IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHE 'D.' NEW DELHI

BEFORE SHRI SAKTIJIT DEY, VICE-PRESIDENT
AND
SHRI DR. B.R.R. KUMAR, ACCOUNTANT MEMBER

ITA Nos. 1831, 1832/Del/2022 & 451/Del/2023
Assessment Years: 2018-19, 2019-20 & 2020-21

Planetcast International Pte. Ltd., (Formerly known as Adore Technologies Pte. Ltd.), 151, Lorong Chuan Number 03-02, New Tech Park, Singapore. **PAN: AANCA4305L**	Versus	ACIT, Circle 1(1)(1), International Taxation, New Delhi.
(Appellant)		(Respondent)

Assessee by	:	Sh. Ajay Vohra, Sr. Advocate & Sh. Parth, Advocate
Revenue by	:	Sh. Vizaya Vasanta, CIT-DR

Date of hearing : 20.04.2023
Date of pronouncement: 14.07.2023

ORDER

Captioned appeals by the assessee arise out of final assessment orders passed under section 143(3) read with section 144C(13) of the Income-tax Act, 1961 pertaining to assessment years 2018-19, 2019-20 and 2020-21, in pursuance to the directions of learned Dispute Resolution Panel (DRP).

ITA No. 1831/Del/2022 (A.Y. 2018-18):

2. Ground Nos. 1 & 2, being general grounds, do not require specific adjudication.

3. In ground Nos. 3 & 4, the assessee has challenged the taxability of receipts from provision of disaster recovery up-linking services, disaster recovery play-out services, down-linking and distribution services, space segment capacity services and digital satellite news gathering services as royalty income, both, under section 9(1)(vi) of the Act as well as under Article 12(3) of India-Singapore Double Taxation Avoidance Agreement (DTAA).

4. Briefly, the facts relating to this issue are, the assessee is a non-resident corporate entity and a tax resident of Republic of Singapore. As stated, principal activities of the assessee are that of satellite telecommunication network operations and wholesale of electronic and telecommunication equipments and parts. In course of assessment proceedings, the Assessing Officer noticed that the assessee had receipts from disaster recovery up-linking services, disaster recovery play-out services, down-linking and distribution services, digital satellite news gathering services etc. However, the

assessee has not offered them to tax in India. Being of the view that the receipts from such services are in the nature of royalty as defined under section 9(1)(vi) of the Act and Article 12(3) of India-Singapore DTAA, the Assessing Officer issued a show cause notice to the assessee to explain as to why such receipts should not be brought to tax in India as royalty income. Though, the assessee objected to the proposed addition, however, rejecting the submissions of the assessee, the Assessing Officer proceeded to treat the receipts of Rs.21,03,86,858/- as income in the nature of royalty both under section 9(1)(vi) of the Act and Article 12(3) of India-Singapore DTAA and accordingly, added the same to the income of the assessee. The assessee contested the aforesaid addition by filing objections before learned DRP. However, relying upon the directions issued on identical issue in assessee's case in assessment year 2017-18, learned DRP upheld the addition.

5. Before us, learned Sr. Counsel appearing for the assessee submitted that while deciding identical issue in assessment year 2017-18, the Tribunal in ITA No. 702/Del/2021 dated 19.12.2022 has

deleted the addition made by the Assessing Officer and confirmed by learned DRP.

6. Learned Departmental Representative, though, agreed that the issue has been decided in favour of the assessee in assessment year 2017-18, however, he relied upon the observations of the Assessing Officer and learned DRP.

7. We have considered rival submissions and perused materials on record. The facts on record clearly reveal that while making the disputed addition, the Assessing Officer has relied upon the directions of learned DRP in assessee's case in assessment year 2017-18. Even, learned DRP has followed their directions in assessment year 2017-18. However, while deciding assessee's appeal on the disputed issue in the assessment year 2017-18, the Tribunal in the order referred to above, has deleted the addition holding as under :

> 22. We have given thoughtful consideration to the orders of the authorities below. The first quarrel is whether receipt from uplinking services construe royalty as per Article 12(3) of the DTAA. We find that as per Article 12(3) of DTAA, Royalty has been defined to include, inter alia, use or right to use of secret formula or process and use or right to use of industrial, commercial or scientific equipment.

23. In our understanding of facts, customers of the assessee were neither in possession of any equipment nor had any control over the equipment used by the assessee for providing uplinking and playout services to its customers. We find that while providing these services, the assessee was the sole bearer of the risks in relation to the said equipment.

24. In our considered opinion, the term process can be understood as a sequence of interdependent and linked procedures or actions consuming resources to convert inputs into outputs. Various tangible equipment and resources may be employed in executing a process but 'process' per se, just like a formula or design, is intangible.

25. In our understanding, the term 'process' as contemplated under the definition of royalty has been rather been used in the context of' know-how' and intellectual property. We are of the considered view that Royalty in relation to ‘use of a process’ envisages that the payer must use the ‘process’ on its own and bear the risk of its exploitation. However, in the case in hand, If the ‘process’ is used by the service provider himself and he bears the risk of exploitation or liabilities for the use, then as the service provider makes own entrepreneurial use of the process, therefore, income cannot be characterized as royalty.

26. Considering the facts of the case in totality, we are of the considered view that the assessee provides services to its customers using its equipment outside India. Various satellite based telecommunication services provided by the assessee to its customers are standard services, provided by various other service providers in the industry. Thus, it can be safely stated that there is no ‘know how’ or ‘intellectual property’ involved in the provision of such services by the assessee. Moreover, various satellite-based telecommunication services nowhere envisage granting the use of, or the right to use any technology or process to the customers.

27. The assessee is responsible for maintaining the continuity of the service using its own equipment and facilities since the possession and control of equipment is with the assessee. It is merely making an entrepreneurial use of its own equipment to provide services and it cannot be said that customers have a right to use the process, if any, involved or applied by the assessee in its capacity as a service provider.

28. In other words, the customers are not granted the use of or the right to use any process by the assessee during the course of providing various satellite-based telecommunication services which means that the customers are merely availing a service from the assessee and are not bearing any risk with respect to exploitation of the assessee's equipment involved in the provision of such service.

29. Therefore, in our considered opinion, the amount received by the assessee from its customers in India as consideration for the provision of a service cannot be characterized as royalty for the use or right to use of a process.

30. Heavy emphasis has been made on retrospective amendment brought by the Finance Act with special reference to Explanation 6 of section 9(1)(vi) of the Act. This issue has been well settled by the Hon'ble Jurisdictional High Court of Delhi in the case of New Skies Satellite 382 ITR 114. Relevant findings of the Hon'ble High Court read as under:

"54. Neither can an Act of Parliament supply or alter the boundaries of the definition under Article 12 of the DTAAs by supplying redundancy to any part of it. This becomes especially important in the context of Explanation 6, which states that whether the 'process' is secret or not is immaterial, the income from the use of such process is taxable, nonetheless. Explanation 6 precipitated from confusion on the question of whether it was vital that the "process" used must be secret or not. This confusion was brought about by a difference in the punctuation of the definitions in the DTAAs and the domestic definition. For greater clarity and to illustrate this difference, we reproduce the definitions of royalty across both DTAAs and sub clause (iii) to Explanation 2 to 9(1)(vi).

