) 162 Taxman 1 (Del), the assessee was engaged in the business of information technology like software development/consultany, business process management and electronic banking schemes. The claim of the assessee therein was that business of software development was setup the moment they had employed 30- 40 employees in the relevant previous year. This claim was accepted by the High Court after noticing that the assessee had certain infrastructure facilities at the relevant time."

6.7.3 Further, in para-20 of the decision, the Hon'ble High Court held that training of employee was part and parcel of the business activity. The relevant para is reproduced as under:

"20. Upon recruitment of employees, the factum that expenditure under the different heads, as noticed above, was incurred is indicative that business was set up. Training to the employees was given to ensure that when the work was undertaken and performed, there were no glitches, trouble or problems. It is not indicative of the fact that necessary infrastructure was not there and actual business could not have commenced or was not set up. Training was post set up as the employees were recruited. In case of service industry, training and up gradation of skills of employees is a part and parcel of the business activity, a continuous process. The business as a service provider, cannot exist without the said activity being undertaken both at the very initial stage and after business has commenced. Training is done to ensure proper performance and to provide services of acceptable quality or ensure zero or minimal errors. It is to ensure proper standards and optimum utilisation of human resources already employed. It helps in improving productivity, maintaining team work and strengthening bonds inter-se. In the present case, substantial and large numbers of employees after recruitment were kept on payroll, the appellant-assessee paid for their Provident Fund, Employees Insurance Charges; maintenance charges; distributed uniforms, and, pantry charges were incurred. The details and quantum itself is indicative that the business was set up, as training itself was integral to the setting up

of business line of the appellant-assessee. The said training continued even when the business was in operation. It was part and parcel of the business activities as a service provider."

6.7.4 In the instant case, the learned Commissioner of Income-tax (Appeals) brought facts on record that in immediately preceding year the assessee has raised capital and received application money and made investment in fixed assets. The relevant finding of the Ld. Commissioner of Income-tax (Appeals) is reproduced as under:

"The facts on record of this case show that for operating the company's call centre, the appellant raised share capital of Rs.1.38 crores and received application money of Rs.1.51 crores during the immediately preceding years, out of which a sum of Rs.4.59 crores was incurred on the appellant's capital work in progress and an amount of Rs.0.82 crores was the expenditure during the construction period in the immediately preceding year. For operationalizing the call centre, during the immediately preceding year an amount of Rs.3.79 crores was also obtained by way of current liabilities and provisions. The appellant during the immediately preceding year expended in foreign currency Rs.83.13 lakhs for import of capital goods and an amount of Rs.6.24 lakhs for training and development of its employees."

6.7.5 We find from page 58 of the assesseeôs paper book that in the immediately preceding year the assessee has incurred expenses on ótraining of employeesô amounting to Rs.6,24,669/-. We have also seen that the assessee entered into agreement with Videsh Sanchar Nigam Limited (for short óVSNLô) for International Private Leased Line Service on 20/12/2000, which also falls in immediately preceding year.

6.7.6 In view of above facts, respectfully following the decision of the Hon'ble High Court in the case of Omniglobe Information Tech India Private Limited (supra), we are of the opinion that business of the assessee was setup in the immediately preceding year. Further, in view of the decision of the Hon'ble High Court in the case of CIT Vs. Samsung

India Electronics Ltd., the expenses incurred after setup of the business and before actual commencement of the business are allowable. Accordingly, we hold that the expenses claimed by the assessee are revenue in nature and incurred after setting of the business and before actual commencement of the business , hence, allowable under section 37 of the Act. This ground No. 1 of the appeal of the Revenue is rejected.

7. In ground No. 2 of the appeal, the revenue has raised that while deleting the addition of Rs.76,43,892/-on account of capitalization of professional charges, the learned Commissioner of Income-tax (Appeals) ignored the fact that the Assessing Officer had taken all such expenditure which were in the nature of professional charges and which were incurred in view of professional services.

7.1 The facts in respect of issue in dispute are that the Assessing Officer observed that in the profit and loss account a large sum of money was paid as professional charges during the assessment year and after obtaining details from the assessee, he treated the expenses amounting to Rs.76,43,892/- as capital in nature and disallowed from the business expenses. The Assessing Officer has produced list of all such professional charges held as capital expenditure and disallowed in a tabular format in the assessment order. Before the learned Commissioner of Income-tax (Appeals), the assessee submitted that during the year, out of gross amount of Rs.40,97,720/- incurred towards professional charges , amounts of Rs.18,39,915/- and Rs.6,58,337/- were booked under expenses during construction period and treated directly as capital expenditure. Further, expenses of Rs.71,678/- were transferred to deferred revenue expenditure and thus leaving a balance of Rs.15,27,790/- , which was claimed under the profit and loss account as professional charges. The assessee further claimed that the assessee had professional expertise in the field of running call centre business and

those professional charges paid after the commencement of the commercial operations were treated as revenue expenditure in the profit and loss account. The assessee further submitted that except the amount of Rs.15,27,790/- out of addition of Rs.76,43,892/-, balance expenses were already treated by the assessee as capital expenditure and no disallowance could have been made again in respect of those expenses. The learned Commissioner of Income-tax (Appeals) agreed with the contention of the assessee and allowed the ground of the appeal raised by the assessee before him.

7.2 Before us, the learned Senior Departmental Representative relying on the order of the Assessing Officer submitted that learned Commissioner of Income-tax (Appeals) has given no finding in respect of expenses of Rs.15.27 lakhs claimed by the assessee as professional charges.

7.3 The learned counsel, on the other hand, referred to page 56 of the paper book and submitted that in Schedule 10 of profit and loss account, under the head administrative expenses, the assessee only claimed professional charges of Rs.15,27,790/- and, therefore, disallowance of Rs.76,43,892/- holding the same as capital expenditure was totally incorrect on the part of Assessing Officer. He further submitted that learned Commissioner of Income-tax (Appeals), after taking into account the fact that other than expenses of Rs.15,27,790/- , all expenses included under Rs.76,43,892/- were already treated by the assessee as capital expenditure and the expenses of Rs.15,27,790/- being revenue in nature, he deleted the addition made by the Assessing Officer in respect of professional charges. He, accordingly, submitted that the action of the learned Commissioner of Income-tax (Appeals) was justified and required to be upheld.

7.4 We have heard the rival submissions and perused the relevant material on record. We find that learned Commissioner of Income-tax (Appeals) has analyzed the party-wise list of expenses of Rs.76,43,892/- treated by the Assessing Officer as capital expenditure and concluded that only Rs.15,27,790/- was claimed by the assessee as professional charges in the profit and loss account and the balance expenses out of Rs.76,43,892/- were treated by the assessee as capital expenditure and, thus, cannot be disallowed again as the same has not been claimed as revenue expenditure. In respect of expenses of Rs.15,27,790/-, the learned Commissioner of Income-tax (Appeals) has held the same are incurred for running and operation of the assessee's business and accordingly he allowed the amount of Rs.15,27,790/- as revenue expenditure. The relevant finding of the learned Commissioner of Income-tax (Appeals) on the issue in dispute is reproduced as under:

"3.4 I have considered the submissions of the appellant the findings of the A.O. and the facts on record. The gross professional charges for the year under appeal amounted to Rs. 40,97,720/-. These included payments to Unicon Consulting - Rs. 2,21,117/- for C D. Rom presentation, to Abhishekh Mukherjee - Rs. 2,50,000/- for management consultancy fee, to Sh. S.R.Wadhwa - Rs 11,000/-for tax consultancy, to Leading Edge Consultants - Rs. 23,100/- for recruitment consultancy, to Jerath Electronics and Allied 'ndustries of Rs. 23,00,000/- for consultancy on technical and marketing support, to Charan Gupta Enterprises - Rs.50,000/- for actuarial valuation, to the Counsel of Rs. 7875/- for retainership fee in legal matter, to Itec Solutions - Rs. 1,35,000/- for consultancy charges for connectivity, to GTL Ltd. - Rs. 9,00,000/- for consultancy charges for connectivity, to Ravi Parkash Jerath - Rs. 47.250/- for income tax consultancy and retainership, to Sushil Jeetpuria & Co.- Rs. 92,178/- towards consultancy for maintenance of PF and ESI accounts, to India Net Software and Education - Rs. 55,000/- for consultancy charges for corporate internet site Of the gross expenses incurred during the year amounting to Rs. 40,97,720/-, Rs. 24,98,252/- has been taken to expenditure during construction period and an amount of Rs.71,678/- has been taken to deferred revenue expenditure. Meaning thereby that an amount of Rs. 24,98,252/- would be

capitalized to the cost of the assets, and an amount of Rs. 71,678/- would be claimed as expenditure in future years. The remaining amount of Rs. 15,27,790/- under professional charges has been considered as expenditure in the P&L account.

The A.O's action in treating an amount of Rs. 76,43,892/- as capital expenditure from out of a claim of Rs. 15,27,790/- under that head in the P&L account is actuated by the fact that many of the accounts under professional charges have either been not mentioned in the order reported or the amount against an individual party being represented differently by the A.O. Thus whereas the A.O. has not considered payments to Unicon Consulting, S.R.Wadhwa, Leading Edge Consultants, Jerath Electronic & Allied Industries, Charan Gupta Enterprises, the Counsellor , S.K.Sharma & Co. Ravi Parkash Jerath, Sushil Jeetpuria &Co., although those names appear in the accounts under professional charges, the A.O. has in turn referred to payments by the appellant to Fonet Consultancy Pvt. Ltd. Nest 4 India Ltd, North Star Call Centre College, Main Stream and Shardha India. Those latter parties do not figure under professional charges as per the appellant's claim. Moreover the A.O. has included an amount of Rs.36,29,950/- payable to GTL Ltd. as capital expenditure from out of the appellant's claim of professional expenditure, whereas the appellant in the schedule of professional charges refers to a payment of Rs 9,00,000/- to GTL Ltd. The result of the omission of payments to specific parties or including parties whose names do not appear in the list of professional charges, or excess allocation of expenditure against specific party in the assessment order has resulted in disallowance of Rs. 76,43,892/- from out of the appellant's claim of professional charges, whereas the appellant has debited to the P&L account an amount of Rs. 15,27,70/- under that head.

In so far as the appellant has made payments to India Net Software & Education on 12.3.2002 for consultancy and professional charges; made payments of Rs.4,42,400/- to Fonet vide invoices dt. 8.1.2002 and 11.2.2002 for training and development; to Net 4 India of an amount of Rs. 14,899/- for domain registration; to North Central Call Centre College of an amount of Rs. 10,55,922/- for call centre training vide invoices from August, 2001 to December, 2001; to Main Stream of an amount of Rs.11,00,400/- for training and development of its call centre personnel through invoices of November and December, 2001 and January, 2002; to Shardha India of Rs. 9,60,315/- for training of its personnel vide invoices of

November and December,2001 and January, 2002; and whereas the appellant's call centre operations as per accounts commenced for commercial use on 20.12.2001, I hold that the company having set up its business, is entitled to claim as revenue expenditure the amounts indicated against the said parties in all such cases where the incurrence of expenditure was subsequent to the commencement of the operations. This method is part of the appellant's accounting policy and adhered to in drawing the accounts.

In all such cases where the expenses under professional charges have been incurred before the commencement of commercial operations, those have been treated as capital expenditure by the appellant. In that manner Rs. 24,98,250/- out of the professional charges have been booked under expenditure during construction period. The remaining expenditure under professional charges incurred for the running and operation of the appellant's business has alone been claimed in the accounts. I hold therefore that the disallowance and treatment of a sum of Rs 76,43,892/- as capital expenditure, whereas the appellant's professional charges amounted to Rs.15,27,790/- is not in order. Since incurred for the purposes of business, I hold that the expenditure is inter alia allowable u/s 37(1) of the Act. The ground is allowed."

7.4.1 In our opinion, the order of the learned Commissioner of Income-tax (Appeals) on the issue in dispute is comprehensive and well reasoned and thus no interference on our part is required on the finding of the learned Commissioner of Income-tax (Appeals), accordingly, we uphold the same. The ground No. 2 of the appeal of the Revenue is rejected.

8. In the result, appeal of the Revenue is dismissed

ITA No. 1927/Del/2008 for AY: 2002-03

9. In the ground No. 1 raised in its appeal, the assessee has challenged the finding of the learned Commissioner of Income-tax (Appeals) in upholding the action of the Assessing Officer in treating the

payment of International Private Leased Circuit (IPLC) to M/s. Kick Communication Inc., USA and connectivity charges to M/s. IGTL Solution Inc. USA of Rs.15,98,596/- and Rs.40,29,640/- respectively, chargeable to tax in India as órovaltyôunder section 9(1)(vi) of the Act and Article 12 of the DTAA between the USA and India and consequent disallowance under section 40(a)(i) on the ground that no tax was deducted at source under section 195 of the Act before making such payments. In ground No. 1.1, the assessee has challenged the alternative finding of the learned Commissioner of Income-tax (Appeals) that payments are in the nature of Fee for Technical Services (FTS) under section 9(1)(vii) read with article 12(2) and 12(4) of the DTAA between USA and India.

9.1 The facts in respect of issue in dispute are that the assessee company was operating an outbound call centre in Vaishali, Gaziabad and was engaged in telemarketing services on behalf of its clients based at USA. The Assessing Officer has described the procedure of making calls involved in the case of the assessee in the assessment order as under:

> (a) That a call centre executive sitting in the premises of the assessee makes an outbound call to the USA on telephone numbers of potential buyers of clients of the assessee company in real-time. In the process of calling by the executive to the person located at the USA, the voice data is converted into electronic data and is carried over by multiple entities.
>
> (b) From Delhi to Mumbai the call is carried over line provided by the Videsh Sanchar Nigam Ltd.(VSNL) and Mumbai onwards this call is carried over an underwater sea cable maintained by the VSNL and M/s. AT & T, USA upto the shores of USA at Miami. From another end of underwater see cables at USA, the call is

connected to basic telephone service provider of the USA by M/s IGTL Solutions (USA) Inc (in short 'IGTL Solutions').

9.2 This underwater sea cable is jointly maintained by the VSNL and M/s AT & T, USA. For running the call centre, the assessee acquired dedicated Private bandwidth in the underwater sea cable from M/s VSNL and M/s AT&T USA. The dedicated 'private bandwidth' means certain portion of total data carrying capacity of the cable would be available to the assessee. M/s Kick Communication Inc. USA (in short 'Kick Communications') is a reseller of AT&T USA. The assessee paid the International Private Leased Circuit (IPLC) charges to M/s VSNL and to M/s Kick communication for the use of dedicated Private bandwidth in underwater sea cable.

