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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO. 1395 OF 2016

The Commissioner of Income Tax(IT)-4 .. Appellant.
v/s.
M/s. Reliance Infocomm Ltd., .. Respondent.

Mr. Tejveer Singh, for the Appellant.
Mr. J. D. Mistri, Sr. Advocate with Mr. B. G. Yewale i/b. Rajesh Shah &
Co., for the Respondents.

**CORAM: AKIL KURESHI &
M.S.SANKLECHA, JJ.**
DATE : 5th FEBRUARY, 2019.

P.C:-

The Revenue is in Appeal against the Judgment of the Income Tax Appellate Tribunal (in short the Tribunal), raising the following questions for our consideration:-

(a) Whether on facts and circumstances of the case and in law, the Tribunal erred in holding that the amount payable by payee was not taxable as royalty in the hands of the payee, under the DTAA between India and Netherlands and hence not liable for tax withholding u/s. 195?

(b) Whether on facts and circumstances of the case and in law, the Tribunal erred in relying upon the decision of Hon'ble Delhi High Court in case of payee i.e. New Skies Satellites NV, Netherlands to hold that the amount was not taxable under the treaty in hands of payee without appreciating that the provisions of section 9(1)(vi) are pari-materia with the Royalty

provisions under the DTAA as also held by Madras High Court in case of Poompuhar Shipping 360 ITR 257 and Verizon Communication Singapore Pte ITR 575 (Mad.)?

(c) Whether on facts and circumstances of the case and in law, the Tribunal erred in relying upon the decision of Hon'ble Delhi High Court in case of payee i.e. New Skies Satellites NV, Netherlands to hold that the amount was not taxable under the treaty in hands of payee, without appreciating that the said decision of Delhi High Court had not considered the principles of updating construction, as enunciated by apex court in case of Podar cements 226 ITR 625 (SC)? .

2 Though three separate questions are framed by the Revenue, issue is single namely - Whether the Respondent-Assessee while making payment on royalty to the payee Company failed to deduct tax at source, though required in law?

3 Before the Tribunal as well as before us, the Revenue has principally relied on the amendment to Section 9(1)(vi) of the Income Tax Act, 1961 (for short "the Act"), wherein explanations 5 and 6 were inserted by Finance Act, 2015 w.e.f. 1st April, 1976. Both these explanations commence with the expression "*for the removal of doubts, it is hereby declared that*". According to the Revenue, these explanations are in the nature of declatory explanations and merely clarified the position in law and, therefore, the income of the foreign based payee was taxable in India and the Assessee, therefore, had liability to deduct tax at source while making such payments.

4 The entire issue was examined in detail by the Delhi High Court in case of *Director of Income Tax v/s. New Skies Satellite BV* reported in **382 ITR 114**. The High Court while dismissing the Revenue's

appeal, in the context of the nature of amendments noted above, held and observed as under:-

The circumstances in this case could very well go to show that the amendment was no more than an exercise in undoing an interpretation of the court which removed income from data transmission services from taxability under Section 9(1)(vi). It would also be difficult, if not impossible to argue, that inclusion of a certain specific category of services or payments within the ambit of a definition alludes not to an attempt to illuminate or clarify a perceived ambiguity or obscurity as to interpretation of the definition itself, but towards enlarging its scope. Predicated upon this, the retrospectivity of the amendment could well be a contentious issue. Be that as it may, this Court is disinclined to conclusively determine or record a finding as to whether the amendment to 9(1)(vi) is indeed merely clarificatory as the Revenue suggests it is, or prospective, given what its nature may truly be. The issue of taxability of the income of the assessee in this case may be resolved without redressal of the above question purely because the assessee has not pressed this line of arguments before the court and has instead stated that even if it were to be assumed that the contention of the Revenue is correct, the ultimate taxability of this income shall rest on the interpretation of the terms of the DTAA's. Learned Counsel for the assessee has therefore contended that even if the first question is answered in favour of the Revenue, the income shall nevertheless escape the Act by reason of the DTAA. The court therefore proceeds with the assumption that the amendment is retrospective and the income is taxable under the Act.

5 The Court further observed that mere amendments in the Act would not over-ride the provisions of Double Tax Avoidance Agreement (for short "DTAA"). It was held that: *on a final note, India's change in position to the OECD Commentary cannot be a fact that influences the interpretation of the words defining royalty as they stand today. The only manner in which such change in position can be relevant is if such change is incorporated into the agreement itself and not otherwise. A change in*

*executive position cannot bring about a unilateral legislative amendment into treaty concluded between two sovereign states. It is fallacious to assume that any change made to domestic law to rectify a situation of mistaken interpretation can spontaneously further their case in an international treaty. Therefore, mere amendment to Section 9(1)(vi) cannot result in a change. It is imperative that such amendment is brought about in the agreement as well. Any attempt short of this, even if it is evidence of the State's discomfort at letting data broadcast revenue slip by, will be insufficient to persuade this Court to hold that such amendments are applicable to the DTAA's. In the said decision, Delhi High Court had also referred and relied upon the decision of this Court in the case of **CIT v/s. Siemens Aktiengesellschaft** reported in **310 ITR 320**, in which it was held that, mere amendment of the Act, would not over-ride the provisions of DTAA treaties .*

6 In view of such detailed consideration by the Delhi High Court in the case of New Skies Satellite BV (supra), which is the foreign based company to whom the assessee has made payment in question, where identical issue came up for consideration, we do not find any reason to interfere this Appeal.

7 In the result, **Appeal dismissed.**

(M.S.SANKLECHA,J.)

(AKIL KURESHI,J.)