Article 12(3), Indo Thai Double Tax Avoidance Agreement:

3. The term "royalties" as used in this article means payments of any kind received as a consideration for the alienation or the use of, or the right to use, any copyright of literary, artistic or scientific work (including cinematograph films, phonographic records and films or tapes for radio or television broadcasting), any patent, trade mark, design or model, plan, secret formula or process, or for the use of, or the right to use industrial, commercial or scientific equipment, or for

information concerning industrial, commercial or scientific experience." (emphasis supplied)

Article 12(4), Indo Netherlands Double Tax Avoidance Agreement

"4. The term "royalties" as used in this Article means payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work including cinematograph films, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience." (emphasis supplied)

Section 9(1)(vi), Explanation 2, Income Tax Act, 1961

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

55. The slight but apparently vital difference between the definitions under the DTAA and the domestic definition is the presence of a comma following the word process in the former. In the initial determinations before various ITATs across the country, much discussion took place on the implications of the presence or absence of the "comma". A lot has been said about the relevance or otherwise of punctuation in the context of statutory construction. In spoken English, it would be unwise to argue against the importance of punctuation, where the placement of commas is notorious for diametrically opposite implications. However in the realm of statutory interpretation, courts are circumspect in allowing punctuation to dictate the meaning of provisions. Judge Caldwell once famously said "The words control the punctuation marks, and not the punctuation marks the words." Holmes v. Pheonix Insurance Co.47. It has been held in CGT v. Budur 48and Hindustan Const v. CIT49 that while punctuation may assist in arriving at the correct construction, yet it cannot control the clear meaning of a statutory provision. It is but, a minor element in the construction of a statute, Hindustan Construction Co

56. The courts have however created an exception to the general rule that punctuation is not to be looked at to ascertain meaning. That exception operates wherever a statute is

carefully punctuated. Only then should weight undoubtedly be given to punctuation; CIT v. Loyal Textile51; Sama Alana Abdulla vs. State of Gujarat52; Mohd Shabbir vs. State of Maharashtra53; Lewis Pugh Evans Pugh vs. Ashutosh Sen54; Ashwini Kumar Ghose v. Arbinda Bose55; Pope Alliance Corporation v. Spanish River Pulp and Paper Mills Ltd.56. An illustration of the aid derived from punctuation may be furnished from the case of Mohd. Shabbir v. State of Maharashtra57 where Section 27 of the Drugs and Cosmetics Act, 1940 came up for construction. By this section whoever "manufactures for sale, sells, stocks or exhibits for sale or distributes" a drug without a license is liable for punishment. In holding that mere stocking shall not amount to an offence under the section, the Supreme Court pointed out the presence of after "manufactures for sale" and "sells" and the absence of any comma after "stocks" was indicative of the fact "stocks" was to be read along with "for sale" and not in a manner so as to be divorced from it, an interpretation which would have been sound had there been a comma after the word "stocks". It was therefore held that only stocking for the purpose of sale would amount to an offence but not mere stocking.

57. However, the question, which then arises, is as follows. How is the court to decide whether a provision is carefully punctuated or not? The test- to decide whether a statute is carefully (read consciously) punctuated or not- would be to see what the consequence would be had the section been punctuated otherwise. Would there be any substantial difference in the import of the section if it were not punctuated the way it actually is? While this may not be conclusive evidence of a carefully punctuated provision, the repercussions go a long way to signify intent. If the inclusion or lack of a comma or a period gives rise to diametrically opposite consequences or large variations in taxing powers, as is in the present case, then the assumption must be that it was punctuated with a particular end in mind. The test therefore is not to see if it makes "grammatical sense" but to see if it takes on any "legal consequences".

58. Nevertheless, whether or not punctuation plays an important part in statute interpretation, the construction Parliament gives to such punctuation, or in this case, the irrelevancy that it imputes to it, cannot be carried over to an international instrument where such comma may or may not

have been evidence of a deliberate inclusion to influence the reading of the section. There is sufficient evidence for us to conclude that the process referred to in Article 12 must in fact be a secret process and was always meant to be such. In any event, the precincts of Indian law may not dictate such conclusion. That conclusion must be the result of an interpretation of the words employed in the law and the treatises, and discussions that are applicable and specially formulated for the purpose of that definition. The following extract from Asia Satellite58 takes note of the OECD Commentary and Klaus Vogel on Double Tax Conventions, to show that the process must in fact be secret and that specifically, income from data transmission services do not partake of the nature of royalty.

"74. Even when we look into the matter from the standpoint of Double Taxation Avoidance Agreement (DTAA), the case of the appellant gets boost. The Organisation of Economic Cooperation and Development (OECD) has framed a model of Double Taxation Avoidance Agreement (DTAA) entered into by India are based. Article 12 of the said model DTAA contains a definition of royalty which is in all material respects virtually the same as the definition of royalty contained in clause (iii) of Explanation 2 to Section 9(1) (vi) of the Act. This fact is also not in dispute. The learned counsel for the appellant had relied upon the commentary issued by the OECD on the aforesaid model DTAA and particularly, referred to the following amendment proposed by OECD to its commentary on Article 12, which reads as under:

'9.1 Satellite operators and their customers (including broadcasting and telecommunication enterprises) frequently enter into transponder leasing agreements under which the satellite operator allows the customer to utilize the capacity of a satellite transponder to transmit over large geographical areas. Payments made by customers under typical transponder leasing agreements are made for the use of the transponder transmitting capacity and will not constitute royalties under the definition of paragraph 2; these payments are not made in consideration for the use of, or right to use, property, or for information, that is to in the definition (they cannot be viewed, for instance, as payments for information or for the use of, or right to use, a secret process since the satellite technology is not transferred to the customer). As regards treaties that include the leasing of industrial,

commercial or scientific (ICS) equipment in the definition of royalties, the characterization of the payment will depend to a large extent on the relevant contractual arrangements. Whilst the relevant contracts often refer to the lease of a transponder, in most cases the customer does not acquire the physical possession of the transponder but simply its transmission capacity: the satellite is operated by the lessor and the lessee has no access to the transponder that has been assigned to it. In such cases, the payments made by the customers would therefore be in the nature of payments for services, to which Article 7 applies, rather than payments for the use, or right to use, ICS equipment. A different, but much less frequent, transaction would be where the owner of the satellite leases it to another party so that the latter may operate it and either use it for its own purposes or offer its data transmission capacity to third parties. In such a case, the payment made by the satellite operator to the satellite owner could well be considered as a payment for the leasing of industrial, commercial or scientific equipment. Similar considerations apply to payments made to lease or purchase the capacity of cables for the transmission of electrical power or communities (e.g. through a contract granting an indefeasible right of use of such capacity) or pipelines (e.g. for the transportation of gas or oil).

75. Much reliance was placed upon the commentary written by Klaus Vogel on Double Taxation Conventions (3rd Edition)'. It is recorded therein:

'The use of a satellite is a service, not a rental (thus correctly, Rabe, A., 38 RIW 135 (1992), on Germany's DTC with Luxembourg); this would not be the case only in the event the entire direction and control over the satellite, such as its piloting or steering, etc. were transferred to the user.'

76. Klaus Vogel has also made a distinction between letting an asset and use of the asset by the owner for providing services as below:

'On the other hand, another distinction to be made is letting the proprietary right, experience, etc., on the one hand and use of it by the licensor himself, e.g., within the framework of an advisory activity. Within the range from services', viz. outright transfer of the asset involved (right, etc.) to the payer of the royalty. The other, just as clear-cut extreme is the exercise by the payee of activities in the service of the payer, activities for

which the payee uses his own proprietary rights, know-how, etc., while not letting or transferring them to the payer.'

77. The Tribunal has discarded the aforesaid commentary of OECD as well as Klaus Vogel only on the ground that it is not safe to rely upon the same. However, what is ignored is that when the technical terms used in the DTAA are the same which appear in Section 9(1)(vi), for better understanding all these very terms, OECD commentary can always be relied upon. The Apex Court has emphasized so in number of judgments clearly holding that the well-settled internationally accepted meaning and interpretation placed on identical or similar terms employed in various DTAAs should be followed by the Courts in India when it comes to construing similar terms occurring in the Indian Income Tax Act....

78. There are judgments of other High Courts also to the same effect.

(a) Commissioner of Income Tax Vs. Ahmedabad Manufacturing and Calico Printing Co., [139 ITR 806 (Guj.)] at Pages 820-822.

(b) Commissioner of Income Tax Vs. Vishakhapatnam Port Trust [(1983) 144 ITR 146 (AP)] at pages 156-157.

(c) N.V. Philips Vs. Commissioner of Income Tax [172 ITR 521] at pages 527 & 538-539."

59. 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 a 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 revenues slip by, will be insufficient to persuade this Court to hold that such amendments are applicable to the DTAAs.

60. Consequently, since we have held that the Finance Act, 2012 will not affect Article 12 of the DTAAs, it would follow that the first determinative interpretation given to the word "royalty" in Asia Satellite59, when the definitions were in fact pari materia (in the absence of any contouring explanations), will continue to hold the field for the purpose of assessment years preceding the Finance Act, 2012 and in all cases which involve a Double Tax Avoidance Agreement, unless the said DTAAs are amended jointly by both parties to incorporate income from data transmission services as partaking of the nature of royalty, or amend the definition in a manner so supra note 1 ITA 473/2012, 474/2012, 500/2012 & 244/2014 Page 49 that such income automatically becomes royalty. It is reiterated that the Court has not returned a finding on whether the amendment is in fact retrospective and applicable to cases preceding the Finance Act of 2012 where there exists no Double Tax Avoidance Agreement.