9.3 The assessee deducted TDS on payments made to VSNL, however, no tax was deducted on payments amounting to Rs.15,98,526/- made to M/s Kick Communication.

9.4 It was explained by the assessee that M/s Kick Communication is a non-resident party, which has not rendered any services in India as the cable on which bandwidth was made available was lying outside India.

9.5 According to the Assessing Officer, the Authorized Representative of the assessee took the physical existence of the cable for establishing its case of services rendered outside India by a non-resident entity. However, the Assessing Officer was of the view that service was not in the physical sense but it was a service provided on a physical cable. M/s Kick Communication was also given the responsibility of rectifying the connectivity problems. The Assessing Officer referred to para 2 and 3 of service level agreement between the assessee and M/s kick communication and observed that M/s Kick Communication was having its own dedicated network management function and the technical management team for providing services of restoration, notification to the

customer of updates and current information as required, alarm handling and Management, fault coordination Management, network and service interruption coordination and management, network and service reporting, preventing monitoring and maintenance, preventing field maintenance.

9.6.1 The Assessing Officer further referred to para 6 of the agreement, according to which, M/s Kick Communication was supposed to provide a technical project manager who would be a single point of contact for the assessee company on all the pre-and post-provisioning, installation and commissioning activity.

9.6.2 The Assessing Officer further referred to para-9 of the agreement which provided that all faults were to be reported immediately to M/s. Kick Communication Network Operation personal and faults could have also been detected by one of the network supplies management tools available to network operation Centre of M/s Kick Communication.

9.6.2 The Assessing Officer further referred to para-10 of the agreement, according to which M/s Kick Communication was required to provide 365 days X 24 hours helpdesk for full fault handling, escalation and customer reporting service.

9.6.3 Further, the Assessing Officer referred to para 3(a) of the agreement, according to which M/s. Kick Communication was required to have sole responsibility for installation, testing operation, service and equipment at lessee's Miami co-location and also coordination with VSNL at Mumbai. According to the Assessing Officer the equipments were not only maintained at the US end but also at the Indian end, which is another co-location.

9.6.4 The Assessing Officer observed that contention of the assessee that those services had absolutely no connection with Indian territory would not be correct as the services are provided to the call centre of the

assessee company situated at Vaishali, Ghaziabad. The Assessing Officer referred to section 9(1)(i) which provides that all income accruing or arising whether directly or indirectly through or from any business connection shall be deemed to be accrue or arise in India. According to the Assessing Officer, there was certainly a business connection between the two parties and the payments were made for using the facilities of M/s Kick Communication by the assessee from India. The Assessing Officer further stated that Explanation-2 to section 9(1)(vi) of the Act was applicable in the case of the assessee, according to which royalty include consideration for imparting of any information concerning technical, industrial, commercial or scientific knowledge or experience or a skill. The Assessing Officer was of the view that the right to use the bandwidth & technical services in the nature of maintenance fall within the definition of royalty and thus the tax was required to be deducted. Further the Assessing Officer stated that that Article 12 of the Double Tax Avoidance Agreement (DTAA) between India and USA deals with royalties and fees for included services and the term royalty has been defined in clause 3(b) as payment of any kind received as consideration for use of, or the right to use, and industrial, commercial or scientific equipment and therefore the term royalty has been defined on similar lines as per section 9 of the Act. The Assessing Officer held that income deemed to accrue or arise in India within the meaning of section 9 and DTAA and tax was to be deducted on this amount before making payments and therefore he disallowed the payment in terms of section 40(a)(i) of the Act for non-deduction of tax.

9.7 Regarding disallowance of payments to M/s IGTL Solutions amounting to Rs.40,29,614/- under section 40(a)(i), the Assessing Officer observed that the assessee company under an agreement paid to M/s. IGTL Solutions for providing connectivity facility from IPLC leased line to

local PSTN network (basic telephoning network) in USA. According to the Assessing Officer, M/s IGTL Solutions is a co-locator engaged in pickup of the calls from the IPLC circuits terminating at Miami and connecting it to local basic telephone service providers. The Assessing Officer further observed that job of M/s IGTL includes suggesting equipment to the call centre situated in India so that voice data can be translated into digital data and reserving its ports for call Centre executive so that all the calls made by the call Centre executive get matured. In view of above observations the Assessing Officer concluded that the IGTL had business connection with assessee company during the period of operation of calls Centre and in view of discussion made on section 9 and DTAA in the case of M/s kick communication , the assessee was required to deduct TDS on payment made to M/s IGTL amounting to Rs.40,29,614/- and failure in doing so ,the amount was disallowed under section 40(a)(i) of the Act.

9.8 Aggrieved with the disallowances, the assessee filed appeal before the first appellate authority and made elaborate submissions justifying no liability to deduct tax at source in case of payments to the above two parties. In support of its contention, the assessee relied on various judgments as under:

(i) Skycells Communications Ltd. vs Deputy Commissioner of Income Tax, 251 ITR 53 (Mad.)

(ii) ITO Vs Rajendra Jain Networks Ltd. (ITA No. 1827 and 1828/Mad./1998)

(iii) Wipro Ltd Vs. Income Tax Officer, 80 TTJ 191(Bang.)

(iv) Lucent Technology (Hindustan) Ltd. Vs. iTunes 92 ITD 366 (Bang.)

(v) Wipro Ltd Vs. Income Tax Officer, 92 TTJ 796(Banglore)

(vi) Dun and Bradstreet, 272 ITR 99(AAR)

(vii) DCIT Vs. Panamsat International System Inc., 103 TTJ 861(Del.)

9.9 The learned Commissioner of Income-tax (Appeals) after considering the submissions made a gist of agreements with both the parties, which is reproduced as under:

" 2.3.1 I have considered the submissions of the appellant, findings of the AO and the facts on record. The gist of agreements in question runs as under:

(a) The agreement with Kick Communication Inc. is dated 09.08.01. The agreement is towards rendering of services by way of band width capacity lease. The appellant as per the agreement is responsible for establishing each service inter connection and shall bear the cost of the service inter connection, has the responsibility of installation, testing, operation of and cost associated with the facility, services and equipment at the Miami co location other than those specifically to be provided by Kick Communication and shall include any coordination with VSNL at Mumbai, and T-1 at the US end. In the event that the appellant believes that a condition has occurred effecting service, the appellant would immediately contact Kick Communication's designated network operating centre to open a report and thereafter Kick Communication with takes steps to determine the indicated on the report. In terms of clause 14 of the agreement, the recitals thereof are said to be confidential and no disclosure thereof will be made to any third party. In terms of service level agreement dated 09.08.01, it has been stated that Kick Communications would commit for 99.5% service availability guarantee. That it has its own dedicated network management function located in New York managed 365 days x 24 hours x 7 days a week. Kick Communication's Technical Management team shall provide services to the appellant in the nature of (a) restoration of services (b) notification to customers of updates and current information as required (c) alarm handling and management (d) fault coordination management (e) network and service interaction coordination and management (f) network and service reporting (g) preventive monitoring and maintenance (h) preventive field maintenance. As per clause 6 of the service level agreement, Kick Communication will provide a technical project manager will be the single point of contact for the customer on all pre and post provisioning, installation and commissioning activity. The technical project manager will liaise with the appellant at-the beginning of the installation cycle to approve the technical specification of delivery, responsibility and time scale and to agree documentation that the

appellant would like to receive. Prior to the end to end test of the customer's circuit, Kick Communication will complete the bearer test and the local tail test from the customer's demarcation. According to clause 9 of the agreement, all faults shall be recorded on the fault management system and thereafter Kick Communication shall continue to provide updates and advisory information necessary to keep the appellant fully informed of the progress towards fault resolution and restoration of service.

(b) The IGTL connectivity agreement is dated 04.10.01. The agreement provides for connectivity facility to the appellant to generate and cater to the out bound PSTN calls within USA. This shall comprise of co located equipment set up at USA and IGTL arrangement with local PSPN carrier using T-1 circuit from such carrier for PSTN connectivity within USA. In terms of the agreement IGTL shall provide connectivity to the appellant for the number of ports and shifts as set out in the exhibit to the agreement. The obligations of the IGTL are to provide connectivity in accordance with service, level agreement and in case of discontinuation of connectivity facility due to non on working or faults in CRM software, it shall immediately inform the appellant about such fault and make the equipment available to the appellant or its software vendor. As regards the appellant's obligations, it shall endeavor that all the equipment, circuit and CRN software loaded on the equipment in IGTL node necessary for using IGTL connectivity are in working condition. In accordance with clause 10 of the agreement, the recitals and the information contained in the agreement have been treated are confidential."

9.9.1 In the light of the facts of the case, the learned Commissioner of Income-tax (Appeals) held that the decisions relied upon by the assessee were either not applicable over the facts of the case or distinguishable.

9.9.2 The learned Commissioner of Income-tax (Appeals) relied on the decision of the Tribunal in the case of Asia Satellite Telecommunication Company Ltd. Vs. Deputy Commissioner of Income Tax, 85 ITD 478(Del.), wherein it was held that lease rent payments by TV channels for using transponder capacity so as to enable the cable operators to

catch their program to the assessee was in the nature of royalty as contemplated under section 9(1)(vi)(c) of the Act .

9.9.2 The learned Commissioner of Income-tax (Appeals) concurred with the finding of the Assessing Officer that payments made to the two parties were in the nature of royalty with the findings as under:

"……
In the case of the appellant, the IPLC process of Kick Communications was made available under a non assignable and confidential agreement, in connection thereof technical management teams including the services of a technical project manager were provided to the appellant and various services from restoration of services to preventive field maintenance were to be rendered by the non-resident. In so far as IGTL is concerned, the process for PSTN connectivity would only have been completed when the appellant would , have facility to ensure that all equipment, circuit and CRM Software loaded on equipment in IGTL node, which is necessary for using IGTL connectivity. The condition for obtaining PSTN connectivity is only by using a personalized process and equipment indicated in the agreement with IGTL. In a similar context in ABC (In - Re) 154 CTR 246 (AAR), charges for software and facility for using a specific client service technology was held as "consideration for use of, of the right to use design, or model, plan, secret formula or process……." within the meaning of royalties in article 12(3)(a) of the Indo US DTAA. I hold therefore that the AO was justified in rendering a decision that the amounts of remittances to the non residents are taxable in India within the meaning of section 9 and article 12 of the Indo US DTAA and that since no deduction of tax at source was made of the payments above, the amount is disallowable u/s 40a(i)."

9.9.3 The Ld. Commissioner of income tax (appeals) alternatively also held that amounts of remittance were chargeable as Fee for Technical Service (FTS) under section 9(1)(vii) read with article 12(2) and 12(4) of the DTAA between USA and India with following observations:

"2.3.5 In the case similar to the case of the appellant, where payments were made on account of lease line rental charges, port charges (inter connectivity charges) and access charges to BSNL without deduction of tax at source u/s 194J of the Act, it was held in

Hutchinson Telecom East Ltd. Vs ACIT (2007) 16 SOT 404 (Kol.), that since the services provided by BSNL were based on technology and assessee without technical services by BSNL would not be able to continue its business to transmit call / voice and signal to recipients, payments made by the assessee to BSNL with regard to port charges (inter connectivity charges) and access charges was in the nature of technical services subject to TDS u/s 194J. Fees for technical services for the purposes of TDS u/s 194J is as per the definition given in Explanation 2 to section 9(1)(vii). Going by the citation above and aligning to the facts under appeal, the appellant has paid for connectivity charges to non residents. The appellant is a resident. The charges were not payable with respect of services utilized in the business by the appellant outside India. The amount was also not paid for the purpose of making or earning any income from any source outside India. Article 12 of DTAA between India and USA provides that fees for included services arising in any contracting state and paid to a residents of other contracting state may also be taxed in the contracting state in which it arises according to the laws of that state at the rate prescribed in Article 12(2). Article 12(4) defines the words "fees for included services" As per this clause, the payments for rendering technical services, or consultancy services, if such services make available technical knowledge, experience, skill, know how or processes, or consist of development and transfer of technical plan or technical design can be charged to tax in India. In the case of the appellant the non residents provided technical services by way of technical knowledge, experience, know how or processes to the appellant for setting up and operationalsing its call centre. Notwithstanding a view that the amounts of remittance bear the character or royalty as understood u/s 9(1)(vi)which support, I also hold alternatively that the amounts of remittances are also chargeable u/s 9(1)(vii) read with Article 12(2) and 12(4) of the DTAA. The ground is dismissed."

9.10 Before us, the learned counsel of the assessee submitted that the payment made to the non-resident parties were towards the commercial services rendered by them outside the Indian Territory and there for consideration paid was neither liable as royalty nor as fee for technical services(FTS). The submissions of the learned counsel are summarized as under:

(i) that while holding the payments as royalty, the Ld. Commissioner of Income-tax(Appeals), relied on the decision of the Tribunal in the case of Asia satellite Telecommunication Company Limited (supra), which has subsequently been reversed by the Hon'ble Delhi High Court in Asia satellite telecommunication company limited versus CIT reported in 332 ITR 340. In the case of Asia satellite telecommunication company limited (supra) , the assessee was engaged in uplinking television signals to the transponder located on the satellite and thereafter down linking over the footprint area on various continents, where the cable operator received the signals. The Hon'ble court held that the assessee was the operator of the satellite and was in control of the satellite and it has not leased out the equipment to the customers. The assessee had merely given access to a broad bandwidth available in the transponder which can be utilized for the purpose of transmitting signals to the customer. There was no use of "process" by the television channels.

(ii) In the case of the present assessee also the dedicated bandwidth have been utilised by the assessee in undersea water cables and network in USA and call transfer/connectivity charges have only been paid to the non-resident parties and therefore same does not fall under the category of royalty either under the Explanation-2 to section 9(1)(vi) of the Act or article 12 of the DTAA between USA and India.

(iii) the Payments made for bandwidth charges for completion of international leg of the call to non-resident companies was neither royalty nor fee for technical services as held by the Authority for Advance Ruling in the case of Cable & Wireless networks India private limited : AAR 786 of 2008 . The special leave petition filed

by the Revenue against the decision of the Authority for Advance Ruling was dismissed in SLP No. 6392/2010 . In support of the contention, the assessee also relied on the decision of the Authority for Advance Ruling in the case of Dell International services India private limited reported in 305 ITR 37.

(iv) in the case of Cable & Wireless networks India private limited: AAR 786 of 2008, the assessee company proposed to enter into an agreement with another group company namely M/s Cable & Wireless UK with a view to provide end-to-end international long-distance telecommunication services to its Indian customers and M/s cables and wireless UK was required to provide international leg of the service using its international infrastructure and equipments. The assessee sought ruling of the Authority for Advance Ruling on the issue whether the amounts payable by the assessee to M/s Cable & Wireless UK, would be in the nature of ñfee for technical servicesò (FTS) within the meaning of the term in Explanation-2 to clause (vii) of section 9(1) or within the meaning of the term in article 13 of the agreement for avoidance of double taxation entered into between the Government of United Kingdom and the Government of the Republic of India (ñTreatyò). The assessee also sought ruling of the authority as to whether the amount payable by the assessee would be in the nature of royalty within the meaning of the term in Explanation-2 to clause(vi) of section 9(1) of the Act for in the nature of ñroyaltyò within the meaning of the term in article 13 of the treaty. The Authority in the decision ruled that no technical service was rendered and there was no transfer of technology, the payment was not towards ñfee for technical servicesò either under the Act or the treaty. Similarly the authority held that payment was also not in the nature of

royalty either under the provisions of the Act or under the treaty. The special leave petition filed by the revenue in SLP No. 6392/2010 against the decision of the authority for advance ruling stands dismissed.

(v) that the amendment under section 9(1)(vi) of the Act by finance Act 2012 has no bearing on the provisions of DTAA as held by the Hon'ble Delhi High Court in the case of DIT versus New Skies Satellite BV in ITA 473/2012

(vi) that in the case of Bharti Airtel Limited Vs. Income Tax Officer in ITA No. 3593 to 3596/del/2012, the Tribunal held that the payment of interconnectivity charges to foreign telecom operators was not income deemed to accrue or arise in India as fee for technical services(FTS) either in terms of section 9(1)(vii) r/w Explantion-2 of the Act or under the articles of the respective DTAA . The Tribunal also held that such payment of interconnectivity charges was not in the nature of Royalty as the foreign telecom operators had no exclusive ownership rights in respect of the process embedded in their network which is usually a standard facility to render telecommunication services to the subscriber as well as the interconnecting telecom operators and therefore payment of interconnectivity charges made to foreign telecom operators do not fall within the ambit of royalty under section 9(1)(vi) of the Act as well as the term royalty under the DTAA. Further it is held that change in domestic law cannot be read into the treaties as long as there is no change in the wording of the treaties. In the case of the assessee also payment has been made for connecting the domestic leg of the call with the international leg of the call.

(vii) that retrospective amendment in law cannot have retrospective effect to the TDS provisions or lead to disallowance under section

40(a)(i) of the Act. In support of the contention, he relied on the decision of the Tribunal Delhi bench in the case of Business India Television International Ltd versus ACIT reported in 11 SOT 486 and other decisions listed in the compilation of case laws.

(viii) the Hon'ble Supreme Court in the case of **GE INDIA TECHNOLOGY CENTRE (P) LTD. vs. COMMISSIONER OF INCOME TAX & ANR., reported in 327 ITR 456** held that the payer is bound to deduct tax at source only if the income is assessable in India. If income is not so assessable, there is no question of tax at source being deducted. In the case of present assessee , income is not chargeable in the hands of non-resident recipients and therefore the assessee was not liable to deduct tax at source and accordingly no disallowance could have been made under section 40(a)(i) of the Act.

9.11 On the other hand, the learned Senior Departmental Representative relied on the orders of the authorities below.

9.12 We have heard the rival submissions of the parties and perused the relevant material including the order of the lower authorities and case laws relied upon by the both the parties.

9.12.1 The assessee company did not deduct tax at source on the payments made to non-resident parties namely "Kick Communication" and "GTL solutions" holding that no income was chargeable in their hands. The issue in question before us is whether the payments made to those parties was liable as income accrued or deemed to accrue in their hands within the provisions of the Act or income in their hands as per the articles of the DTAA between the USA and the India. If the answer to the question is positive, the assessee was liable to deduct tax at source on

those payments and consequent disallowance under section 40(a)(i) of the Act.

9.12.2 The services rendered by both the parties have been described in detail by the lower authorities in their orders. Briefly, it can be summarized that the executive of the call Centre of the assessee located at Ghaziabad used to make call to the persons in USA for marketing of the products of the clients of the assessee. The voice call data was converted into electronic data and transmitted from the call Centre in India to the person in USA to whom the call was made. The call from the call Centre at Ghaziabad to the last point of Indian territory at Mumbai was transmitted by the VSNL. We may call it as domestic leg of the call transmission. Further, the call data was transmitted from last point in Indian Territory at Mumbai to entry point in the USA at Miami through undersea cable by M/s kick communication. The data from entry point at Miami in USA to the person connected to the call was transmitted by M/s IGTL solutions. We may call these both the part of the call transmission as international leg of the call transmission. From the analysis of the agreements with the both the non-resident parties by the Ld. Commissioner of Income-tax (Appeals), we find that M/s Kick Communication was not only responsible for providing smooth transmission of call data, it was also responsible for managing the faults arising in transmission of calls and providing all information to the assessee in respect of transmission of call data. Similarly, M/s. IGTL Solutions was responsible for smooth transmission and management of call data from entry point in the USA to the person to whom the call was made. The lower authorities have not raised any issue of rendering service by the non-resident parties through any permanent establishments in India. The Assessing Officer held that there was certainly a business connection between the assessee and the non-

resident parties and the payments were made for using facilities of non-resident parties by the assessee from India. He further held that The payments made for services rendered by above two non-resident parties was in the nature of royalty as the assessee was having right to use of bandwidth and technical services in the nature of maintenance in terms of Explanation-2 to section 9(1)(vi) of the Act. The Assessing Officer held that the payment made was also in the nature of the royalty under the DTAA as the term royalty has been defined in clause 3(b) of the DTAA as payment of any kind received as consideration for use of, or the right to use any industrial commercial or scientific equipment. The learned Commissioner of Income-tax (Appeals) upheld the finding of the Assessing Officer in view of the decision of the Tribunal in the case of Asia Satellite Telecommunication Ltd. Vs. Deputy Commissioner of Income Tax, reported in 85 ITD 478(Del). The learned Commissioner of Income-tax (Appeals) alternatively also held that the amount of remittances to both non-resident parties were chargeable as fee for technical services in their hands under section 9(1)(vii) read with article 12(2) and article 12(4) of the DTAA between USA and India.

9.12.3 Therefore, first we discuss whether income accrued or arisen in hands of the recipient non-resident parties in terms of section 9(1)(i) of the Act. In this respect, we are reproducing the relevant part of section 9(1)(i), 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."

9.12.4 Thus, for Revenue to succeed on this issue, it has to prove that income has accrued or arisen, whether directly or indirectly in India:

(a) through or from any business connection in India

(b) through or from any property India

(c) through or from any assets or source of income in India

(d) through a from transfer of capital asset situated in India.

9.12.5 Further the ñbusiness connectionò has been defined in Explanation-2 below the subsection 9(1)(i) as under:

> *"Explanation 2.*ð 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,ð
>
> (*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*) has no such authority, but habitually maintains in India a stock of goods or merchandise from which he regularly delivers goods or merchandise on behalf of the non-resident; or
>
> (*c*) habitually secures orders in India, mainly or wholly for the non-resident or for that non-resident and other non-residents controlling, controlled by, or subject to the same common control, as that non-resident:
>
> **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 :
>
> **Provided further** that where such broker, general commission agent or any other agent works mainly or wholly on behalf of a non-resident (hereafter in this proviso referred to as the principal non-resident) or on behalf of such non-resident and other non-residents which are controlled by the principal non-resident or have a controlling interest in the principal non-resident or are subject to the same common control as the principal non-resident, he shall not be deemed to be a broker, general commission agent or an agent of an independent status.ò

9.12.6 The CBDT Circular No. 23, dated 23/07/1969 (which was subsequently withdrawn by the CBDT Circular No. 7/2009, dated 22/10/ 2009) provided certain illustrative instances of a non-resident having business connection in India as under:

*"**2.** The expression 'business connection' admits of no precise definition. The import and connotation of this expression has been explained by the Supreme Court in their judgment in CIT vs. R.D. Aggarwal & Co. (1965) 56 ITR 20 (SC) : TC 39R.1098. The question whether a non-resident has a 'business connection' in India from or through which income, profits or gains can be said to accrue or arise to him within the meaning of s. 9 of the IT Act, 1961, has to be determined on the facts of each case. However, some illustrative instances of a non-resident having business connection in India, are given below :*

(a) Maintaining a branch office in India for the purchase or sale of goods or transacting other business.

(b) Appointing an agent in India, for the systematic and regular purchase of raw materials or other commodities, or for sale of the non-resident's goods or for other business purposes.

(c) Erecting a factory in India where the raw produce purchased locally is worked into a firm suitable for export abroad.

(d) Forming a local subsidiary company to sell the products of the non-resident parent company.

(e) Having financial association between a resident and non-resident company.

***3.** The following clarifications would be found useful in deciding questions regarding the applicability of the provisions of s. 9 in certain specific situations :*

1. Non-resident exporter selling goods from abroad to Indian importer.—(i) No liability will arise on accrual basis to the non-resident on the profits made by him where the transactions of sale between the two parties are on a principal to principal basis. In all cases, the real relationship between the parties has to be looked into on the basis of an agreement existing between them but where :

(a) the purchases made by the resident are outright on his own account,

(b) the transactions between the resident and the non-resident are made at arm's length and at prices which would be normally chargeable to other customers,

(c) the non-resident exercises no control over the business of the resident and sales are made by the latter on his own account, or

(d) the payment to the non-resident is made on delivery of documents and is not dependent in any way of the sales to be effected by the resident.

it can be inferred that the transactions are on the basis of principal to principal.

(ii) A question may arise in the above type of cases whether there is any liability of the non-resident under s. 5(1) of the IT Act, 1961, on the basis of receipt of sale proceeds including the profits in India. If the non-resident makes over the shipping documents to a bank in his own country which discounts the documents and sends them for collection to the bankers in India, who present the sight or usance draft to the resident importer and deliver the documents to him against payment or acceptance by the latter, the non-resident will not be liable to tax on the profit arising out of the sales on receipt basis. Even if the shipping documents are not discounted in the foreign country, but are handed over in India against payment or acceptance, no portion of the profits will be chargeable to tax under the IT Act, if this is the only operation carried on in India on behalf of the non-resident."

9.12.7 On perusal of the Explanation-2 as well as the illustrative examples of business connection given in CBDT Circular No. 23, we are of the opinion that non-resident parties in the case of the assessee are not having any business connection as no such facts of business activity carried out through a person acting on behalf of the non-resident or through a broker or agent have been brought forward before us by the Revenue.

9.12.8 Further, we find that Hon'ble Delhi High Court in the case of Asia Satellite Telecommunication Company Limited Vs. DIT (supra) has decided the issue of applicability of section 9(1)(i) as under:

"3.2 After considering the respective submissions, we are of the view that the findings of the learned Tribunal on the non-applicability of Section 9(1)(i) of the Act are proper, justified and legally sustainable. We have already taken note of the Explanation (a) to this sub-clause, which lays down that in the case 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. It, thus, clearly follows that carrying out the operations in India, wholly or at least partly, is sine qua non of the application of Clause (i) of sub-section (1) of Section 9 of the Act. Can it be said that the appellant, under the given circumstances, is doing some business in India, i.e., is there any business act of the appellant which could be attributed to the Indian territory? Under the agreement with TV channels, role attributed to the appellant can be paraphrased in the following steps:

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

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

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

33. Accepted position is that the first two steps are not carried out in India and the entire thrust of the Revenue is limited to the third step and the argument is that the relaying of the programmes of in India amounted to the operations carried out in India. Whether this argument is sustainable? Answer is emphatic no! Merely because the footprint area includes India and the programmers by 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. The Tribunal has rightly emphasized the expressions —operations‖

and —carried out in India‖ occurring in Explanation (a) to hold that these expression signify that it was necessary to establish that any part of the appellant's operations were carried out 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. Even the Tracking, Telemetering and Control (TTC) operations are also performed outside Indian in Hong Kong. No man, material or machinery or any combination thereof is used by the appellant in the Indian territory. There is no contract or agreement between the appellant either with cable operators or viewers for reception of signals in India.

34. We, thus, hold that Section 9(1)(i) is not attracted in the present case."

9.12.9 In the instant case also, the undersea cable for providing dedicated bandwidth to the assessee was installed beyond the territory of India and no operations were carried out by the non-resident party M/s Kick Communication in India. It was responsible for restoring connectivity and Managing faults in connectivity etc in respect of data transmitted through undersea cable only. Similarly, the operations carried out by M/s. IGTL Solutions are also in USA and not in India. Since operations by both the non-resident parties are carried out beyond the territory of India, we thus hold that section 9(1)(i) is of the Act is not attracted in case of above two non-resident parties.

10. Now the next issue is whether the payments in the hands of the recipient was income by way of royalty. The relevant part of the section 9(1)(vi) of the Act is reproduced 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)……..

(ii)……..

(iii)……..

(iv)……..

(v)……

(vi) income by way of royalty payable by—

(a) ……..

(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) ……..”

Further, Explanation-2 below the subsection, which is invoked by the lower authorities, is reproduced as under:

“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).”

10.1 The Assessing Officer has invoked clause (iva) of the Explanation according to which consideration for the use or right to use any industrial commercial or scientific equipments falls under the royalty.

10.2 From the facts of the case in hand we find that under the agreements with M/s. Kick Communication, the consideration was not for the use or right to use any equipment due to reasons as under:

(a) The copy of agreement between M/s. Kick Communication and the assessee is available on page 21 to 30 of the assesseeÕs paper book. On page 21 of the paper book, the services have been mentioned as under:

ó1. Services: Lessor agrees to furnish and the lessee agrees to lease the telecommunication services set forth in attachment A attached hereto.ô

The attachment óAô available on page 30 of the paper book has made provision for providing network points between Miami and Mumbai for capacity of 1Mb/IPLC and also for each additional capacity.