61. For the above reasons, it is held that the interpretation advanced by the Revenue cannot be accepted. The question of law framed is accordingly answered against the Revenue. The appeals fail and are dismissed, without any order as to costs."

31. Similar view was taken by the Hon'ble High Court of Judicature at Bombay in the case of NEO Sports Broadcast Pvt Ltd. 264 Taxmann.com 323. The relevant findings read as under:

"3. We notice that an identical issue came up for consideration before Delhi High Court in case of Asia Satellite Telecommunications Co. Ltd. Vs. DIT, reported in (2011) 332 ITR 340. It was the case in which the assessee a non-resident was engaged in satellite communication, having control of satellites. The assessee would provide use of transponder facility on satellite to the television companies outside India, which in turn would be routed to the operators in India, who would pass them on to the customers. The question was whether the payments made to the non-resident were in the nature of royalty and therefore come within the scope of section 9(1) of the Income Tax Act, 1961 ('the Act' for short). The Court by a detailed judgment held that the payments were not in the nature of royalty charges. The Court made a distinction between transfer of rights in respect of property and transfer of rights in the property.

4. Later on similar issue once again came before Delhi High Court in the case of Directorate of Income-tax Vs. New 4/7 06-ITXA-1487-18.odt Skies Satellite BV, reported in (2016) 382 ITR 114. The Court followed the earlier decision in case of Asia Satellite Telecommunication (supra) and dismissed the revenue's Appeal. It was held that the explanations added below section 9(1) of the Act were not merely clarificatory in nature. Respectfully agreeing with the said decisions of the Delhi High Court, this question is not considered"

32. The Hon'ble High Court of Delhi in the case of Asia Satellite Telecommunications Co. Ltd 332 ITR 340 had the occasion to consider a similar grievance and held as under:

"It is clear from the reading of section 5(2) that a non-resident is liable to pay tax on the income derived by him, which is received or deemed to be received in India or which accrues or arises or is deemed to accrue or arise in India during the relevant year. Thus, a non-resident is under an obligation to pay tax in respect of the income generated/earned by him in India. Section 9 lays down the various circumstances under which income would be deemed to accrue or arise in India. **[Para 25]**

In the instant case, the endeavour of the revenue was to bring the case of the assessee within the mischief of all or any of the clauses f\ ) and (V\) of sub-section (1) of section 9 in order to bring the assessee within the tax net in India. **[Para 26]**

Applicability of section 9(1)(vii)

The findings of the Tribunal on the non-applicability of section 9(1)(\) were proper, justified and legally sustainable. The **Explanation** ***(a) to this section, lays down that in a case in which all the operations are not carried out in India, the income of the business deemed to have accrued or arisen 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 of the operations in India, wholly or at least partly, is*** **sine qua non** ***for the application of clause () of sub-section (1) of section 9. Under the agreement***

with TV channels, role attributed to the assessee could be paraphrased in the following steps :

Programmes were uplinked by the TV channels (admittedly, not from India).

ii*) After receipt of the programmes at the satellite (at the locations not situated in the Indian airspace), those ™A ere amplified through a complicated process.*

iii*) The programmes so amplified were relayed in the footprint area including India where the cable operators received the waves and passed them over to the Indian population.* [Para 32]

Accepted position was that the first two steps were not carried out in India and the entire thrust of the reroute was limited to the third step and the argument was that the relaying of the programmes in India amounted to the operations carried out in India. That argument was not sustainable. Merely because the footprint area included India and the ultimate consumers/viewers were watching the programmes in India, even when they were uplinked and relayed outside India, would not mean that the assessee was carrying out its business operations in India. The Tribunal had rightly emphasized on the expressions 'operations' and 'carried out in India' occurring in the **Explanation** ***(a) to hold that these expressions signify that it was necessary to establish that any part of the assessee's operations was being carried out in India. No machinery or computer, etc., was installed by the assessee in India through which the programmes were reaching India. The process of amplifying and relaying the programmes was performed within the satellite which was not situated in the Indian airspace and even the Tracking, Telemetering and Control (TTCj operations were also performed outside India in Hongkong. No man, material or machinery or any combination thereof was used by the assessee in the Indian territory. There was no contract or agreement between the assessee with the* **0***(able operators or with the viewers for reception of the signals in India.* [Para 33]**

Thus, section 9(l)(i) was not attracted in the instant case. **[Para 34]**

Applicability of section 9(1)(*vi]*

The entire controversy revolved around the interpretation to

be given to clause (vi) of section 9(1). This clause makes income by way of royalty payable by certain persons as chargeable to tax. **[Para 52]**

Following principles are to be kept in mind while interpreting provisions of clause (vi) of section 9(1)

Section 9 is a deeming provision and if the situation specified therein exists, it is to be deemed that income has accrued or arisen in India.

2. Clause) says that 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.

2 It is a settled-law that the words of a statute are first understood in their natural, ordinary or popular sense and phrases and sentences are construed according to their grammatical meaning, unless that leads some absurdity or unless there is something in the context or in the object of the statute to suggest to the contrary. In case the language of the statute is not clear and there is need to resort to aids of construction such aids can either be internal or external. Internal aids of constructions are definitions, exceptions, the

Explanations . ***fictions, deeming provisions, headings, marginal notes, preamble, provisos, punctuation,.- saving clauses,*** **non obstante** ***clauses, etc. The external aids are dictionaries, the earlier Acts, history of legislation, the Parliamentary history, the Parliamentary proceedings, state of law as it existed when the la was passed, the mischief sought to be suppressed and the remedy sought to be advanced by the AL.' Therefore, need for these aids would arise only if some ambiguity is found in the definition of term 'royalty appearing in the aforesaid provision.***

(4) As per section 9(1)(Vi), the income by way of royalty payable by the Government or a resident or a nonresident shad be deemed to accrue or arise in India. The term 'royalty' has been defined in **//^Explanation 2** ***to section 9(1)(vi). In the case*** **o/ Keshavji Ravji *&* Co. v. C1T** ***[l990j*** **183 ITR I 49 Taxman 87.** ***the Supra'-. Court held that an*** **Explanation,** ***generally***

speaking, is intended to explain the meaning of certain phrases an, expressions contained in the statutory provisions. There is no general theory as to the effect and intendment of an Explanation, *except that the purpose and intendment are determined by its own words. An* Explanation *depending upon its own language, might supply or take away something from the contents of a provision It also true that an* Explanation *may be introduced by way of an abundant caution in order to clear any menu cobwebs surrounding the meaning of the statutory provision spun by interpretative errors and to place who the Legislature considers to be true meaning, beyond any controversy or doubt. In view of the decision of Supreme Court in* Keshavji Ravji & Co.'s *case* /supra), *the* Explanation 2 *has to be read as part and parcel section 9(1)(Vi).*

From a joint reading of the Explanation *to section 9 inserted with effect from 1-6-1976 by the Finance A c 2007 which has been again substituted by the Finance Act, 2010 with retrospective effect from 1-6-1976, it . clear that income of a non-resident shall be deemed to accrue or arise in India under clause (x) or clause (x or clause* /vii *), irrespective of the fact whether the non-resident has a residence or a place of business • business connection in India or the non-resident has rendered services in India. Therefore, once the consideration is received by non-resident for the transfer of all or any rights, including the granting of licence in respect of a patent, invention, model, design, secret formula or process or similar property or am. copyright for literary, artistic or scientific work, the consideration received shall be deemed to accrue < arise in India and will be taxable in India. Section 90 provides relief from double taxation. The four clause of sub-section (1) of section 90 lay down the scope of power of the Central Government to enter into a agreement with another country. Clause (a) contemplates situations where tax has already been paid on to same income in both the countries and in that case it empowers the Central Government to grant relief w respect of such double taxation. Clause (b) of section 90(1), which is wider than clause (a), provides that a agreement may be made for the avoidance of double taxation of income under the Act and the corresponding laws may be enforced in that country. Clauses (c) and (A) essentially deal with the agreements made fey exchange of information, investigation of cases and recovery of income-tax. The effect of an agreement man. pursuant to section 90 is that if no tax*

liability is imposed under the Act, the question of resorting l agreement would not arise. No provision of the agreement can fasten a tax liability when the liability is nt imposed by the Act. If a tax liability is imposed by the Act, the agreement may be resorted to for negativing reducing it. In case of difference between the provisions of the Act and the provisions of an agreement under section 90, the provisions of the agreement shall prevail over the provisions of the Act and can be enforced ~ an appellate authority or the Court. However, as provided by sub-section (2), the provisions of the Act u *apply to the assessee in the event they are more beneficial to him. Where there is no specific provision in the. agreement, it is the basic law.* i.e., *the Income-tax Act which will govern the taxation of income.* **[Para 54]**