(b) Further, on page 26 of the paper book, in clause 3 of service level agreement, the services provided have been listed as under:

ó3. Services Providedô

The Kick Communications technical management team shall provides the following services:

Restoration of services

Notification to customer of updates and current information as requires

Alarm handling and management

Fault co-ordination management

Network and service interruption co-ordination and management

Network and and service reporting

Preventive monitoring and maintenance

Preventive field maintenance"

(c) On page 25 of the paper book, in clause 1.1 of the service level agreement 99.50% service availability has been granted and the service unavailability has been referred to a period during which there is a break in transmission reported to and confirmed by the kick communications customer service.

10.3 Above terms and conditions of the agreement makes, it evident that M/s Kick Communication agreed for rendering services of transmission of call data and its effective management and there was no agreement for use or right to use any industrial commercial or scientific equipment between the non-resident and the assessee and thus the said clause of the Explanation-2 was not applicable over the facts of the instant case.

10.7 Further, the learned Commissioner of Income-tax (Appeals) has invoked clause (iii) and clause (iv) of the Explanation-2 for holding that the consideration to non-resident was in the nature of royalty.

10.7.1 The Ld. Commissioner of Income-tax (Appeals) has referred to consideration for use of the process of transmission of data as royalty. In our opinion, in the Explanation-2, the process referred, is the patentable process and consideration received for allowing use of such patentable process for manufacturing or any other use has been termed as royalty. For earning royalty, the person should have exclusive rights in respect of the process embedded. But in the case of the assessee, we do not find any mention in the agreement for the use of any process, which is of a patentable nature or under exclusive rights of the non-resident party. Further, we also find from the agreements with the Kick Communication that no information concerning technical, industrial, commercial or

scientific knowledge, experience or a skill has been imparted to the assessee by the non-resident party. All the services mentioned in the service level agreement are to effect the service of transmission of data and its effective management so as to ensure 99.50% service availability guarantee as agreed between the parties. In our opinion the clause(iii) and (iv) of Explanation-2 are not applicable over the facts of the instant case.

The agreement between M/s. IGTL Solutions and the assessee is available on pages 1 to 20 of the assesseeôs paper book. On page 3 of the paper book, in clause 2 of the agreement scope of services have been mentioned, which is reproduced as under:

ñ(2) Scope:
Subject to charges and terms and conditions set forth herein IGTL shall provide 'IGTL Connectivity' to the Call Net Indian Ltd. and the Call Net India Ltd. shall avail 'IGTL Connectivity' for the number of Ports and shifts as setout in 'Exhibit 1'. It is clarified that the Call Net India Ltd. can avail more number of ports in multiple of 60, and the same shall be provided by IGTL subject to availability at a additional pro-rata prices.ò

10.9 Further the term ñIGTL Connectivityôhas been defined on page 2 of the assesseeôs paper book as under:ò

ñIGTL Connectivityò shall mean that including Connectivity Facility to enable the Call Net India Ltd. to generate and to cater to Outbound PSTN calls without USA. This shall primarily comprise to co-located equipment, set up at USA and IGTL's arrangement with Local PSTN carrier, using TI Circuits from such Carriers for PSTN Connectivity with USA.ò

10.10 We find that the service in substance is for providing connectivity facility to the assessee to generate and cater to outbound Public Switch

Telephone Network (PSTN) calls within the USA. Thus, the clause (iii), (iv) or (iva) are not applicable for consideration paid to M/s IGTL Solutions by the assessee.

10.10.1 In view of above, we are of the opinion that consideration paid to the non-resident parties does not fall under the term royalty in terms of section 9(1)(vi) of the Act.

10.10.2 Further, we now examine whether the consideration paid by the assessee falls in the definition of the ôroyaltyôin the hands of the recipient as per the DTAA between USA and India. The term ôroyaltyôhas been defined under the DTAA between India and USA in article 12 (3) of the treaty as under:

ñ3. The term "royalties" as used in this Article means :

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

(b) payments of any kind received as consideration for the use of, or the right to use, any industrial, commercial, or scientific equipment, other than payments derived by an enterprise described in paragraph 1 of Article 8 (Shipping and Air Transport) from activities described in paragraph 2(c) or 3 of Article 8.ò

10.11 The learned Assessing Officer has held consideration received for use of right to use any industrial, commercial or scientific equipment as royalty. The Ld. Commissioner of Income-tax (Appeals) has held consideration for use or right to use of process or information as royalty. As we have already held that in the facts of the case only services of transmission of call and connectivity from the end of the Indian Territory

to the person to whom the call is made in USA, have only been provided by the two non-resident parties and there was no use of any process or right to use the process or information was involved in the facts of the case. Similarly, the consideration was not for use or right to use any industrial, commercial or scientific equipment as the control of equipments was with the non-resident parties, and therefore in our opinion the consideration paid also does not fall in the term royalty as defined in the DTAA between India and USA.

10.12 We find that the learned Commissioner of Income-tax (Appeals) relied on the decision of the Tribunal in the case of Asia Satellite Telecommunication Company Limited (supra). The Tribunal observed that the TV channels were utilizing the process made available by the Asia satellite telecommunication company limited in its satellite for the purpose of their business and that the customer were using the process embedded in the satellite for the purpose of their business, and accordingly held that whether any process was used or any service in connection with processes provided, same held within the meaning of royalty as defined in Explanation. -2.

10.13 Above decision of the Tribunal was reversed by the Hon'ble Delhi High Court in the case of Asia Satellite Telecommunications Co, Ltd. Vs. DIT, 332 ITR 340. The Hon'ble High Court held that consideration paid for bandwidth used for up-linking and down-linking of the television signals cannot be termed as royalty either under the section 9(1)(vi) of the Act or under the terms defined in DTAA. The Hon'ble High Court has discussed in detail the use or right to use the process, information or equipments. The relevant paragraphs of the decision of the Hon'ble High Court are reproduced as under:

"55. Keeping in view the aforesaid principles, we now embark upon the interpretative process in defining the ambit and scope of term

'royalty' appearing in Expln. 2 to sub-cl. (vi) of s. 9(1) of the Act. Sub-cl. (i) deals with the transfer of all or any rights (including the granting of a licence) in respect of a patent, etc. Thus, what this sub-cl. envisages is the 'transfer of rights in respect of property' and not transfer of 'right in the property'. The two transfers are distinct and have different legal effects. In first category, the rights are purchased which enable use of those rights, while in the second category, no purchase is involved, only right to use has been granted. Ownership denotes the relationship between a person and an object forming the subject-matter of his ownership. It consists of a bundle of rights, all of which are rights in rem, being good against the entire world and not merely against a specific person and such rights are indeterminate in duration and residuary in character as held by the Supreme Court in the case of Swadeshi Ranjan Sinha vs. Hardev Banerjee AIR 1992 SC 1590. When rights in respect of a property are transferred and not the rights in the property, there is no transfer of the rights in rem which may be good against the world but not against the transferor. In that case, the transferee does not have the rights which are indeterminate in duration and residuary in character. Lump sum consideration is not decisive of the matter. That sum may be agreed for the transfer of one right, two rights and so on all the rights but not the ownership. Thus, the definition of term royalty in respect of the copyright, literary, artistic or scientific work, patent, invention, process, etc. does not extend to the outright purchase of the right to use an asset. In case of royalty, the ownership on the property or right remains with owner and the transferee is permitted to use the right in respect of such property. A payment for the absolute assignment and ownership of rights transferred is not a payment for the use of something belonging to another party and, therefore, no royalty. In an outright transfer to be treated as sale of property as opposed to licence, alienation of all rights in the property is necessary.

56. As noticed above, the Tribunal has held that the appellant is deriving income from lease of transponder capacity of its satellites. The appellant is deriving income from lease of transponder capacity of its satellites. The appellant is amplifying and relaying the signals in the footprint area after having been linked up by the TV channels. The essence of the agreement of the TV channels with the appellant is to relay their programmes in India. The responsibility of the appellant is to make available programmes of the TV channels in India through transponders on its satellite. The function of the satellite in the transmission chain is to receive the modulator carrier

that earth stations emitted as uplinking, amplifying them and retransmitting them and downlink for reception at the destination earth stations. The meaning of the word process being a series of action or steps taken in order to achieve a particular end, considering the role of the appellant in the light of meaning of the term 'process', it is evident that the particular end, viz., viewership by the public at large was achieved only through the series of steps taken by receiving the uplinked signals, amplifying them and relaying them after changing the frequency in the footprint area including India. This is held that the TV channels in entire cycle of relaying the programmes in India were using the process provided by the assessee and, therefore, it is liable to be taxed as royalty income.

57. We have to test the rationality of the aforesaid reasoning and consider the attack thereupon by the appellants in their arguments recorded above. Before that, we may take note of few judgments relevant to the context. In the case of CIT vs. Datacons (P) Ltd. (1985) 47 CTR (Kar) 162 : (1985) 155 ITR 66 (Kar), the company was engaged in processing the data supplied by its customers by using IBM unit record machine computer. The assessee received vouchers and statements of accounts from its customers and converted them into balance sheets, stock accounts, sales analyses etc. They were printed as per the requirement of the customers. The Karnataka High Court held that in all these activities, the assessee had to play an active role by co-ordinating the activities and collecting the information. Such activities amounted to processing of goods. In the case of NV Philips vs. CIT (supra), the assessee received the amount for providing specialized knowledge of manufacturing particular commodity which included working methods, manufacturing process including indications, instructions, specifications, standards and formulae, method of analysis and quality control. It was held that the payment for the user of such specialized knowledge, though not protected by a patent, was assessable as royalty. In the case of DCM Ltd. vs. ITO, the issue related to transfer of comprehensive technical information know-how and supply of equipment. It was held that the collaboration agreement dealing with the dispatch of one or more of its engineers, technologists to visit the factory site of the assessee, train the factory personnel and to commission the specified processes, would not create a PE. Therefore, it was held that the payments were not in the nature of royalty'. In Modern Threads (I) Ltd. vs. Dy. CIT, it was held that the payments were made in instalments to Italian

company for supply of technical knowhow and also for supply of basic process engineering documentation for designing, construction and operation of plant subject to their liability on account of rectifying form, it was held that the amount paid for supply of technical know-how and basic engineering documentation for setting of the plant in India for manufacturing of PTA was the business profit in the hands of Italian company in the absence of PE in India.

58. In the light of our discussion explaining Expln. 2 to s. 9(1) of the Act, let us proceed to apply these principles on the facts of the case. The starting point has to be the nature of services provided by the appellant to its customers as per the agreement arrived at between them. Keeping in view the aforesaid operation of the satellites, we revert back to the agreement entered into between the appellant and its customers. It is clear from various clauses of the agreement (and noticed above), the appellant is the operator of the satellites. It also remains in the control of the satellite. It had not leased out the equipments to the customers. On this basis, it is argued by the appellant that the equipment is used by the appellant and it is only providing and rendering services to its customers and not allowing the customers to use the process. In the case of ISRO (supra), AAR has narrated in detail the process of the operation of a satellite and the role played by the transponder therein.

59. Following features of the agreement entered into by the appellant with its clients need to be highlighted at this stage :

(a) The appellant is a foreign company incorporated in Hong Kong and carries business of providing satellite business and broadcasting facilities.

(b) The clients with whom the appellant has entered into agreement are not the residents of India.

(c) The appellant has launched its satellites in the orbit footprint on which it is extended over four continents including Asia and, thus, covers India.

(d) The agreement signed with the customers which are TV channels, the appellant provides facility of transponder capacity available on its satellite to enable these TV channels to relay their signals. These customers have their own relaying facilities, which are situated outside India. From this facility, the signals are beamed in space where they are received by a transponder located in the appellant's satellite. The transponder receives the signal and on account of the distance these signals have to

travel, they are required to be amplified. After amplification frequency of signals are downlinked to facilitate the transmission of signals. This is how the signals are received over various parts of the earth spanning numerous countries including India.
(e) The outcome, thus, would entirely depend upon the question as to whether any process is used by the TV channels and also whether a secret process is required to bring within the ambit of Expln. 2.

60. Once we keep in mind the aforesaid important aspects, it is not difficult to find the answer to the question posed. In fact, we can say that it is so provided by the AAR in ISRO (supra). A close scrutiny of the said ruling of the AAR would clearly reveal that where the operator has entered into an agreement for lease of transponder capacity and has not given any control over parts of satellite/transponder, the provisions of sub-cl. (vi) would not apply. In the present case also, the appellant had merely given access to a broadband available in a transponder which can be utilized for the purpose of transmitting the signals of the customer. In that case, after taking note in depth, the operation and the functioning of transponder, the AAR emphasized on the fact that data sent by the telecast operator does not undergo any change for improvement through the media of transponder. Following discussion from the said judgment needs to be reproduced :

"13. As IGL does not carry on any business in India through PE, as discussed towards the end, the main contention of Revenue is that the 'charges' paid by the applicant—ISRO under the terms of the agreement is in the nature of consideration paid for the 'use of' or 'right to use' the scientific equipment within the meaning of cl. (b) of art. 13(3) of the treaty.

14. The crucial question that needs to be addressed, therefore, is whether the payment made to IGL under the aforementioned contract constitutes consideration for the use of or right to use equipment of IGL. To answer this question, we have to discern the substance and essence of the contract as revealed from the terms of the contract document, the technical report and other facts furnished by the applicant. The first article in the contract makes it clear that the payment is for the lease of' navigation transponder segment capacity. From the designated transponder (L1 and L5) of Inmarsat satellite, this capacity at a particular frequency is made available to the applicant through INLUS (Navigation Land Uplink Station) which is set up and operated by

the applicant. The capacity is meant to be used for the purpose of providing an augmentation to global satellite navigation system. The capacity will be utilized through data commands issued from the ground station INLUS. Undeniably, the applicant will not be able to operate the transponder in the space but it will be transmitting/uplinking the augmented data to the navigation transponder. Access to the transponder's space capacity is established through the applicant's operations at the ground station INLUS pursuant to which the transponder transmits signals/data received from INLUS from the geo-stationary orbits. The Inmarsat satellite carries many transponders out of which the transponder for navigation purposes will provide the satellite based augmentation system signals in space at two frequencies i.e. 1575.42 MHz (L1) and 1176.45 MHz (L5) which are accessed for the GAGAN project undertaken by the applicant. It is also seen that the navigation transponder which uplinks and downlinks the data is a passive transponder unlike the communication transponder.

15. It will be relevant to know the connotation of the term transponder'. In McGraw Hill's Dictionary of Scientific and Technical Terms, the meaning given is a transmitter-receiver capable of accepting the challenge of an interrogator and automatically transmitting an appropriate reply. In Chamber's Dictionary of Science and Technology, transponder (communication), is defined as an equipment forming part of a communications satellite, which receives signals from a ground station at one frequency and re-transmits them to another ground station or to domestic satellite receivers at another frequency.

16. It is clear that the applicant in the course of carrying out its objectives and operations will not be using any equipment of IGL satellite or the transponder. What the applicant needs to do is to adjust or tune its system to access the navigation transponder space segment capacity. By earmarking a space segment capacity of the transponder for use by the applicant, the applicant does not get possession (actual or constructive) or control of the equipment of IGL. The applicant and the end-users are enabled to have the benefit of use of facility provided by Inmarsat 4th generation satellite and the navigational transponder it has. That is the objective of GAGAN project. The applicant does not use or operate any equipment of IGL. The

lease of space segment capacity related to L1 and L5 transponder only means that a segment of the navigational transponder though which the data passes is allocated to the applicant so that it could be utilized for the specific purpose of making available the augmented data sent by the applicant through its ground station to the users extensively. The substance of the contract is the facility given to the applicant for the utilization of space segment capacity of the transponder for transmitting the augmented data as to the position of an object on land, air or water so that the end user can have access to it through SABS receiver. The use of capacity, as clarified by the applicant involves the use of bandwidth, that is to say, a particular bandwidth in the transponder meant exclusively for navigational purposes is linked to the earth station INLUS. The expression 'use of space segment capacity' of transponder has no reference to any operations performed by means of the transponder. The use or operation of transponder as such is not at all contemplated under the contract. What really happens is that the augmented data sent by INLUS reaches the transponder and it is transmitted back to the earth and the same is accessed by SBAS user receivers in the coverage area. In response to a query, the applicant specifically clarified that the transponder does not perform any operation with reference to the data uplinked and downlinked and "there is no on-board data storage."

61. It is worthwhile to note that the contention of the Department that there was use of transponder by the applicant was specifically rejected in the following terms:

"17. It is contended by the Revenue that in substance, there is use of equipment i.e. transponder by the applicant. The exclusive capacity of specific transponder is kept entirely at the disposal of the applicant. The use of transponder is ensured when it responds to the directions sent through the ground station. Such directions, it is stated, are akin to the operation of TV by remote control apparatus. We find it difficult to accept this contention. The fact that the transponder automatically responds to the data commands sent from the ground station network and retransmits the same data over a wider footprint area covered by Inmarsat satellite does not mean that the control and operation of transponder is with the applicant. Undoubtedly, the applicant does not operate the transponder; it gets access to the

navigation transponder through the applicant's own network/apparatus. The data sent by the applicant does not undergo any change or improvements through the media of transponder. In essence, it amounts to the provision of a communication/navigational link through a facility owned by IGL and exclusively operated/controlled by it. The operation and regulation of transponder is always with IGL. It is also pertinent to notice that a navigation transponder unlike a communication transponder is not an active transponder in the sense it does not amplify. It is a passive transponder, as pointed out by the applicant. This is also a pointer that the applicant does not use the equipment (transponder) as such."

62. It is also clear from the above that the aspect of amplification of data by the transponder is taken only as additional factor, but the judgment is not entirely rested on that. This ruling further categorically demonstrates that in a case like this, services are provided which is integral part of the satellite, remains under the control of the satellite/transponder owner (like the appellant in this case) and it does not vest with the telecast operator/TV channels.

63. Position is substantially the same in the present case as well. The Tribunal has distinguished this judgment and has opined that it is not applicable because of the reason that in ISRO (supra), there was any (sic-no) amplification of the signal whereas in the present case, signals are amplified. That, to our mind, would not make any difference insofar as ultimate conclusion is concerned, in as much as the ruling of the AAR is not founded on the aforesaid consideration. It becomes manifest when we take note of the question posed by the AAR before answering the same. The AAR expressed this as under:

"The crucial question that needs to be addressed, therefore, is whether the payment made to IGL under the aforementioned contract constitutes consideration for the use of or right to use equipment of IGL. To answer this question, we have to discern the substance and essence of the contract as revealed from the terms of the contract document, the technical report and other facts furnished by the applicant."

64. On the aforesaid poser, the AAR discussed the issue and held that the transponder and the process therein are actually utilized for the satellite user for rendering the services to the customer and

further that it cannot be said that the transponder or process employed therein are used by the customer.

65. It needs to be emphasized that a satellite is not a mere carrier, nor is the transponder something which is distinct and separable from the satellite as such. It was explained that the transponder is in fact an inseverable part of the satellite and cannot function without the continuous support of various systems and components of the satellite, including in particular: (a) Electrical power generation by solar arrays and storage battery of the satellite, which is common to and supports multiple transponders on board the satellite.

(b) Common input antenna for receiving signals from the customers' ground stations, which are shared by multiple transponders.
(c) Common output antenna for retransmitting signals back to the footprint area on earth, which are shared by multiple transponders.
(d) Satellite positioning system, including position adjusting thrusters and the fuel storage and supply system therefor in the satellite. It is this positioning system which ensures that the location and the angle of the satellite is such that it receives input signals properly and retransmits the same to the exact desired footprint area.
(e) Temperature control system in the satellite, i.e., heaters to ensure that the electronic components do not cease to operate in conditions of extreme cold, when the satellite is in the shadow.
(f) Telemetry, tracking and control system for the purpose of ensuring that all the abovementioned systems are monitored and their operations duly controlled and appropriate adjustments made, as and when required.

66. It was also not disputed that each transponder requires continuous and sustained support of each of the abovementioned systems of the satellite without which it simply cannot function. Consequently, it is entirely wrong to assume that a transponder is a self-contained operating unit, the control and constructive possession of which is or can be handed over by the satellite operator to its customers. On the contrary, the transponder is incapable of functioning on its own. In fact, the Tribunal has itself demonstrated so in the order as is clear from the following:

"A bare perusal of this meaning reveals that equipment is an instrument or tool which is capable of doing some job independently or with the help of other tools. A part of an equipment incapable of performing any activity in itself cannot be termed as an equipment. We take an example of scissors which has two blades. This scissors is an equipment but when one blade is separated from the other blade, it ceases to be an equipment. In other words, the blade in isolation cannot be termed as an equipment. Reverting to the facts of the present case, we find that the transponder is not an equipment in itself. In other words, it is not capable of performing any activity when divorced from the satellite. It was fairly conceded by the learned Authorised Representative that the transponder in itself without other parts of satellite is not capable of performing any function. Rightly so because satellite is not plotted at a fixed place. It rotates in the same direction and speed as the earth. If it had been fixed at a particular place or the speed or direction had been different from that of earth, it could not have produced the desired results. Transponder is part of satellite, which is fixed in the satellite and is neither moving in itself nor assisting the satellite to and the transponder, namely, a part of it, playing howsoever important role, cannot be termed as equipment."

67. Even after stating so, the Tribunal did not take the aforesaid view to its logical conclusion, viz., the process carried on in the transponder in receiving signals and retransmitting the same, is an inseparable part of the process of the satellite and that process is utilized only by the appellant who is in control thereof. Whether it is done with or without amplification of the signal would not make any difference, in such a scenario.

68. We are inclined to agree with the argument of the learned senior counsel for the appellant that in the present case, control of the satellite or the transponder always remains with the appellant. We may also observe at this stage 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. When we go through the various clauses of the said agreement, it becomes clear 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. We may also point out that against the decision of the AAR in ISRO (supra) case, SLP was dismissed by

the Supreme Court [see Puran Singh Sahni vs. Sundari Bhagwandas Kripalani & Ors. (1991) 2 SCC 180].

69. We may also refer to the following distinction brought out by the Karnataka High Court between leasing out of equipment and the use of equipment by its customer. This was done in the case of Lakshmi Audio Visual Inc. vs. Asstt. Commr. of Commercial Taxes (supra) in the following terms :

> *"9. Thus if the transaction is one of leasing/hiring/letting simpliciter under which the possession of the goods, i.e., effective and general control of the goods is to be given to the customer and the customer has the freedom and choice of selecting the manner, time and nature of use and enjoyment, though within the framework of the agreement, then it would be a transfer of the right to use the goods and fall under the extended definition of "sale". On the other hand, if the customer entrusts to the assessee the work of achieving a certain desired result and that involves the use of goods belonging to the assessee and rendering of several other services and the goods used by the assessee to achieve the desired result continue to be in the effective and general control of the assessee, then, the transaction will not be a transfer of the right to use goods falling within the extended definition of "sale". Let me now clarify the position further, with an illustration which is a variation of the illustration used by the Andhra Pradesh High Court in the case of Rashtriya Ispat Nigam Ltd. vs. CTO.*

Illustration :

> *(i) A customer engages a carrier (transport operator) to transport one consignment (a full lorry load) from place A to B, for an agreed consideration which is called freight charges or lorry hire. The carrier sends its lorry to the customer's depot, picks up the consignment and proceeds to the destination for delivery of the consignment. The lorry is used exclusively for the customer's consignment from the time of loading, to the time of unloading at destination. Can it be said that right to use of the lorry has been transferred by the carrier to the customer ? The answer is obviously in the negative, as there is no transfer of the "use of the lorry" for the following reasons : (i) The lorry is never in the control, let alone effective control of the customer; (ii) the carrier decides how, when and where the lorry moves to the destination,*

and continues to be in effective control of the lorry; (iii) the carrier can at any point (of time or place) transfer the consignment in the lorry to another lorry; or the carrier may unload the consignment en route in any of his godowns, to be picked up later by some other lorry assigned by the carrier for further transportation and delivery at destination.

(ii) On the other hand, let us consider the case of a customer (say a factory) entering into a contract with the transport operator, under which the transport operator has to provide a lorry to the customer, between the hours 8 a.m. to 8 p.m. at the customer's factory for its use, at a fixed hire per day or hire per km. subject to an assured minimum, for a period of one month or one week or even one day; and under the contract, the transport operator is responsible for making repairs apart from providing a driver to drive the lorry and filling the vehicle with diesel for running the lorry. The transaction involves an identified vehicle belonging to the transport operator being delivered to the customer and the customer is given the exclusive and effective control of the vehicle to be used in any manner as it deems fit; and during the period when the lorry is with the customer, the transport operator has no control over it. The transport operator renders no other service to the customer. Therefore, the transaction involves transfer of right to use the lorry and thus be a deemed sale."

70. Argument was addressed on the meaning which is assigned to the term royalty occurring in sub-cl. (iii) of Expln. 2. The learned counsel for the appellant had argued that the doctrine of noscitur a sociis would apply and the process should be treated as item of intellectual property. On this it was argued that the process employed in the transponder of a satellite, i.e., changing of frequency and amplifying the signal, is not at all an item of intellectual property. Though there appears to be some force in this argument, it is not necessary to answer it conclusively. The fact remains that there is no use of process by the TV channels. Moreover, no such purported use has taken place in India. It is stated at the cost of repetition that the telecast companies/customers are situated outside India and so is the appellant. Even the agreements are executed abroad under which the services are provided by the appellant to its customers. The transponder is in the orbit. Merely because it has its footprint on various continents would not mean that the process has taken place

in India. This aspect now stands concluded by the Supreme Court in the case of Ishikawaima-Harima Heavy Industries Ltd. (supra). In that case, the appellant, a non-resident company incorporated in Japan, along with five other enterprises formed a consortium. The consortium was awarded by petronet a turnkey project for setting up a liquefied natural gas (LNG) receiving, storage and regasification facility in Gujarat. The contract specified the role and responsibility of each member of the consortium and the consideration to be paid separately for the respective work of each member. The appellant was to develop, design, engineer, procure equipment, materials and supplies to erect and construct storage tanks including marine facility (jetty and island breakwater) for transmission and supply of LNG to purchasers, to test and commission the facilities, etc. The contract involved : (i) offshore supply, (ii) offshore services, (iii) onshore supply, (iv) onshore services, and (v) construction and erection. The price for offshore supply and offshore services was payable in US dollars, that for onshore supply and onshore services and construction and erection partly in US dollars and partly in Indian rupees. The payment for offshore supply of equipment and materials supplied from outside India was received by the appellant by credit to a bank account in Tokyo and the property in the goods passed to Petronet on the high seas outside India. Though the appellant unloaded the goods, cleared them from customs and transported them to the site, it was for and on behalf of Petronet and the expenditure including the customs duty was reimbursed to it. The price of offshore services for design and engineering including detailed engineering in relation to the supplies, services and construction and erection and the cost of any other services to be rendered from outside India, was also paid in US dollars in Tokyo. On these facts the appellant applied to the AAR (income-tax) for a ruling on the following points :

> *(a) Whether the amounts received/receivable by the appellant from Petronet for offshore supply of equipment, materials, etc., were liable to tax in India under the provisions of the IT Act, 1961, and the Double Taxation Avoidance Convention between India and Japan;*
> *(b) Whether the amounts received/receivable from Petronet for offshore services were chargeable to tax in India under the Act and the Convention; and*
> *(c) Would the appellant be able to claim deduction for expenses incurred in computing the income from offshore services.*

The authority ruled :

(i) That though property in the goods passed to Petronet while the goods were on the high seas, and insofar as the activities of the appellant for taking delivery of the goods from the ship, payment of customs duty and transportation of the goods to the site were concerned, these facts did not militate against the property in the goods passing to the appellant. In connection with the offshore supply, certain operations were inextricably interlinked in India, such as, signing of the contract in India which imposed liability on the appellant to procure equipment and machinery in India and receiving, unloading, storing and transporting, paying demurrage and other incidental charges on account of delay in clearance. The price of the goods covered not only their price but also of all these operations which were carried out in India and from which income accrued to the appellant. Therefore, income accrued to the appellant from the offshore supply through business connection in India and some operations of the business were carried out in India. Profits were deemed to accrue/arise in India would be only such part of the profits as was reasonably attributable to the operation carried out in India.

(ii) That having regard to art. 7(1) of the Convention for Avoidance of Double Taxation and Fiscal Evasion with respect to taxes on income between India and Japan read with para 6 of the protocol supply of equipment or machinery (sale of which was completed around, the order having been placed directly by the overseas office of the enterprise) would be within the meaning of the phrase directly or indirectly attributable to that PE and, therefore, so much of the amount received or receivable by the appellant as was directly or indirectly attributable to the PE as postulated in para 6 of the protocol would be taxable in India. The price of the offshore services would be deemed to accrue or arise under s. 9(1)(vii) of the IT Act, 1961. And in as much as fees for technical services were specifically provided in art. 12 of the Convention, they would not fall under art. 7. Therefore, the price of the offshore services was taxable in India under the Act as well as the Convention.