Keeping in view the aforesaid principles, one should embark upon the interpretative process while defining the ambit and scope of the term 'royalty' appearing in the Explanation 2 *to clause (vi) of section 9(1). Clause (i) deals with the transfer of all or any rights (including the granting of a licence) in respect of a patent, rtc. Thus, what this clause envisages is the transfer of "rights in respect of property" and not transfer of "right : the property". The two transfers are distinct and have different legal effects. In the first category, the rights are purchased which enable use of those rights, while in the second category, no purchase is involved: o>: the right to use has been granted. Ownership denotes the relationship between a person and an obp. forming the subject-matter of his ownership. It consists of a bundle of rights, all of which are rights* in re~ *being good against the entire world and not merely against a specific person and such rights a . indeterminate in duration and residuary in character When the rights in respect of a property are transfer. and not the rights in respect of 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 a right which are indeterminate in duration and residuary in character Lump <nm consideration is not decisive for the matter That sum may he agreed tor the transfer of one right, two rights and so. on all the rights but not the ownership. Thus, the definition of the term 'royalty' in respect oj 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*

c. of royalty, the ownership of the property or right remains with the owner and the transferee is permitted i se the right in respect of such a 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, not royalty. In an outright transfer to be treated as sale of property as opposed to licence, alienation of all rights in the proiperty is necessary. **[Para 55]**

In the instant case, the assessee was deriving income from the lease of the transponder capacity of its satellites. It was 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 assessee was to relay their programmes in India. The responsibility of the assessee was to make available programmes of the TV . channels in India through transponders on its satellite. The function of the satellite in the transmission chain was to receive the modulator carrier that earth stations emitted on 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 actions or steps taken in order to achieve a particular end, considering the role of the assessee in the light of meaning of the term 'process', it was 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.*** **[Para 56]**

It was clear from various clauses of the agreement that the assessee was the operator of the satellites. It also rt mained in the control of the satellites. It had not teased out the equipments to the customers. **[Para 58]**

A close scrutiny of the ruling of the AAR in ISRO Satellite Centre (ISACT).In re [2008] 307 1 1R 59175 Taxman 97 (New Delhi)vi-'o»/r/ **clearly reveal that where the operator has entered into an agreement for lease of the transponder capacity and has not given any control over parts of the satellite/transponder, the provisions of clause (x\) would not apply. In the instant case also, the assessee had merely given access to a broadband available in a transponder which could be utilized for the purpose of transmitting the signals of the customers.** ***[Para 60]***

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. 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 the following :

(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 re-transmitting signals to the footprint area on earth, which are shared by multiple transponders.

(A) Satellite positioning system, including position adjusting thrusters and the fuel storage and supply system therefore in the satellite. It is this positioning system which ensures that the location and the angh of the satellite is such that it receives input signals properly and re-transmits the same to the exact desired footprint area.

© Temperature control system in the satellite, **i.e.,** ***heaters to ensure that the electronic component- do cease to operate in conditions of extreme cold, when the satellite is in the 'shadow'***

(f)Telemetry (racking and control system for the purpose of ensuring that all the above mentioned systems are monitored and their operations are duly controlled and appropriate adjustments are made, as and when required. **| Para 65]**

Each transponder requires continuous and sustained support of each oft he above mentioned systems of the satellite, without which it simply cannot function. Consequently, it would he 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. **[Para 66]**

In the instant case, control of the satellite or the transponder always remained with the assessee. 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. On going through the various clauses of the said agreement, it was clear that the control always remained with the assessee who had merely given access to a broadband available with the transponder to particular customers. **[Para 68]**

The fact remained that there was no use of 'process' by the TV channels. Moreover, no such purported use had taken place, in India. The telecast companies/customers were situated outside India and so was the assessee.

Even the agreements were executed abroad under which the services were provided by the assessee to its^^^^B customers. The transponder was in the orbit. Merely because it had its footprint areas on various continents, it would not mean that the process had taken place in India. **[Para 70]**

The Tribunal had made an attempt to trace the fund flow and observed that since the end consumers, **i.e.**. ***persons watching TV in India were paying the amounts to the cable operators who, in turn, were paying the same to the TV channels, the flow of the fund was traced to India. That was a far-fetched ground to rope in the assessee in the taxation net. The Tribunal had glossed over an important fact that the money which was received from the cable operators by the telecast operators was treated as income by those telecast operators which had accrued in India and they had offered and paid tax. Thus, the income generated in India had been ■July subjected to tax in India. It M>as the payment made by the telecast operators situated abroad to the '*** **set** ***also a non-resident, that was sought to be brought within the tax net.*** **[Para 72]**

For the aforesaid reasons, it was difficult to accept such a far-fetched reasoning with no causal connection.
[Para 73]

Even when one looked into the matter from the standpoint of Double Taxation Avoidance Agreement (DTAA), the case of the assessee got a boost. The Organization of Economic Cooperation and Development (OECD) has framed a model of

***Double Taxation Avoidance Agreement (DTAA) entered into by India Article 12 of the said model DTAA contains a definition of 'royalty' which is in all material respects virtually the same as the definition of' royalty' contained in clause (iii) of (*Explanation 2 *to section 9(l)(x\). The assessee had relied upon the commentary issued by the OECD on the aforesaid model DTAA.* [Para 74]**

***The Tribunal had discarded the aforesaid commentary of the OECD only on the ground that it was not safe to rely upon the same. However, what was ignored was that when the technical terms used in the DTAA are the same as in section 9(1)(C\), for better understanding all these very terms, the OECD commentary can always be relied upon. The Apex Court has emphasized so in a number of judgments, clearly holding that the well- settled internationally accepted meaning and interpretation placed on identical or similar terms employed in the various DTAAs should be followed by the Courts in India when it comes to construing similar terms occurring in the Indian Income-tax Act.* [Para 77]**

***For the aforesaid reasons, the view taken by the Tribunal in the impugned judgment on the interpretation of section 9(1)(C\) could not be accepted.* [Para 79]**

Thus, the Tribunal was not justified in holding that the amount paid to the assessee by its customers , represented, income by way of royalty, as the said expression is defined in the* Explanation 2 *to section 9(1)(vi)."

33. Considering the facts in totality, in light of the judicial decision discussed hereinabove, we direct the Assessing Officer to delete the addition of Rs. 6,26,29,403/-. Ground No. 2 with all its sub-grounds is allowed."

8. There being no difference in the factual position in the impugned assessment year, respectfully following the decision of the

coordinate Bench in assessee's own case for assessment year 2017-18, we delete the addition made by the Assessing Officer.

9. In ground Nos. 5 to 7, the assessee has challenged the taxability of receipts from provision of disaster recovery up-linking services and disaster recovery play-out services as fee for technical services (FTS) under section 9(1)(vii) of the Act and Article 12(4) of India-Singapore DTAA. Without prejudice to the addition made as royalty income, the Assessing Officer relying upon the directions of learned DRP in assessment year 2017-18 held that the receipts from disaster recovery play-out services and disaster recovery up-linking services amounting to Rs.15,73,71,079/- are in the nature of FTS both under section 9(vii) of the Act and Article 12(4) of India-Singapore DTAA and added to the income of the assessee. Though, the assessee contested the aforesaid addition before learned DRP, however, the addition was upheld.

10. Before us, learned Sr. Counsel appearing for the assessee submitted, the issue is squarely covered in favour of the assessee by the decision of the Tribunal in assessee's case in assessment year 2017-18.

11. Learned Departmental Representative, though agreed that the issue has been decided in favour of the assessee by the Tribunal in assessment year 2017-18, however, he relied upon the observations of the Assessing Officer and learned DRP.

12. We have considered rival submissions and perused materials on record. Undisputedly, both, the Assessing Officer and learned DRP have treated the disputed receipts as FTS by following the directions of learned DRP on such issue in assessee's case for assessment year 2017-18. It is observed, while deciding assessee's appeal for assessment year 2017-18, the Tribunal in the order referred to above has held as under :

> 34. Coming to the receipts from Disaster Recovery Playout Services being treated as FTS, we find that Article 12(4) of the DTAA defines FTS as "payments of any kind to any person in consideration for services of a managerial, technical or consultancy nature including provision of such services through technical or other personnel, if such services:
>
> ***(i)*** 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;
>
> ***(ii)*** making available technical knowledge, experience, skill, know-how or processes, which enables the person acquiring the services to apply the technology contained therein; or
>
> (iii) consist of the development and transfer of a technical plan or technical design, but excludes any service that does not enable the person acquiring the service to apply the technology contained therein.