(iii) That, however, in view of s. 115A(1)(b)(B) of the Act and art. 12(2) of the Convention, tax was payable at the fixed rate of 20 per cent of the gross amount of fees for technical services and

the applicant would not be able to claim any deduction from the amount.

71. In that case, the appellant approached the Supreme Court challenging the aforesaid judgment of the AAR. The Supreme Court reversed the decision of the AAR and in the process, inter alia, held as under :

"(i) That s. 9 of the IT Act, 1961, raises a legal fiction; but, having regard to the contextual interpretation and in view of the fact that the Court is dealing with a taxation statute, the legal fiction must be construed having regard to the object it seeks to achieve. The legal fiction created under s. 9 must also be read having regard to the other provisions thereof.

(ii) That the second sentence of art. 7(1) which allowed the State of the PE to tax business profits, but only so much of them as was attributable to the PE excluded the applicability of the principle that where there was a PE, the State of the PE should be allowed to tax all income derived by the enterprise from sources in the State irrespective of whether or not such income was economically connected with the PE. The State of the PE was allowed to tax only those profits which were economically attributable to the PE, i.e., those which resulted from the PE's activities, which were economically from the business carried on by the PE. In this case, the PE's non-involvement in the transaction of offshore supply, excluded it from being a part of the cause of the income itself and thus there was no business connection.

(iii) That for attracting the tax there had to be some activities through the PE. If income arose without any activity of the PE, even under the Convention the taxation liability in respect of overseas services would not arise in India. Sec. 9 spelled out the extent to which the income of a non-resident would be liable to tax in India. Sec. 9 had a direct territorial nexus. Relief under a double taxation avoidance treaty, having regard to the provisions contained in s. 90(2), would arise only in the event taxable income of the assessee arose in one Contracting State on the basis of accrual of income in another Contracting State on the basis of resident. So far as accrual of income in India was concerned, taxability must be read in terms of s. 4(2) r/w s. 9, whereupon the question of seeking assessment of such income

in India on the basis of the double taxation treaty would arise. Para 6 of the protocol to the Convention was not applicable, because, for the profits to be attributable directly or indirectly, the PE must be involved in the activity giving rise to the profits.

(iv) That where different severable parts of a composite contract were performed in different places, as in this case, the principle of apportionment could be applied to determine which fiscal jurisdiction could tax that particular part of the transaction. This principle helped to determine where the territorial jurisdiction of a particular State lay and to determine its capacity to tax on event. Applying it to composite transactions which had some operations in one territory and some in the other, was essential to determine the taxability of various operations. The concepts of profits of business connection was relevant for the purpose of application of s. 9, the concept of PE was relevant for assessing the income of a non-resident under the Convention.

(v) That in this case the entire transaction was completed on the high seas and, therefore, the profits on sale did not arise in India. Once excluded from the scope of taxation under the IT Act application of the double taxation avoidance treaty would not arise.

(vi) That, in relation to offshore services, s. 9(1)(vii)(c) required two conditions to be met: to be taxable in India the services which were the source for the income sought to be taxed had to be rendered in India as well as utilized in India.

(vii) That whatever was payable by a resident to a non-resident by way of technical fees would not always come within the purview of s. 9(1)(vii). It must have sufficient territorial nexus with India so as to furnish a basis for imposition of tax.

(viii) That even in relation to such income, viz., income from offshore services, the provisions of art. 7 of the Convention would be applicable, as services rendered outside India would have nothing to do with the PE in India. Thus, if any services had been rendered by the head office of the appellant outside India, only because they were connected with the PE, even in relation to the principle of apportionment would apply.

72. The Tribunal has made an attempt to trace the fund flow and observed that since the end consumers, i.e., persons watching TV in India are paying the amounts to the cable operators who in turn are paying the same to the TV channels, the flow of fund is traced to India. That is a farfetched ground to rope in the appellant in the taxation net. The Tribunal has glossed over an important fact that the money which is received from the cable operators by the telecast operators is treated as income by these telecast operators which has accrued in India and they have offered and paid tax. Thus, the income which is generated in India has been duly subjected to tax in India. It is the payment which is made by the telecast operators who are situated abroad to the appellant which is also a nonresident, i.e., sought to be brought within the tax net."

10.14 In the case of instant assessee, the control of equipment was with the non-resident parties and they have not leased the equipments, i.e. the undersea cable etc. to the assessee. The equipments were owned and used by the non-resident parties only and therefore it cannot be said that the consideration paid was for use of equipment by the assessee. Similarly the non-resident parties have not provided use of any process to the assessee, which are of patentable nature having exclusive ownership rights. The assessee was not concerned with any of the process involved in transmission or connectivity of call data. The only concern of the assessee was transmission of call data beyond the boundaries of India to the person in USA to whom call was made.

10.15 Identical issue came up before the Delhi bench of Tribunal in the case of Bharti Airtel Ltd. vs. Income Tax Officer (supra), wherein also the issue whether payment towards call interconnectivity charges for call transmission on foreign network was amounted to royalty or not. The findings of the Tribunal are reproduced as under:

"11.4 Thus, the essence of the agreement is that each party to the contract shall connect to network of other party at port locations. It is not a case of lease or licence of network of foreign operator in

favour of the appellant. Once two networks are interconnected, the flow of call is completed. A foreign operator connects his network with network of the appellant and call coming from appellant's network is taken up by network of foreign operator for further transmission. In this model, only foreign operator is using his network and appellant is not using or is not allowed to use network of foreign operator. Thus, there is no 'use' on part of the appellant. Whether taking-up of call by network of foreign operator from network of the appellant is a 'process', is another issue to be looked into. The AO has not given a finding to the effect that it constitutes a 'process'. According to Explanation 6, which is proposed to be incorporated in section 9(1)(vi) of the Act by Finance Act, 2012, the process shall include transmission by optic fibre or similar technology. Thus, after this amendment, the transmission of ITA Nos. 3593 TO 3596/Del/2012 [Bharti Airtel Ltd. vs. ITO(TDS)] & ITA Nos. 4076 TO 4079/Del/2012 [ITO(TDS) vs. Bharti Airtel Ltd.] call across gateway/interconnect shall be a 'process' under domestic law. However, even if there is a 'process' involved; there is no use of it by the appellant. In discussion supra under Issue no. 1, it has been held that non-resident telecom operator has provided technical services to the appellant. This is possible only when non-resident operator is using his network. Without using his network, non- resident cannot provide services to the appellant. Now, when non-resident is using his network, it cannot be said that the appellant is using the network of non-resident operator. Therefore, two situations are mutually exclusive. Only one of them, either non-resident operator or the appellant is using the network of non-resident while transmission of call through optic fiber. It has already been held that non-resident operator has provided technical services to the appellant as is the case made by the AO, consequently it cannot be said that payments made by the appellant are for 'use of process' and hence in nature of royalty. The appellant has further contended that reliance placed by the AO on decision in case of Verizon Communications Singapore Pvt. Ltd. v. ITO: [2011] 45 SOT 263(Chennai) is misplaced. I have carefully gone through facts of the case law. In that case, the Indian payer company had obtained 'leased lines' on hire basis under a contract from non-resident Verizon Communication. This is a ITA Nos. 3593 TO 3596/Del/2012 [Bharti Airtel Ltd. vs. ITO(TDS)] & ITA Nos. 4076 TO 4079/Del/2012 [ITO(TDS) vs. Bharti Airtel Ltd.] vital fact which makes all the difference. When an Indian Co. takes leased line on hire, then it can be said that it had 'used' it. In present appeal under consideration, the appellant has neither been leased

nor been given on hire network of foreign operator, then it cannot be said that the appellant has 'used' the network belonging to foreign operator. Therefore, reliance of AO on the said case law is misplaced.

11.5 It is seen from proposed Explanation 5 & 6 and Memorandum of explanation that meaning of word 'process' has been widened, the 'process' need not be secret and situs of control & possession of right, property or information has been rendered irrelevant. However, all these changes do not affect the definition of royalty as per DTAA. In Article 13 (3)(a) of Indo-UK tax treaty, the word employed is 'use or right to use' in contradistinction to the word 'use' in domestic law. The meaning attached to phrase 'use or right to use' has been explained in various judicial decisions in case of Mis Yahoo India Pvt Ltd vs. DCIT (ITAT Mumbai), Standard Chartered Bank v.' DDIT, Mumbai, ISRO Satellite Centre [2008 307 ITR 59 AAR] and Dell International Services (India) P. Ltd. [2008305 ITR 37 AAR]. All these judicial pronouncements say that in order to satisfy 'use or right to use'; the control and possession of right, property or ITA Nos. 3593 TO 3596/Del/2012 [Bharti Airtel Ltd. vs. ITO(TDS)] & ITA Nos. 4076 TO 4079/Del/2012 [ITO(TDS) vs. Bharti Airtel Ltd.] information should be with payer. Therefore, under DT AA, the restricted meaning of royalty shall continue to operate despite amendments in domestic law.

11.6 The appellant has further argued that even if it is assumed that payments partake the character of royalty after retrospective amendment in the act, the appellant cannot be held to be assessee in default in respect of those payments. I find force in this argument in view of various judicial decisions relied upon by the appellant. The obligation imposed upon the appellant u/s 195 to deduct tax is 'at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier '. Therefore time of credit or actual payment of sum is relevant to see the obligation of the payer. Thus, subsequent amendment though retrospective in effect, cannot create any obligation upon payer which did not exist at time of crediting or actual payment of the sum.

11.7 In view of discussion supra, I have no hesitation to hold that payments made by the appellant are not in nature of royalty under domestic law and relevant DTAA. This disposes off ground of appeal no. 19 which is accordingly allowed."

10.16 Further the assessee in support of the proposition that amendment under section 9(1)(vi) of the Act by finance Act 2012 has no bearing on the provisions of DTAA has relied on the decision of the Hon'ble Delhi High Court in the case of DIT Vs. New Sky Satellite BV, in ITA 473/2012. In the instant case also the assessment year involved is 2002-2003, and thus the Explanation-5 and 6 and Memorandum of Explanation cannot be brought into action as there has not been any corresponding change in the definition of the term royalty in the DTAA between India and the USA. Accordingly, we are of the opinion that under the DTAA, the restricted meaning of the royalty shall continue to operate despite the amendment in law.

10.17 As far as the assessee is concerened, in case of difference between provisions of the Act and an agreement under section 90 i.e. (DTAA), the provisions of the agreement shall prevail over the provisions of the Act.

10.18 In view of our discussion above, we hold that the payments made by the assessee are not in the nature of royalty either under the domestic law or relevant DTAA.

11. Further, in the case of the instant assessee, it has been argued by the learned counsel that even if it is assumed that payment was in the nature of royalty after retrospective amendment in the Act, the assessee cannot be held in default for not deducting tax on those payments. In support of the contention, learned counsel has relied on the decision of the Delhi bench of Tribunal in the case of Business India Televisions International Limited Vs. ACIT, 11 SOT 486. We agree with the contention of the argument of learned counsel in view of the judicial decisions relied upon. The obligation under section 195 of the Act to deduct tax is at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by issue of cheque or

draft or any other mode, whichever is earlier. Therefore, it is relevant to see the obligation of the payer at the time of credit or actual payment and any subsequent amendment through retrospective effect, cannot create any obligation upon the payer which did not exist at the time of crediting or actual payment of the sum.

12. Thus, we hold that no disallowance could have been made under section 40(a)(i) of the Act for non-deduction of tax on the payments to non-resident parties, namely, M/s Kick Communication and M/s IGTL Solutions. Accordingly, the ground No. 1 of the appeal is allowed.

13. The learned Commissioner of Income-tax (Appeals) has alternatively held that the payments to the above two non-resident parties was chargeable in their hands as ñFee for Technical Servicesò (FTS). In ground No. 1.1, the assessee has challenged this alternative finding of the learned Commissioner of Income-tax (Appeals).

14. In Section 9(1)(vii) of the Act, Fee for Technical Services, which has been deemed as income accrue or arise in India, as under:

> *"9(1)(vii) income by way of fees for technical services payable by—*
>
> *(a) ……*
>
> *(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) ……."*

15. Further, the ñFee for Technical Servicesô has been defined in Explanation -2 below the section 9(1)(vii), which is reproduced as under:

> *"Explanation 2.—For the purposes of this clause, "fees for technical services" means any consideration (including any lump sum consideration) for the rendering of any managerial, technical or consultancy services (including the provision of services of technical or other personnel) but does not include consideration for any construction, assembly, mining or like project undertaken by the recipient or consideration which would be income of the recipient chargeable under the head "Salaries".*

16. In the instant case, the CIT(A) has alleged that the non-resident parties have rendered services of transmission of call beyond Indian Territory, which are technical services. We find that the Hon'ble Delhi High Court in the case of CIT V/s Bharti Cellular Ltd. (2008) 175 Taxman 575 (Delhi) has held that technical services must be rendered by human element and it does not include any service provided by machine or robots. The call connectivity and transmission services have been held as not involving human element by the Tribunal in the case of Bharti Airtel Ltd. Vs. Income Tax Officer (supra). In the instant case, the Revenue has not brought forwarded any evidences that human element was involved in call transmission services through dedicated bandwidth. The identical issue was before the Authority for Advance Ruling in the case of Cable & Wireless Networks India (P) Ltd. The facts of the case has been submitted by the learned counsel in his submission. The assessee company proposed to enter into an agreement with M/s. Cable & Wireless, UK with a view to provide end-to-end international long distance telecommunication services to its Indian customers. M/s. Cable & Wireless, UK was required to provide international leg of the service using it international infrastructure & equipments. The assessee sought ruling of the AAR on the issue whether the amount payable by the assessee would be in the nature of 'Fee for Technical Services' (FTS) within the meaning of section 9(1) or within the meaning of term in Article 13 of the agreement for avoidance of double taxation agreement. The Authority of Advance Ruling ruled as under:

> *"7. We shall first take up the issue whether the applicant pays fees to C&W UK for rendering 'technical services' under the Act or under the treaty. Explanation 2 to para (vii) of section 9(1) defines 'fees for technical services' to mean any consideration paid for rendering any managerial, technical or consultancy services, including provision of services of technical or other personnel. In the present case, in*

carrying telecom signals for Marseilles to other countries, C&W UK is not providing any managerial, technical or consultancy services, nor is it providing the services of its technical or other personnel to the applicant. C&W UK performs this part of service itself without the involvement of the applicant. The applicant has thus rightly urged that the fees paid by it to C&W UK is not in the nature of fees for technical services under the Act. So far as article 13(4) of DTAA is concerned, the first part of it defines 'technical services' in a manner similar to Explanation 2 to section 9(1)(vii), but it further qualifies this expression in clauses (a), (b) & (c). Clause (c) is relevant for the present consideration. This clause requires that the technical service in question should make available technical knowledge, experience, skill, know-how or process, or consist of the development and transfer of a technical plant or technical design (emphasis supplied). From the description of service presented before us, we do not find that the requirements of clause (c) are fulfilled here. First, no technical service is rendered and secondly, there is no transfer of technology. The Revenue also concedes that this is not a case of payment of fees for technical services."

17. We find that in the case of Bharti Airtel Ltd. Vs. ITO (supra) the Tribunal, Delhi Bench has decided the identical issue of payment made for carrying calls from outside India and terminating such calls in India. The relevant part of the decision is reproduced as under:

"23. A perusal of the above extracted paras leads to the following conclusions:

The Assessee, as part of its ILD Telecom Services business, is responsible for providing services to its subscribers in respect of calls originated/terminated outside India. Thus, for the provisions of ILD services, the Assessee is required to obtain the services of FTOs for provision of Carriage Connectivity Services over the last leg by the communication channel i.e. the lack of communication channel where the assessee does not have a Licence/ capacity to provide connectivity services. Thus, the ILD business is the provisions of connectivity to the subscribers for international portion of the call, which may or may not originate domestically. The local connectivity within India is provided by the Access Providers and the National Long Distance Operators (NLD operators) and the

International connectivity by the ILD Operators interconnection with FTO, who provide the last mile connectivity. An international call has to be routed through NLD/ILD using the International Gate way. For termination of the international calls in India, ILD have commercial arrangements with foreign carriers who deliver the Traffic using the international connectivity and calls are delivered to the Indian ILD Operator. The assessee entered into an agreement with Overseas Network Corporate to connect the call over the network. This is done to provide seamless connectivity services to the subscribers. The Access Provider provide seamless end to end connectivity to the subscribers and the entire revenue arise out of such services is paid by the subscribers to the Access Provider. If the NLD Operator is difference from Access Provider, then the NLD Operator Bills the Access Provider for his part of service rendered. The ILD Operator is in turn billed by the FTO in the form of Inter-connected Usage Charges (IUC).

24. The basic issue before us is whether such Interconnected Charges Billed by the FTOs and paid by the Assessee are in the nature of Fee of Technical Services (FTS) or in the nature of Royalty. We would first take up the adjudication of these two issues and then we would be reverting to other issues.

25. Issue No. 1- Whether the payments of IUC by assessee to FTOs are taxable as fees for technical services under s. 9(1)(VII) of the Act. (As the Section 9(1)(vii) has already been extracted in the earlier paragraphs, we do not repeat the same.)

26. The Hon'ble Delhi High Court on this issue held as follows in the assessee's own case i.e. CIT vs. Bharti Cellular Ltd. (2009) 319 ITR 139 (Delhi):-

"The expression 'fees for technical services' as appearing in s. 194J has the same meaning as given to the expression in Expln. 2 to s. 9(1)(vii). In the said Explanation, the expression 'fees for technical services' means any consideration for rendering any (managerial, technical or consultancy services'. The word (technical' is preceded by the word 'managerial' and succeeded by the word 'consultancy'. Since the expression 'technical services' is in doubt and is unclear, the rule of noscitur a sociis is clearly applicable. This would mean that the word 'technical' would take colour from the words 'managerial' and 'consultancy', between which it is sandwiched. A managerial service would be one which pertains to or

has the characteristic of a manager. It is obvious that the expression (manager' and consequently (managerial service' has a definite' human element attached to it. To put it bluntly, a machine cannot be a manager. The service of consultancy also necessarily entails human intervention. The consultant, who provides consultancy service, has to be a human being. A machine cannot be regarded as a consultant. From the above discussion, it is apparent that both the words 'manaqerial" and 'consultancy' involve a human element. And, both, managerial service and consultancy service, are provided by humans. Consequently, applying the rule of noscitur a soccis, the word 'technical' as appearing in Expln. 2 to s. 9(1)(vii) would also have to be construed as involving a human element. But, the facility provided by MTNL/ other companies for interconnect/ port access is one which is provided automatically by machines. It is independently provided by the use of technology and that too, sophisticated technology, but that does not mean that MTNL/ other companies which provide such facilities are rendering any technical services as contemplated in Expln. 2 to s. 9(l)(vii). This is so because the expression 'technical services' takes colour from the expressions 'managerial services' and 'consultancy services' which necessarily involve a human element or, what is nowadays fashionably called, human interface. In the facts of the present appeals, the services rendered qua interconnection port access do not involve any human interface and, therefore, the same cannot be regarded as 'technical services' as contemplated under s. 194J. The interconnect/ port access facility is only a facility to use the gateway and the network of MTNL/ other companies. MTNL or other companies do not provide any assistance or aid or help to the respondents/ assessees in managing, operating, setting up their infrastructure and networks. No doubt, the facility of interconnection and port access provided by MTNL/ other companies is 'technical' in the sense that it involves sophisticated technology. The facility may even be construed as a 'service' in the broader sense such as a 'communication service'. But, while interpreting the expression 'technical service', the individual meanings of the words 'technical' and 'service' have to be shed. And only the meaning of the whole expression 'technical services' has to be seen. Moreover, the expression 'technical service' would have reference to only technical service rendered by a human. It would not include any service provided by machines or robots. Thus, the interconnect charges/ port access charges cannot be regarded as fees for technical services." [emphasis supplied]

27. The judgment of the Hon'ble Delhi High Court in the aforesaid case may thus be summarized as under:

• The rule of noscitur a sociis is clearly applicable and the word 'technical' would take colour from the words 'managerial' and 'consultancy', between which it is sandwiched.

• Both managerial service and consultancy service are provided by humans.

Consequently, applying the rule of noscitur a soccis, the word 'technical' as appearing in Expln. 2 to s. 9(1)(vii) would also have to be construed as involving a human element • The expression 'technical service' would have reference to only technical service rendered by a human.

• MTNL or other companies do not provide any assistance to the assessee in managing, operating, setting up their infrastructure and networks.

• No doubt, such a facility is 'technical' in the sense that it involves sophisticated technology and may even be construed as 'communication service' but while interpreting the entire expression 'technical service', the individual meanings of the words 'technical' and 'service' have to be shed and only the meaning' of the whole-expression 'technical services' has to, be seen.

• The services rendered qua interconnection/ port access do not involve any human interface and, therefore, the same cannot be regarded as 'technical services' as contemplated under s. 194J."

28. The phraseology of Fees for Technical Services covers only such technical services provided for Fees. There should be a direct co-relation between the Services which are on technical nature and the consideration received in lieu of rendering the services. The services can be said to be of technical nature is the special skills and knowledge relating to technical field which required for the provisions of such services. These are required to be rendered by humans. The services provided by machines and robust do not fall within the ambit of technical services as provided u/s. 9(1)(vii) of the Act.

29. On appeal by the Revenue, the Hon'ble Supreme Court in the case reported as CIT vs. Bharti Cellular Ltd. (2011) 330 ITR 239

upheld the proposition of law laid down by the Hon'ble Delhi High Court. The Hon'ble Supreme Court has held as under:-

"The question basically involved in the lead case is:

whether TDS was deductible by M/s. Bharti Cellular Limited when it paid interconnect charges/access/port charges to BSNL? For that purpose, we are required to examine the meaning of the words "fees for technical services" under Section 194J read with clause (b) of the Explanation to Section 194J of the Income Tax Act, 1961, [`Act', for short] which, inter alia, states that "fees for technical services" shall have the same meaning as contained in Explanation 2 to clause (vii) of Section 9(1) of the Act. Right from 1979 various judgments of the High Courts and Tribunals have taken the view that the words "technical services" have got to be read in the narrower sense by applying the rule of Noscitur a sociis, particularly, because the words "technical services" in Section 9(1)(vii) read with Explanation 2 comes in between the words "managerial and consultancy services".

The problem which arises in these cases is that there is no expert evidence from the side of the Department to show how human intervention takes place, particularly, during the process when calls take place, let us say, from Delhi to Nainital and vice versa. If, let us say, BSNL has no network in Nainital whereas it has a network in Delhi, the Interconnect Agreement enables M/s. Bharti Cellular Limited to access the network of BSNL in Nainital and the same situation can arise vice versa in a given case. During the traffic of such calls whether there is any manual intervention, is one of the points which requires expert evidence. Similarly, on what basis is the "capacity" of each service provider fixed when Interconnect Agreements are arrived at? For example, we are informed that each service provider is allotted a certain "capacity". On what basis such "capacity" is allotted and what happens if a situation arises where a service provider's "allotted capacity" gets exhausted and it wants, on an urgent basis, "additional capacity"? Whether at that stage, any human intervention is involved is required to be examined, which again needs a technical data. We are only highlighting these facts to emphasise that these types of matters cannot be decided without any technical assistance available on record. There is one more aspect that requires to be gone into. It is the contention of Respondent No.1 herein that Interconnect Agreement between, let us say, M/s. Bharti Cellular Limited and BSNL in these cases is

based on obligations and counter obligations, which is called a "revenue sharing contract". According to Respondent No.1, Section 194J of the Act is not attracted in the case of "revenue sharing contract". According to Respondent No.1, in such contracts there is only sharing of revenue and, therefore, payments by revenue sharing cannot constitute "fees" under Section 194J of the Act. This submission is not accepted by the Department. We leave it there because this submission has not been examined by the Tribunal. In short, the above aspects need reconsideration by the Assessing Officer. We make it clear that the assessee(s) is not at fault in these cases for the simple reason that the question of human intervention was never raised by the Department before the CIT. It was not raised even before the Tribunal; it is not raised even in these civil appeals. However, keeping in mind the larger interest and the ramification of the issues, which is likely to recur, particularly, in matters of contracts between Indian Companies and Multinational Corporations, we are of the view that the cases herein are required to be remitted to the Assessing Officer (TDS).

Accordingly, we are directing the Assessing Officer (TDS) in each of these cases to examine a technical expert from the side of the Department and to decide the matter within a period of four months. Such expert(s) will be examined (including cross-examined) within a period of four weeks from the date of receipt of the order of this Court. Liberty is also given to Respondent No.1 to examine its expert and to adduce any other evidence. Before concluding, we are directing CBDT to issue directions to all its officers, that in such cases, the Department need not proceed only by the contracts placed before the officers."

29.1 Thus in our view the proposition of law laid down in the judgment of the Hon'ble Delhi High Court have attained finality. The Hon'ble Supreme Court held that the issue as to whether there is involvement / presence of human element or not was a factual and technical matter and required to be examined. The other proposition have been accepted by the Hon'ble Supreme Court. As the Hon'ble Supreme Court was of the opinion that this factual aspect of human intervention was not examined by the AO, the matter was remanded to the AO for factual examination only. The AO in pursuance of the directions of the Hon'ble Supreme Court examined witness on oath and also gave the assessee the opportunity to cross examine them. He also re- examined the expert witness. Our decision will be based on the evidence so collected by the AO on this aspect of human

intervention in the services rendered. It held that the word "technical services" have got to be read in the narrower sense by applying the rule of noscitur a sociis, particularly, because the words "technical services" in Section 9(1)(vii) r/w Expln. 2 comes in between the words "managerial and consultancy services". Hence, there should be involvement/ presence of human element for coming to a conclusion that "technical services" can be said to have been rendered in terms of Explanation 2 to Section 9(1)((vii) of the Act. In our view the Hon'ble Supreme Court of India has approved the proposition laid down by the Hon'ble High Court, that this is a service and that if would be FTS as defined u/s. 9(1)(vii) if there is human interference in such communication service. Hence the issue to be considered is narrow and based on evidence collected by the Revenue post the Hon'ble Supreme Court judgment. All other issues are no more res-integra.

29.2 This aspect as to whether a human element is involved in such interconnect services or not, has been examined by different Benches of the Tribunal based on the evidence collected by the AO in the above stated set-aside proceedings. The facts that are on record are the same as the facts and evidence which have been examined by various Coordinate Benches of the Tribunal. These include the statement of experts recorded by the Assessing Officer and the cross examination done by the Representative of the Company. For the sake of brevity, we do not extract the statement and cross examination etc. of the various experts, as these were considered in detail by the Coordinate Benches and it was held as follows:

29.3 The Kolkata Bench of the Tribunal in the case of Vodafone East Ltd. vs. Addl. CIT in ITA No. 243/Kol/2014, vide order dated 15.9.2015 held as follows:-

"From the aforesaid statement recorded from technical experts pursuant to the directions of the Supreme Court in CIT Vs. Bharti Cellular Ltd. (330 ITR 239) which has been heavily relied upon by the Learned CITA, we find that human intervention is required only for installation setting up/ repairing/ servicing/ maintenance/ capacity augmentation of the network. But after completing this process, mere interconnection between the operators while roaming, is done automatically and does not require human intervention and accordingly cannot be construed as technical services. It is common knowledge that when one of the subscribers in the assessee's circle

travels to the jurisdiction of another circle, the call gets connected automatically without any human intervention and it is for this, the roaming charges is paid by the assessee to the Visiting Operator for providing this service. Hence we have no hesitation to hold that the provision of roaming services do not require any human intervention and accordingly we hold that the payment of roaming charges does not fall under the ambit of TDS provisions u/ s 194J of the Act."