35. We find that the terms 'managerial', 'technical' and 'consultancy' appearing in the definition of 'fees for technical services' have not been specifically defined in the treaty and the Act. In our understanding, Managerial service signifies a service for management of affairs or services rendered in performing management functions.

36. It involves controlling, directing, managing or administrating the business of the service recipient and can be rendered only with the application of human mind and must involve human interface/ human intervention.

37. Similarly, 'technical service' means a service requiring expertise in technology. Services are of a 'technical' nature when special skills or knowledge related to technical field[3] are required for provision of such services.

38. In our understanding, only those services which involve application of any expert technical education or skill can be classified as technical service and routine services, which do not require application of any technical knowledge or skill cannot be classified as technical service. Further, the term 'consultancy services' involves giving of an advice or advisory services by a professional. With such understanding, we are of the considered view that disaster recovery playout services cannot be considered as being 'managerial' in nature as such services do not involve any element of controlling, directing or administering the business of customers.

39. In our understanding of the facts, Playout service is nothing but the broadcasting and/ or transmission of channels by the assessee for its customers, without any involvement in decision-making with respect to the playlists and the content being broadcasted. Moreover, the assessee does not have a right to edit, mix, modify, remove or delete any content or part thereof as provided by the customer.

40. The disaster recovery playout service merely involves provision of uninterrupted availability of the playout service at a pre-determined level. Therefore, receipts from disaster recovery playout services are not in the nature of FTS as envisaged under Article 12(4)(a) of the DTAA as they are not ancillary or subsidiary to

disaster recovery uplinking and allied services.

41. We are of the considered view that service must be related to application or enjoyment of the right, property, or information for which a payment in the nature of royalty is received and predominant purpose of the arrangement under which payment of service fee is received must be application or enjoyment of the right, property, or information in respect of which the royalty is received. Thus, both conditions must be cumulatively satisfied for services to be considered as ancillary or subsidiary to the payment of royalty.

42. Therefore, in our considered view, receipts from disaster recovery playout services are not in the nature of FTS as they do not make available any technical knowledge, experience, skill, know-how, or process or consist of the development and transfer of any technical plan or technical design.

43. The Hon'ble Karnataka High Court in the case of De Beers India Pvt Ltd 346 ITR 467 and the Hon'ble Delhi High Court in the case of Guy Carpenter & Co. 346 ITR 504 have held that mere rendition of services does not fall within the term ‘make available” unless the recipient of services is enabled and empowered to make use of technical knowledge by itself in its business or for its own benefit without recourse to original service provider in future.

44. The co-ordinate bench in the case of Atos Information Technology, Singapore ITA Nos. 7144/MUM/17 and 5744/MUM/18 had the occasion to consider similar issue and held as under:

“26. Having held so, now let us examine whether the payment received can be treated as FTS. Before we proceed to decide the issue, it is necessary to look at the definition of FEES FOR TECHNICAL SERVICES as per Article 12(4) of the India Singapore DTAA, which reads as under:-

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

ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 3 is received ; or (b) make available technical knowledge, experience, skill, know-how or processes, which enables the person acquiring the services to apply the technology contained therein ; or (c) consist of the development and transfer of a technical plan or technical design, but excludes any service that does not enable the person acquiring the service to apply the technology contained therein. For the purposes of (b) and (c) above, the person acquiring the service shall be deemed to include an agent, nominee, or transferee of such person"

27. On a careful reading of Article 12(4) of the tax treaty, it becomes very much clear that Article 12(4)(a) and 12(4)(c) are not applicable to the present case. Insofar as Article 12(4)(b) is concerned, it clearly denotes that a payment can be treated as FTS, if it makes available technical knowledge, experience, skill, knowhow or process which enables the person acquiring the services to apply the technology contained therein. Therefore, the most crucial factor which requires examination is, while rendering services, whether the assessee has made available any technical knowledge, experience, skill, know-how or process in terms of section 12(4)(b). In our view, the material on record would not persuade one to conclude so. The true meaning of the aforesaid provision is, not only the payment is received for providing technical or managerial services, but, while doing so the service provider also makes available any technical knowledge, experience, skill, know-how or process, etc. to the recipient of services, which enables the person acquiring such services to apply the technology contained therein independent of the service provider. In other words, the service recipient must be in a position to apply the technical knowledge, experience, skill, knowhow, etc. without requiring the permission or presence of the service provider.

28. In the facts of the present case, there is nothing on record to suggest that Atos India can use any technical knowledge, experience, skill, know-how or process, etc. independently on its own without requiring the involvement of the assessee. Therefore, in our considered opinion, the tests and conditions of Article 12(4)(b) are not satisfied. That being the case, the payment received by the assessee from various

projects related services would not qualify as FTS either. That being the case, the payment received by the assessee has to be treated as business profits; hence, would not be taxable in absence of a permanent establishment in India.

45. In light of the above decisions, the facts of the case in hand clearly show that the assessee has provided Disaster Recovery Playout services to its customers through its facility in Singapore and the customers are not provided with any technology knowledge, experience, skill, know-how or processes as envisaged under Article 12(4)b of the DTAA.

46. Further, receipts are also not in the nature of FTS as per Explanation 2 of section 9(1)(vii) of the Act.

47. Considering the facts of the case in totality, in light of the decisions referred to hereinabove, payments received by the assessee as consideration for providing disaster recovery playout services are not taxable as FTS and the Assessing Officer is directed to delete the same. Ground No. 3 with its sub-grounds is allowed."

13. There being no difference in the factual position in the impugned assessment year, respectfully following the decision of the coordinate Bench, as referred to above, we hold that the receipts in dispute are not in the nature of FTS, hence, not taxable in India. Accordingly, the Assessing Officer is directed to delete the addition. Grounds are allowed.

14. In ground Nos. 8 to 12, the assessee has challenged the addition of Rs.6,01,37,566/-, being business profits of the assessee attributable to the alleged permanent establishment (PE) in India.

15. Briefly, the facts relating to this issue are, in course of assessment proceedings, the Assessing Officer noticed that in addition to sale of equipments to Accenture Solutions Pvt. Ltd. in India, the assessee through sub-contractors had carried out installation and commissioning of such equipments. He observed that in addition to an amount of Rs.43,20,29,395/- received towards sale of equipments, the assessee had also received installation and commissioning charges of Rs.1,74,29,247/-. Whereas, the assessee has not offered them to tax in India. After calling for necessary details and examining them, the Assessing Officer observed that as per Article 5(3) of India-Singapore DTAA, a building site or construction, installation or assembly project, if continues for a period of more than 183 days in any fiscal year constitutes a PE. Similarly, as per Article 5(4) of India-Singapore DTAA, if a person carries out supervisory activities in connection with a building site or construction, installation or assembly projects being undertaken in another State for a period

of more than 183 days in any fiscal year, it will constitute a PE. According to the Assessing Officer, the time limit provided in the DTAA is applicable from the start to the end of the project activities and not on the basis of presence of company's or sub-contractors' personnel during the entire duration. He observed, the assessee had carried out installation activities at two different sites of Accenture Solutions Pvt. Ltd. For the first activity, installation began on 14th June, 2017 and ended on 11th November, 2017. Whereas, for the second activity, installation began on 9th November, 2018 and ended on 2nd February, 2018. Thus, cumulatively, the activities of supervisory/installation work began on 14.06.2017 and ended on 02.02.2018, which worked out to 233 days.

16. Thus, according to the Assessing Officer, the activities of the assessee in India exceeded the threshold limit of 183 days as per Article 5(3) and 5(4) of India-Singapore DTAA. Hence, the assessee had a PE in India. Justifying the aforesaid conclusion, the Assessing Officer observed that for all practical purposes, the two projects carried out for Accenture Solutions Pvt. Ltd. in India have to be considered together, as both the projects are related to each other

and were carried out for the same customer at two different locations and secondly, the nature of the projects are similar. While coming to such conclusion, the Assessing Officer observed that unlike India-Netherlands DTAA, the India-Singapore DTAA does not explicitly prohibit considering together all the projects sites, rather than considering each site separately. In the aforesaid premises, ultimately, the Assessing Officer concluded that the assessee had a PE in India. Hence, both, the receipts from sale of equipments and installation & commissioning services are taxable in India as business profits. Accordingly, he proceeded to apply the global net profit ratio for the assessment year 2018-19 at 13.38% and attributed profit of Rs.6,01,37,566/- to the PE in India. Though, the assessee contested the aforesaid addition by raising objections before learned DRP, however, the addition was sustained. Accordingly, the assessment was finalized.

17. Before us, learned Sr. Counsel appearing for the assessee submitted that the findings of the departmental authorities that the assessee had a PE in India is perverse, as the assessee did not have any PE in India either under Article 5(3) or 5(4) of India-Singapore

DTAA. Drawing our attention to Article 5(3), learned counsel submitted, to constitute a PE in India, there must be a building site, construction or installation or assembly project and it must have continued for more than 183 days in any fiscal year. He submitted, the project sites where the installation and commissioning activities were carried out cannot be considered as building site or construction, installation or assembly projects. He submitted, the contract with Accenture Solutions Pvt. Ltd. is basically a contract for supply of equipment and not an installation contract. Explaining further, he submitted, as per the terms of the agreement, the client (Accenture Solutions Pvt. Ltd.) requested the assessee for proposal to supply equipment in India. The client identifies the original equipment manufacturer (OEM) having the capability to provide the equipment. The assessee obtains quotes from the said OEM and shares the same with the client. Based on the approval of the client, the contract for supply of equipment is entered into between the assessee and the client and a consequent contract is entered into between the assessee and the OEM for supply of equipment. During

the entire process, no employee of the assessee or the OEM visits the project sites.

18. He submitted, once, the equipment reaches the assessee, they were transferred to the client and transported to India. Client is responsible for all custom clearance procedures once the goods reach India. He submitted, in case any of the equipments require installation, employees of the OEM visit the respective project sites to provide the services. However, during the entire exercise, no employee of the assessee assists or supervises the installation of the equipment. Thus, he submitted, the contract with Accenture Solutions Pvt. Ltd. is one of supply of equipments only and installation services, if any, are merely incidental to the said contract. Hence, it cannot be said that the project sites at Bangalore and Gurugram are installation projects thereby constituting assessee's PE in India. He submitted, a reading of Article 5(3) of the treaty demonstrate that it can only be invoked if the building site, construction, installation or assembly project belongs to the assessee itself. Whereas, the project sites are of Accenture Solutions Pvt. Ltd.. Hence, Article 5(3) cannot apply.

19. As regards applicability of Article 5(4) of the treaty, learned counsel submitted, the conditions are, an enterprise must carry on supervisory activities in another State for a period of more than 183 days in any fiscal year in connection with building site, construction, installation or assembly project being undertaken in that State. He submitted, the installation activities for Bangalore project site of Accenture Solutions Pvt. Ltd. started on 14.06.2017 and ended on 29.07.2017. Whereas, for Gurugram project site, it started on 08.11.2017 and ended on 02.02.2018. He submitted, if duration of such activities are considered cumulatively, it will work out to 133 days. Therefore, the threshold limit of 183 days was not exceeded. Drawing our attention to certain details furnished in the paper book, learned counsel submitted, the threshold limit of 183 days as provided under Article 5(3) and 5(4) were not breached both in terms of man days and solar days in respect of two projects in India to constitute PE in India. He submitted, while concluding that the assessee had a PE in India, the Assessing Officer has committed a fundamental error by considering the date of signing of agreement or raising invoice as the starting date of the project/activity rather than

actual date of commencement of the installation activity of the equipment. He submitted, both the Assessing Officer and learned DRP while coming to their respective conclusions that the assessee had PE in India, have considered the period between booking of first invoice and last invoice as per the ledger account of Accenture Solutions Pvt. Ltd.. In support of such contention, he relied upon the following decisions :

(i). JDIT vs. Krupp Uhde GmbH (2010) 1 ITR(T) 614 (Mumbai);

(ii). CIT vs. Bellsea Ltd., (2023) 147 taxmann.com 488 (Delhi).

(iii). Rheinbraun Engineering Und Wasser GmbH vs. DDIT (2016) 68 taxmann.com 34 (Mumbai-Trib.)

20. Without prejudice, he submitted, the threshold period of 183 days for determination of PE has to be computed separately for each project and not cumulatively. For such proposition, he relied upon the following decisions:

(i). Valentine Maritime (Gulf) LLC vs. ADIT (2011) 10 taxmann.com 210 (Mumbai-Trib.)

(ii). Kreuz Subsea Pte Ltd. vs. DDIT (2015) 58 taxmann.com 371(Mumbai-Trib)

(iii). Gujrat Pipavav Port Ltd. vs. ITO (2016) 67 taxmann.com 370 (Mumbai-Trib.)

21. Reverting back to the facts of the case, he submitted, the project at Bangaluru and Gurugram were in relation to distinct purchase orders and different assignments. The nature of equipment supplied under the two purchase orders are different. The nature and purpose of two projects were completely different from each other, despite commonality in customer and few sub-contractors. Therefore, the two projects must be treated separately, in which event, the threshold limit of 183 days would not be fulfilled.

22. Without prejudice, he submitted, the profits from whole operation, both supply of equipment and installation and commissioning services, cannot be attributed to the alleged PE. Rather, only such income/profit can be attributed to the PE, which has been derived if the PE had carried out such activity as a separate, distinct and independent legal entity. In other words, he submitted, only such part of income, which is derived through activities of PE can be attributed to PE. He submitted, once the title over the equipments and risk were transferred outside India, the

income from supply of equipment cannot be taxed in India. In this context, he relied upon the decision of Hon'ble Supreme Court in Ishikawajma-Harima Heavy Industries Ltd vs. DIT (2007) 158 Taxman 259 (SC). Proceeding further, he submitted, even assuming that there is a installation PE, it could have come into existence after the conclusion of supply of goods. Therefore, the profits from sale of goods cannot be made attributable to PE. Thus, ultimately, he submitted that the attribution of profits, if any, to the alleged PE, can be restricted only in respect of the income earned from installation activities aggregating to Rs.1,74,29,247/-.

23. Learned Departmental Representative submitted that the assessee has taken up both the activities of supply of equipment and installation and commissioning services in respect of the customer Accenture Solutions Pvt. Ltd. He submitted, though the assessee claims that it has undertaken two separate projects for Accenture Solutions Pvt. Ltd., however, in reality, both the projects are integrated and a composite project. He submitted, in fact, the assessee has sub-contracted the installation and commissioning services to a third part, who has undertaken the installation and

commissioning services of both the projects of Accenture Solutions Pvt. Ltd. in India. He submitted, even some of the personnel visiting India to render services for installation and commissioning activity are same. In this context, he drew our attention to page 105 and 200 of the paper book. Learned Departmental Representative submitted, the project includes preparatory and auxiliary work. Hence, it has to be included in the duration of the project. Thus, he submitted, since the project activity continued for a period of more than 183 days in the fiscal year, the conditions of Article 5(3) and 5(4) of the treaty stand satisfied. Further, he submitted, since the supply of equipment and installation and commissioning services is one integral activity, the profits from both the activities has to be attributed to the PE, as the PE had a significant role to play both in supply of equipment and installation and commissioning services. Thus, he submitted, the addition made by the Assessing Officer and sustained by learned DRP must be upheld.

24. We have considered rival submissions and perused materials on record. Undisputedly, in the year under consideration, the assessee received two purchase orders from Accenture Solutions

Pvt. Ltd. for its projects in Bangaluru and Gurugram in India. From the materials on record, it is observed that after receiving the purchase orders, the assessee entered in two separate contracts with the original equipment manufacturer (OEM) for supplying the equipment. As per the procedure followed, the assessee obtains quotation of the specific equipment from the OEM and shares the same with Accenture Solutions Pvt. Ltd. After the equipment is approved, the assessee undertakes the supply of equipment manufactured outside India. Undisputedly, in so far as the money received for supply of equipment is concerned, the assessee has claimed that manufacture and sale of the equipment having taken place outside India and title over the goods having been passed outside India and payments, having been received outside India, such receipts cannot be taxed in India. In so far as the receipts for installation and commissioning services are concerned, the assessee has claimed that since the duration of project is less than 183 days, there is no PE of the assessee in India. Whereas, the Assessing Officer has held that the assessee has a PE both in terms of Article 5(3) and Article 5(4) of the treaty.

25. In this backdrop, we have to examine whether the conditions of Article 5(3) and 5(4) of the treaty are satisfied. For ease of reference, we reproduce Article 5(3) and 5(4) of the DTAA herein below :

> **Article 5:**
>
> **(3).** A Building site or construction, installation or assembly project constitutes a permanent establishment only if it continues for a perio of more than 183 days in any fiscal year.
>
> **(4).** An enterprise shall be deemed to have a permanent establishment in a Contracting State and to carry on business through that permanent establishment if it carries on supervisory activities in that Contracting State for a period of more than 183 days in any fiscal year in connection with a building site or construction, installation or assembly project which is being undertaken in that Contracting State.

26. On a careful reading of the aforesaid provisions in the DTAA, it appears that as per Article 5(3), a building site or construction, installation or assembly project constitute a PE if it continues for a period of more than 183 days in any fiscal year. Whereas, as per Article 5(4), if an entity carries on supervisory activities in connection with a building site, construction, installation or assembly project for a period exceeding 183 days in any fiscal year, it will constitute a PE. Thus, keeping in perspective, the aforesaid provisions, the core issue which requires consideration is whether the assessee had operated a building site or construction, installation or assembly project for a

period exceeding 183 days in the relevant year or it has carried out any supervisory activity for a period exceeding 183 days in the relevant year in connection with a building site or construction, installation or assembly project being undertaken in the contracting State.

27. It is observed from the facts on record, the departmental authorities have reckoned the period of 183 days from the date of raising of the first invoice for supply of equipment till the date of last invoice raised by the assessee both for Bangaluru project as well as Gurugram Project. The issue, which arises for consideration is whether the first invoice date for supply of equipment would tantamount to commencement of installation activity for construing the period of 183 days in terms of Article 5(3) and 5(4) of India-Singapore DTAA. It is a fact on record that the assessee had entered into two separate purchase orders with Accenture Solutions Pvt. Ltd. The purchase order relating to Gurugram project of Accenture Solutions Pvt. Ltd. was issued on 22.02.2017. This purchase order related to supply of equipment DDC5 Broadcast Infrabuild Unit. The second purchase order for Bangaluru project was issued on

16.03.2017 relating to supply of equipment for project system integration. It is axiomatic that once the purchase order is placed, the manufacturing process of the equipment as per specific requirement of Accenture Solutions Pvt. Ltd. would kick in. As is evident, the assessee itself is not the manufacturer of the equipment but has sub-contracted the manufacturing of the required equipment to the OEM identified by Accenture Solutions Pvt. Ltd. In other words, the assessee is merely supplier of the equipment manufactured by OEM. Therefore, until the manufacturing of the specified equipments are complete and have been delivered to the customer, i.e., Accenture Solutions Pvt. Ltd., the installation/commissioning services could not have commenced.

28. It is also a fact that the work of installation and commissioning services was also sub-contracted to the OEM and the employees of the OEM visited the respective project sites of Accenture Solutions Pvt. Ltd. in India for providing installation and commissioning services. In that view of the matter, the first date of raising of invoice for supply of equipments cannot be taken to be the date of commencement of installation and commissioning services at the

project sites. From the facts and materials on record, it is quite clear that before the Assessing Officer and learned DRP, the assessee has furnished material evidences to demonstrate that the installation and commissioning services for the Bangaluru project commenced on 14.06.2017 and ended on 29.07.2027, aggregating to 46 days. Whereas, installation and commissioning services for the Gurugram project commenced on 08.11.2017 and ended on 02.02.2018 for a aggregate period of 87 days. Thus, it is quite evident in both the instances the threshold period of 183 days as provided in Article 5(3) and 5(4) of India-Singapore DTAA was not breached. The assessee has also demonstrated that both in terms of man days and solar days, two projects will not constitute PE in India under Articles 5(3) and 5(4) of India-Singapore DTAA. The departmental authorities have not been able to rebut the aforesaid submissions of the assessee with proper reasoning.

29. One more aspect, which requires consideration is whether the projects of Accenture Solutions Pvt. Ltd. in India are to be construed separately or integrated projects. Though, the Assessing Officer has commented that both the projects are integrated projects, however,

such conclusion is neither backed by proper reasoning nor evidence. As discussed earlier, Accenture Solutions Pvt. Ltd. has two projects in India at Bangaluru and Gurugram. The materials on record indicate that the two projects are independent of each other and have no connection. Merely because the installation and commissioning services were provided by the same sub-contractor or some of the personnel engaged in both the projects are common, it cannot be concluded that both the projects are one and single project. The departmental authorities have not brought any material on record to demonstrate such fact. On the contrary, the evidences brought on record by the assessee do indicate that they are different projects. In this context, we may observe, the Assessing Officer while interpreting Article 5(3) and 5(4) of the tax treaty, has observed that all project sites in India have to be treated as one for determination of installation and supervisory PE. To buttress his conclusion, the Assessing Officer has referred to India-Italy, India-Australia and India-USA DTAAs, where, treaty provisions explicitly provide that for determination of existence of PE, all projects in one contracting State have to be construed as single project unlike India-Netherlands DTAA

where each site has to be seen as a separate project. The reasoning of the Assessing Officer is that in absence of such express provision like India-Netherlands DTAA in India-Singapore DTAA, all project sites have to be treated as one.

30. Unfortunately, we are unable to agree with the aforesaid reasoning of the Assessing Officer and learned DRP. A reading of Article 5(3) and 5(4) indicate that the language used refers to 'a' building site or construction, installation or assembly project continuing for a period of more than 183 days in any fiscal years. 'A' denotes singular form. On a careful reading of Article 5(3) and 5(4) of the treaty we do not find use of any words which can either implicitly or explicitly bring the provisions at par with similar provisions in India-Australia, India-Italy or India-USA treaties. Thus, in absence of any such express provision in India-Singapore treaty, words used in other treaties cannot be imported. Rather, we do not find any material difference in the language employed in Article 5(3) of India-Netherlands DTAA and India-Singapore DTAA. Whereas, Article 5 of India-Australia, India-Italy and India-USA DTAAs explicitly provide that a building site or construction, installation or assembly project

together with other such site projects or activities, if continues for specific period, would constitute PE. Therefore, in our considered opinion, provisions contained in Article 5(3) and 5(4) of India-Singapore DTAA cannot at all be compared with similar provisions contained in India-Australia, India-Italy and India-USA DTAAs. Thus, strictly going by the language used in Article 5(3) and 5(4) of India-Singapore DTAA, each project site has to be construed as a separate project for constituting an installation or supervisory PE in terms of Article 5(3) and 5(4) of the treaty. Viewed in the aforesaid perspective, undisputedly, each project site did not exceed threshold limit of 183 days. In that view of the matter, the project sites of Accenture Solutions Pvt. Ltd. at Bangaluru and Gurugram cannot be considered to be either installation or supervisory PE of the assessee in India. That being the factual position emerging on record, in our view, the assessee in the year under consideration did not have any PE in India. Therefore, no profits out of sale of equipments as well as installation and commissioning services can be taxed in India. The addition made is, therefore, directed to be deleted.

31. In ground Nos. 13 & 14, the assessee has challenged levy of interest under section 234B and 234D of the Act. This issue, being consequential in nature, does not require specific adjudication.

32. In ground No. 15, the assessee has challenged imposition of penalty proceedings under section 270A of the Act. The issue raised, being premature at this stage, there is no need to adjudicate this ground.

33. In the result, appeal is partly allowed.

ITA No. 1832/Del/2022 (A.Y. 2019-20):

34. Ground Nos. 1 & 2, being general grounds, do not require specific adjudication.

35. In ground Nos. 3 & 4, the assessee has challenged the taxability of receipts from provision of disaster recovery up-linking services, disaster recovery play-out services, down-linking and distribution services, space segment capacity services and digital satellite news gathering services as royalty income.

36. The issue raised in these grounds are identical to the issue raised in ground Nos. 3 & 4 of ITA No. 1831/Del/2022 decided in the

earlier part of the order. Following our decision therein, we delete the addition made by the Assessing Officer.

37. In ground Nos. 5 to 7, the assessee has challenged the taxability of receipts from provision of disaster recovery up-linking services and disaster recovery play-out services as FTS income under section 9(1)(vii) of the Act and Article 12(4) of India-Singapore DTAA.

38. The issue raised in these grounds is identical to the issue raised in ground Nos. 5 to 7 of ITA No. 1831/Del/2022 decided by us in earlier part of the order. Following our decision therein, we delete the addition made by the Assessing Officer.

39. In ground No. 8, the assessee has challenged taxability of receipts from internet bandwidth charges as royalty income.

40. Briefly, the facts are, in course of assessment proceedings, the Assessing Officer noticed that though the assessee had received an amount of Rs.15,66,888/- towards internet bandwidth charges, however, such income was not offered to tax in India. Being of the view that the receipts are in the nature of equipment royalty as

scientific / commercial equipment in the form of lease line/router is provided by the assessee to the customer, the Assessing Officer proceeded to treat the receipts as royalty income under section 9(1)(vi) of the Act read with Article 12(3) of India-Singapore DTAA and added to the income of the assessee. Though, the assessee contested the aforesaid addition by filing objections before learned DRP, however, the addition was upheld.

41. Before us, learned Sr. Counsel appearing for the assessee submitted that by referring to the amendment made to section 9(1)(vi) of the Act by insertion of Explanation 4 & 5 by Finance Act, 2012, the Assessing Officer has treated the receipts as royalty. He submitted, the amendment made to the Act cannot be automatically imported to the treaty provisions. He submitted, unless corresponding amendment is made to the treaty provisions, the provisions of the Act cannot be read into the treaty provisions. He submitted, as per the treaty provision, the receipts cannot be treated as royalty income. In support of such contention, learned counsel relied upon following decisions :

(i). Telstra Singapore Pte. Ltd. vs. DCIT (2021) 123 taxmann.com 124 (Delhi Trib.)

(ii). ACIT vs. Reliance Jio Infocomm Ltd. (2019) 111 taxmann.com 371 (Mumbai Trib.)

(iii). Qualcomm India (P) Ltd. vs. ADIT (2017) 77 taxamann.com 56 (Hyderabad-Trib.)

(iv). Essity Hygiene and Health AB vs. DCIT, (2021) 129 taxmann.com 70 (Mumbai-Trib.).

42. Learned Departmental Representative strongly relied upon the observation of the Assessing Officer and learned DRP.

43. We have considered rival submissions and perused materials on record. Undisputedly, referring to the amended provisions of section 9(1)(vi) of the Act, the Assessing Officer has treated the receipts from internet bandwidth charges as equipment/process royalty. However, it is observed, no corresponding amendment in line with the amendment brought to section 9(1)(vi) of the Act has been made to Article 12(3) of India-Singapore DTAA. Therefore, in absence of any such amendment widening the scope of expression 'royalty' under the treaty provisions, the amendment made to section 9(1)(vi) of the Act cannot be automatically brought or imported to Article 12(3) of India-Singapore DTAA, as the treaty provisions have to be construed strictly in accordance with the language used in the

provision. While coming to such view, we have found support from the ratio laid down in the decisions cited by learned Sr. Counsel for the assessee. Thus, for the aforesaid reasons, we hold that the receipts from internet bandwidth charges cannot be treated as royalty income under Article 12(3) of India-Singapore DTAA. Accordingly, we direct the Assessing Officer to delete the addition.

44. In ground Nos. 9 to 13, the assessee has challenged the addition of Rs. 18,99,624/-, being business profits of the assessee attributable to the alleged permanent establishment (PE) of the assessee in India.

45. The issue raised in these grounds are identical to the issues involved in ground Nos. 8 to 12 of ITA No. 1831/Del/2022 decided by us in earlier part of the order. Therefore, our decision therein will apply *mutatis mutandis* in this appeal as well.

46. Further, we must observe, the assessee has demonstrated before us that in the year under consideration, no installation and commissioning services were provided in India and the assessee has only made sale of equipments to Indian customers. It is the case of the assessee that the installation revenue received during the year

was for installation and commissioning services carried out during the assessment year 2018-19. On a reading of the assessment order and the directions of learned DRP, we find that the aforesaid claim of the assessee has not been controverted by the Assessing Officer with substantive reasoning. He has merely rejected assessee's claim for the sake of rejection. In view of the aforesaid, we do not find any reason to sustain the addition made of Rs.18,99,624/- being attribution of profit made to the alleged PE. Assessing Officer is directed to delete the addition.

47. In ground Nos. 14 & 15, the assessee has challenged levy of interest under section 234B and 234D of the Act. This issue, being consequential in nature, does not require specific adjudication.

48. In ground No. 16, the assessee has challenged imposition of penalty proceedings under section 270A of the Act. The issue raised in this ground, being premature at this stage, there is no need to adjudicate this ground.

49. In the result, appeal is partly allowed.

ITA No. 451/Del/2023 (A.Y. 2020-21):

50. Ground Nos. 1 & 2, being general grounds, do not require specific adjudication.

51. In ground Nos. 3 to 5, the assessee has challenged the taxability of receipts from provision of disaster recovery up-linking services, disaster recovery play-out services, down-linking and distribution services, space segment capacity services and digital satellite news gathering services as royalty income.

52. The issue raised in these grounds is identical to the issue raised in ground Nos. 3 & 4 of ITA No. 1831/Del/2022 decided by us in the earlier part of the order. Following our decision therein, we delete the addition made by the Assessing Officer.

53. In ground Nos. 6 to 9, the assessee has challenged the taxability of receipts from provision of disaster recovery up-linking services and disaster recovery play-out services as FTS income.

54. The issue raised in these grounds is identical to the issue raised in ground Nos. 5 to 7 of ITA No. 1831/Del/2022 decided by us in earlier part of the order. Following our decision therein, we delete the addition made by the Assessing Officer.

55. In ground No. 10, the assessee has challenged taxability of receipts from internet bandwidth charges as royalty income.

56. This issue is identical to the issue raised in ground No. 8 of ITA No. 1832/Del/2022 decided by us in earlier part of the order. Following our decision therein, we delete the addition.

57. In ground No. 11, the assessee has challenged the taxability of receipts from reimbursement of licence fee as royalty income.

58. Briefly, the facts are, in course of assessment proceedings, the Assessing Officer noticed that in the year under consideration, the assessee has received an amount of Rs.15,34,662/- towards reimbursement of license fee paid to Singapore Government. When called upon to explain why the amount should not be made taxable in India, the assessee replied that the receipt is in the nature of cost to cost reimbursement and do not contain any profit element. It was further submitted that expenses are incurred on account of payment of satellite communication station license fee to a department of Singapore government. The Assessing Officer, however, did not find merits in the submissions of the assessee and ultimately concluded that the receipts are in the nature of royalty both under section

9(1)(vi) as well under India-Singapore DTAA. Accordingly, he added it to the income of the assessee. Though, the assessee contested the addition before learned DRP, however, it was upheld.

59. We have considered rival submissions and perused the materials on record. From the assessment order, it is discernible that the receipts are in the nature of cost to cost reimbursement of payments made to Singapore government. Hence, the receipts did not have any profit element embedded therein. In fact, the Assessing Officer has not disputed the aforesaid factual position. In case of DIT vs. A.P. Moller Maersk AS (2017) 5 SCC 651, the Hon'ble Supreme Court has observed that once the character of the payment is found to be in the nature of reimbursement of expenses without having any profit element embedded therein, it cannot be held to be chargeable to tax. Identical view has been expressed by the coordinate Benches in the following decisions :

(i). SCA Hygiene Products AB vs. DCIT (2021) 123 taxmann.com 152 (Mumbai-Trib.)

(ii). Essity Hygiene and Health AB vs. DCIT (2021) 129 taxmann.com 70 (Mumbai-Trib.)

60. Respectfully following the ratio laid down in the aforesaid decisions, we hold that reimbursement of expenses cannot be treated as royalty income. The Assessing Officer is directed to delete the addition. This ground is allowed.

61. In ground Nos. 12 & 13, the assessee has challenged levy of interest under section 234A and 234B of the Act. This issue, being consequential in nature, does not require specific adjudication.

62. In ground No. 14, the assessee has challenged imposition of penalty proceedings under section 270A of the Act. The issue raised in this ground, being premature at this stage, there is no need to adjudicate this ground.

63. In the result, appeal is partly allowed.

64. To sum up, appeals are partly allowed.

Order pronounced in the open court on 14/07/2023.

Sd/-	Sd/-
(DR. B.R.R. KUMAR)	**(SAKTIJIT DEY)**
ACCOUNTANT MEMBER	**VICE-PRESIDENT**

Dated: 14.07.2023
*aks/-