30. The Jaipur Bench of the Tribunal in the case of Bharti Hexacom Ltd. vs. ITO (TDS) in ITA 656/JP/2010 dated 12.6.2015 held as follows :

"11. We have heard the rival contentions of both the parties and perused the material available on the record. After going through the order of the Assessing Officer, ld CIT(A); submissions of the assessee as well as going through the process of providing roaming services; examination of technical experts by the ACIT, TDS, New Delhi in the case of Bharti Cellular Ltd.; thereafter cross examination made by M/s Bharti Cellular Ltd.; also opinion of Hon'ble the then Chief Justice of India Mr. S.H. Kapadia dated 03/09/2013 and also various judgments given by the ITAT Ahmadabad Bench in the case of Canara Bank on MICR and Pune Bench decision on Data Link Services. We find that for installation/ setting up/ repairing/ servicing/ maintenance capacity augmentation are require human intervention but after completing this process mere interconnection between the operators is automatic and does not require any human intervention. The term Inter Connecting User Charges (IUC) also signifies charges for connecting two entities. The Coordinate Bench also considered the Hon'ble Supreme Court decision in the case of Bharti Cellular Ltd. in the case of i-GATE Computer System Ltd. and held that Data Link transfer does not require any human intervention and charges received or paid on account of this is not fees for technical services as envisaged in Section 194J read with Section 9(1)(vii) read with Explanation-2 of the Act. In case before us, the assessee has paid roaming charges i.e. IUC charges to various operators at Rs.10,18,92,350/-. Respectfully following above judicial precedents, we hold that these charges are not fees for rendering any technical services as envisaged in Section 194J of the Act.
Therefore, we reverse the order of the ld CIT(A) and assessee's appeal is allowed on this ground also."

31. The AO as well as the Ld. CIT(A) has recorded that there is no human intervention when the call is successfully completed. It is also not disputed that there is no difference in the technology, system and methodology used by Telecom Companies in providing inter-connection of domestic calls or of international calls. So what decision is applicable for use of local calls also applies to "IUC" of international calls. Thus the view taken on the deductibility of TDS on IUC charges paid for local inter connectivity service would on all fours apply to charges paid for "IUC" for international inter connectivity.

32. The Chennai Bench of the ITAT in the case of M/s Dishnet Wireless Ltd. vs. DCIT in ITA No. 320 to 329/Mad/ 2014 vide order dated 20.7.2015 on the aspect of human intervention held as follows:-

"25. Now coming to roaming charges, the contention of the assessee is that human intervention is not required for providing roaming facility, therefore, it cannot be considered to be a technical service. We have gone though the judgment of Apex Court in Bharti Cellular Limited (supra). The Apex Court after examining the provisions of Section 9(l)(vii) of the Act, found that whenever there was a human intervention, it has to be considered as technical service. In the light to the above judgment of the Apex Court, the Department obtained an expert opinion from Sub-Divisional Engineer of BSNL. The Sub- Divisional Engineer clarified that human intervention is required for establishing the physical connectivity between two operators for doing necessary system configurations. After necessary configuration for providing roaming services, human intervention is not required. Once human intervention is not required as found by the Apex Court, the service provided by the other service provider cannot be considered to be a technical Service. It is common knowledge that, when one' of the subscribers in the assessee's circle travels to the jurisdiction of another circle, the call gets connected automatically without any human intervention. It is due to configuration of software system in the respective service provider's place. In fact, the Sub-Divisional Engineer of BSNL has explained as follows in response to Question No. 23:-

"Regarding roaming services as explained to question no. 21.

Regarding interconnectivity, initial human intervention is required for establishing the physical connectivity and also for doing the required configuration. Once it is working fine, no intervention is required. In case of any faults human intervention is required for taking necessary corrective actions." In view of the above, once configuration was made, no human intervention is required for connecting roaming calls. The subscriber can make and receive calls, access and receive data and other services without human intervention. Like any other machinery, whenever the system breakdown, to set right the same, human intervention is required. However, for connecting roaming call, no human intervention is required except initial configuration in system. This Tribunal is of the considered opinion that human intervention is necessary for routine maintenance of the system and machinery. However, no human intervention is required for connecting the roaming calls. Therefore, as held by the Apex Court in Bharti Cellular Limited (supra), the roaming connections are provided without any human intervention and therefore, no technical service is availed by the assessee. Therefore, TDS is not required to be made in respect of roaming charges paid to other service providers."

33. All the Benches of the Tribunal are unanimous in their view on this issue. We see no reason whatsoever to deviate from these views. Hence consistent with the view taken in the above referred orders, we hold that the payment in question cannot be characterized as Fee for Technical Services u/s. 9(1)(vii) of the Act. There is no manual or human intervention during the process of transportation of calls between two networks. This is done automatically. Human intervention is required only for installation of the network and installation of other necessary equipments/ infrastructure. Human intervention is also necessary for maintaining, repairing and monitoring each operator or individual network, so that they remain in a robust condition to provide faultless services to the customers. Human intervention is also required in case where the network capacity has to be enhanced by the telecom operators. Such human intervention cannot be said to be for inter-connection of a call.

34. Where routing of every call has been decided, the exhaustive standard of capacity of the transporter network will automatically re-route through another channel through another operator. Human intervention in setting up enhanced capacity has no connection or relation with the traffic of call. Thus it is clear that in the process of

actual calls, no manual intervention is required. The finding of the revenue authorities that interconnection is a composite process, involving several processes which require human intervention is erroneous. The test laid down by the Hon'ble Supreme Court of India in its order when the case was remanded to the AO is to find out as to whether "during traffic of calls, is there was any manual intervention?". There is no reference to the issues of set up, installation or operation maintenance or repair of network as explained by the Ld. CIT(A). These decisions of the various Benches of the ITAT, when read with the judgment of the Hon'ble Delhi High Court as well as the Hon'ble Supreme Court, would settle this matter in favour of the assessee. But as a number of other decisions have been relied upon, we examine the same.

35. The Hon'ble Madras High Court in the case of Skycell Communications Ltd. vd. DCIT (2001) 251 ITR 53 (Mad.) has held that call charges received from telecom operators from firms and companies subscribing to cellular mobile services provided by them do not come within the definition of technical services u/s. 194J read with section 9(1)(vii) Expln. 2, as it a mere collection of Fee for use of standard facility provided to all those willing to pay for it. Applying the proposition laid down in this case law to the facts of this case, we have to hold that inter connection facility and the service of the FTO in picking up, carrying and successful termination the call over their respective network is a standard facility and the and FTO in question does not render any technical services to the assessee under interconnect agreement.

36. The Hon'ble High Court of Delhi in the case of CIT vs. Estel Communications (P) Ltd. (2008) 217 CTR (Del) 102 held as follows:-

"Tribunal considered the agreement that had been entered into by the assessee with T and came to the conclusion that there was no privity of contract between the customers of the assessee and T. In fact, the assessee was merely paying for an internet bandwidth to T and then selling it to its customers. The use of internet facility may require sophisticated equipment but that does not mean that technical services were rendered by T to the assessee. It was a simple case of purchase of internet bandwidth by the assessee from T. Under the circumstances, the Tribunal came to the conclusion that there were no technical services provided by T to the assessee and, therefore, the provisions of s. 9(l)(vii) did not apply. Tribunal has rightly dismissed the appeal after taking into

consideration the agreement between the assessee and T and the nature of services provided by T to the assessee. It was a simple case of payment for the provision of a bandwidth. No technical services were rendered by T to the assessee. On a consideration of the material on record, no substantial question arises in the matter."

37. In the case of ACIT vs. Hughes Software Systems Ltd. (2013) 35 CCH 416 Del. Trib, the Tribunal has held as under:-

"Deduction. of tax at source-Fees for technical services- Assessee was engaged in business of software development of products and providing software services in India and overseas-Assessee was treated as "assessee in default" u/s 201(1) on account of non-deduction of TDS u/ s 194J from payment made for use of tele-communication services i.e telephone charges, link charges and band width charges as 'fee for technical services" u/ s 9(1}(vii}-CIT(A} reversed findings of AO-Held, payments were made to MTNL & BSNL etc. for providing space for transmission of data for carriage of voice and for availing service of inter-communication, port access for which no human intervention was necessary- Payment cannot be characterized as "fee for technical services"-Thus, assessee cannot be held to be in default -for non- deduction of tax at source from payment of telecommunication. charges in terms of section 194J-Revenue's ground dismissed.

38. The Bangalore ITAT in the case of Wipro Ltd. vs. ITO (2003) 80 TTJ (Bang) 191 held as follows:-

"Income deemed to accrue or arise in India-Fees for technical services/ royalty-Payment for transmission of data and software through uplink and down link services- Assessee engaged, inter alia, in the business of development of software providing on line software services through customer based circuits with the help of VSNL and foreign telecom companies outside India-As per the agreements with such telecom companies assessee is to use the standard facility having standard pricing patterns-There is nothing to show that assessee was provided with any technology or technical services- Therefore, the amounts paid by assessee-company to non-resident telecom companies for downlinking and transmitting of data to the assessee's customers located outside India cannot be considered as 'fees for technical services' under s. 9(l)(vii), moreso when similar services offered by VSNL is not ITA Nos. 3593 TO 3596/Del/2012 [Bharti Airtel Ltd. vs. ITO(TDS)] & ITA Nos. 4076 TO

4079/Del/2012 [ITO(TDS) vs. Bharti Airtel Ltd.] regarded as technical services-Further, no process has been made available to the assessee-Hence, there is no question of applicability of s. 9(l)(vi) too-So long as the amount paid is not taxable under the Act, the clause in the DTAA cannot bring the charge-Hence, there was no liability to deduct tax under s. 195"

39. In view of the above discussions, respectfully following the binding judgment of the Hon'ble Supreme Court of India, we have no hesitation in upholding the submissions of the Ld. Counsel of the Assessee that, the payment in question cannot be considered as "Fee for Technical Services" in terms of section 9(1)(vii) read with Expln. 2 of the Act."

18. We find that in the instant case also identical service of transmission of call data from end of the Indian Territory to the person in USA to whom call is made, is involved, and accordingly in view of above discussion and following the judgements cited above, the payment in question cannot be considered as Fee for Technical services (FTS)in terms of section 9(1)(vii) read with Explanation - 2 of the Act .

19. Further in para- 40 of the decision in the case of Bharti Airtel Limited Vs. ITO, the Tribunal has held that where make available clause is found in the treaty and there is no imparting as contemplated in the treaties, the payment cannot be treated as Fee for Technical Services (FTS) under the DTAA. The relevant paragraph of the decision is reproduced as under:

"40. The second aspect of the issue are before us, is without prejudice to the finding under the Domestic Law, whether the payment to FTOs for "IUC" is fee for technical services under the DTAA, wherever 'make available clause' is found in these agreements. In view of our finding that the payment is not fee for technical services under the Act, it would be an academic exercise to examine whether the payment in question would be fee for technical services under DTAA's. Suffice to say wherever treaties contain "making available" clause, then in terms of the judgment of the Hon'ble Karnataka High Court in the case of CIT & Ors. vs. De Beers India Minerals Pvt. Ltd. (2012) 346 ITR 0467; the payment

cannot be treated as FTS under the DTAA as ITA Nos. 3593 TO 3596/Del/2012 [Bharti Airtel Ltd. vs. ITO(TDS)] & ITA Nos. 4076 TO 4079/Del/2012 [ITO(TDS) vs. Bharti Airtel Ltd.] there is no imparting as contemplated in the Treaties. Similar are the propositions on the issue of "make available" in the decisions in the case of Mahindra & Mahindra Ltd. vs. DCIT 313 ITR 263; Ramond Limited vs. DCIT 86 ITD 791; Cable and Wireless Networks India P. Ltd. (2009) 315 ITR 72."

20. We find that in the DTAA between India and the USA the make available clause is in existence. The article 12(4) of the treaty is reproduced as under:

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

(a)		*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, or consist of the development and transfer of a technical plan or technical design.*

21. Since in the call connectivity and transmission from end of the Indian Territory at Mumbai to the termination of call in USA, no technical knowledge has been made available to the assessee, respectfully following the decision of the Tribunal in the case of Bharti Airtel Ltd Vs. ITO (supra), we hold that payment for the services of call transmission through dedicated bandwidth provided by the non-resident parties to the assessee , cannot be termed as Fee for Technical services under the treaty also, in the hands of the recipients.

22. Accordingly, the ground 1.1 of the appeal is allowed.

23. The Grounds No. 2 to 5 of the appeal are general in nature, and not required to be adjudicated upon by us.

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

ITA No. 5851/Del/2011 for AY: 2002-03

25. In ITA No. 5851/Del/2011, the Revenue challenged the cancellation of penalty under section 271(1)(c) of the Act for assessment year 2002-03 by the learned Commissioner of Income-tax (Appeals). Since the quantum of addition in respect of assessment year 2002-03 has already been deleted by us in ITA No. 2088/Del/2008 and ITA No. 1927/Del/2008, the issue of cancellation of penalty by the Commissioner of Income Tax (Appeals) is rendered infructuous.. Accordingly, we dismiss the grounds raised in the appeal of the Revenue.

26. In the result, appeal of the Revenue is dismissed.

ITA 127/Del/2011 for AY: 2003-04

27. Grounds of appeal raised in ITA 127/Del/2011 for assessment year 2003-04 are reproduced as under:

"1. That on the law, facts and in the circumstances of the case, the Learned Commissioner of Income-tax (A) has erred in confirming the disallowance made by Learned Assessing Officer in respect of Telecommunication expenses paid to M/s GNG Solutions Inc. USA, International Private Leased Circuit (IPLC) charges paid to M/s World Com Data International Services USA and connectivity charges paid to M/s IGTL Solution Inc. USA amounting to Rs. 1,99,67,349/-, Rs.41,83,437/- and Rs.57,24,230/- respectively on the ground that no tax was deducted at source under section 195 of the I. T. Act, 1961 before making such payments.

1.1 upholding the action of the Assessing Officer in treating the payment of telecommunication charges, IPLC charges and connectivity charges as chargeable to tax in India under section 9(1)(vii) read with Article 12(2) and 12(4) of DTAA between USA and India.

2. That all the above grounds and sub-grounds have to be read conjunctively and also independent of each other.
3. That the above ground(s) of appeal are to be considered separately and without prejudice to one another.
4. That the appellant assessee craves, leaves to add, alter, amend, substitute, withdraw or forego any of the ground(s) of appeal before or at the time of hearing.
5. That the order of Learned CIT (A) is bad in law and wrong on facts of the case and is in violation of the principles of natural justice without providing reasonable opportunity to the appellant assessee to meet the merits of its case."

28. We find that the issues involved in the instant assessment year is identical to the issues involved in ITA No. 1927/Del/2008, hence, accordingly, following our finding in ITA No. 1927/Del/2008, we allow the appeal of the assessee.

29. In the result, appeals filed by the assessee in ITA Nos. 1927/Del/2008 & 127/Del/2011 are allowed and the appeals filed by the Revenue in ITA Nos. 2088/Del/2008 & 5851/Del/2011 are dismissed.

The decision is pronounced in the open court on 17th January, 2017.

Sd/-	Sd/-
(H.S. SIDHU)	**(O.P. KANT)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: 17th January, 2017.
Laptop
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi