

**IN THE INCOME TAX APPELLATE TRIBUNAL
"I" BENCH, MUMBAI**

BEFORE SMT. BEENA PILLAI (JUDICIAL MEMBER)

&

SHRI BIJAYANANDA PRUSETH (ACCOUNTANT MEMBER)

I.T.A. No. 2991/Mum/2023

(Assessment Year: 2020-21)

Reliance Jio Infocomm USA Inc., 3010, Gaylord Parkway, Suite 150, Frisco, Texas – 75034, USA [PAN: AAHCR2879Q]	Vs.	Deputy Commissioner of Income Tax, (International Tax) – 4(1)(1), Mumbai
(Appellant)		(Respondent)

Assessee by	Shri Nimesh Vora & Moksha Mehta
Revenue by	Shri Krishna Kumar, (SR. DR)

Date of Hearing	24.03.2026
Date of Pronouncement	17.04.2026

ORDER

Per Smt. Beena Pillai, JM:

Present appeal filed by assessee against the final assessment order dated 30.06.2023 passed u/s. 143(3) r.w.s. 144C(13) for A.Y. 2020-21 passed in pursuance of direction given by the DRP dated 16.02.2023 u/s. 144C(5) of the Income Tax Act, 1961. The assessee raised the following grounds of appeal:

“Ground No. 1-On the facts and circumstances of the case and in law, the learned Deputy Commissioner of Income tax, International Tax Circle - 4(1)(1), Mumbai (hereinafter referred to as Ld. DCIT) erred in passing the final assessment order u/s 143(3) r.w.s. 144C(13) for the Impugned Assessment Year 2020-21, on 27th June 2023, beyond the time limit as specified u/s 153 of the Act which expired on 30 September 2022.

Ground No. 2-On the facts and circumstances of the case and in law, the Ld. DCIT erred in holding that the receipts for voice termination services received by the Appellant from Reliance Jio Infocomm Limited ('RJIL') would constitute 'Royalty under section 9(1)(vii) of the Act and DTAA between India and USA ('DTAA'). Article 12 of DTAA

Ground No. 3-On the facts and circumstances of the case and in law, the Ld. DCIT erred in holding that retrospective amendments to the Act can be read as an amendment to the DTAA by virtue of Article 3(2) of the DTAA

Ground No. 4 On the facts and circumstances of the case in law, the Ld. DCIT erred in disregarding the Appellant's submission that the receipts for voice termination services are in the nature of "Business Profits" and not chargeable to tax in India in the absence of the Appellant's PE in India as per provisions of Article 5 read with Article 7 of the DTAA

Each of the above grounds of appeal are independent and without prejudice to each other."

2. Brief facts of the case are as under:

The assessee is a 100% subsidiary of Reliance Jio Infocomm Limited ('RJIL), India and is engaged in the business of providing Telecom network /infrastructure related technical support services through its Advanced Technology Operation Centre ('ATOC') set up in USA, International Long Distance ('ILD') telecom services(voice termination, IP transit) and ancillary marketing and sales support services.

2.1. The assessee filed its return of income for Assessment Year ("AY") 2020-21 on 22.01.2021 declaring Rs. 21,05,67,840/- as income. The case was selected for complete scrutiny under CASS and statutory notice under section 143(2) of the Act was issued on 29.06.2021. In response to such statutory notices, the assessee furnished responses from time to time.

2.2. During the year under consideration, the assessee received following receipts from India:

Sr. No.	Payer	Nature of services	Amount (INR)	Whether offered for tax or not
1.	Reliance Jio Infocomm Limited(RJIL)	Provision of technical services from support Advanced Technology Operation Centre ('ATOC') set up by the Company in USA Nature of receipt - Fees for Technical Services (FTS)	21,02,77,859	Yes, at the rate of 10%
2.	Reliance Jio Infocomm Limited	Provision of voice termination services to RJIL	23,20,70,453	No, assessee treated the same as business income, No PE in India hence not taxable
3.	Jio Haptik Technologies Limited	Provision of marketing and sales support services	6.45,11,179	No, Does not come under FTS as per India-USA DTAA

2.4. The assessee was asked to show cause as to why the receipts on account of Provision of Voice termination services should not be treated as 'Royalty' under section 9(1)(vi) of Income Tax Act and Article 12 of India-USA DTAA. The assessee stated that these services though technology driven, are not patented and the technology to provide the services is also not secret. Further, in the absence of transfer of any rights by the Company to RJIL, the receipts for provision of the voice termination services by the Company does not constitute royalty.

2.5 The assessee submitted that following were the services were rendered by the assessee to the AE :

"1. Nature of services provided by assessee: Before deciding the taxability of the services provided by assessee on account of voice termination services. It is important to understand the services provided by assessee on account of voice termination services, it is important to understand the exact nature and process how these services are provided.

Voice Termination Services means provision of standard telecommunication services by one party to another party for termination of voice traffic which one party has delivered to the other party's interconnection locations, gateways or network domains for termination to agreed destinations. Provision of voice termination services by the Company to RJIL enables R.JIL to transmit voice call of its subscribers to overseas location.

RJIL, the holding company of the assessee company is in the business of providing digital services and has built a next generation all-IP data network with latest 4G LTE technology. R.JIL, holds Unified License which enables it to offer various telecom services including voice and data services. The assessee is engaged in supporting the development and execution of the international long-distance voice and data services of RJIL. USA is one of the main business hubs in the world where most of the incumbent telecom players have their presence. USA also has the world's finest infrastructure and technology required for the telecom industry. The provision of voice termination services by the Company facilitates connectivity outside India to RJIL's subscribers.

The assessee Company has entered into a Reciprocal Carrier Service agreement dated 3 April 2017 (with effect from 1 January 2016) with RJIL to facilitate connectivity for voice calls originating from/ termination into RJIL's network in India.

The assessee has set up the necessary Point of Presence ('PoP') Infrastructure in USA where telecommunication infrastructure equipment like hubs, switches, routers and other related equipment owned by the Company are installed and is used by it for providing the services.

The flow of services between the Company and RJIL for outbound and inbound voice termination services are as under:

- *Outbound voice termination services-Calls originating from India and terminating outside India*
 - *RJIL carries the outbound calls originating on its network upto the Company's PoPs based in US.*
 - *The Company picks up the call from the PoP and transfers it to the relevant telecom operator on whose network the call needs to terminate.*
 - *The Company is responsible for monitoring the necessary infrastructure, software and technology, etc for facilitating the call transfer.*
 - *The local telecom operators carry the local calls upto the end recipient of the call.*
- *Inbound voice termination services and terminating in India Calls originating outside India*
 - *The telecom players on whose network the call originates carries the call upto the Company's PoPs.*
 - *The Company then hands over the call to RJIL*
 - *RJIL arranges for the call to be carried upto India and terminates it at the end recipient.*

For the outbound voice termination services, RJI US charge RJIL on a cost plus 5% mark-up basis. Costs for this purpose includes the charges paid to the third party telecom players for terminating the calls as well as proportionate internal costs. For the inbound voice termination services, the charges received by RJI US from the local telecom players are passed on to RJIL at actuals.

Provision of voice termination services involves owning / using technical equipment like PoP equipments, telecom switches etc.”

2.6 It was submitted that the assessee entered into reciprocal carrier services agreement with Reliance Jio Infocomm Ltd. India. As per the reciprocal agreement, each party shall arrange and monitor its own expenses, telecommunication network facilities, other than customer premises equipment necessary for the provision of the IPST Services. Each party shall advise other as soon as practicably possible of any facility failure in its area of operation that is expected to cause protracted interruption of IPST services.

2.7. It was submitted that, in the event of interruption of any IPST services, parties shall use their reasonable efforts to resume normal operation as soon as practicable and the parties shall connect their respective systems in the manner agreed between them from time to time. The point of inter connection shall be at such location as mutually agreed in writing by both parties.

2.8. The Ld.AR submitted that, the assessee undertakes Infrastructure and technology related risk. He submitted that, this risk refers to glitches in the infrastructure or technology getting obsolete. This risk belongs to assessee since it owns the infrastructure and avail services in relation thereto.

2.9. The Ld.AO, however, treated the receipts on account of the voice termination services by the assessee as process "royalty" as per section 9(1)(vi) of the Act and Article 12 of the India-US DTAA by observing as under:-

“As per Clause (ii) of the above definition, payment for the use of "process" also falls under the scope of royalty. The meaning of "Process" was further clarified

vide explanation 6 to section 9(1)(vi) of the Act. For the sake of brevity, the Explanation is reproduced as under.

"Explanation 6. For the removal of doubts, it is hereby clarified that the expression "process" includes and shall be deemed to have always included transmission by satellite (including up-linking, amplification, conversion for down-linking of any signal), cable, optic fibre or by any other similar technology, whether or not such process is secret," Hence, the above mentioned receipts come under the purview of 'process royalty' as per Income Tax Act. The fact that assessee is undertaking risk of technology getting obsolete signifies that it is using sensitive and specialised process' and unique to itself.

Further, assessee has also contended that it has not transferred any rights to RJIL hence, it does not come under the ambit of reality. The same is not tenable as following Explanations have been inserted to section 9(1)(vi) vide Finance Act, 2012 twr.e.f 1-6-1976:

"Explanation 5-For the removal of doubts, it is hereby clarified that the royalty includes and has always included consideration in respect of any right property or information, whether or not- at the port of such right property or information in with the payer, right property formation is used directly by the payer, c) the location of right property or information is in India.

Further, the assessee has contended that India-USA DTAA provides narrow definition of natty wherein only secret process comes under the definition of royalty.

Firstly, RJIL wring the process for twice termination services as clearly mentioned in the Reciprocal Carrier Service Agreement as well as transfer pricing study report as mentioned above to the similar way. RIII. is also providing such services to assessee wherein assessee is using the process of RJIL, to receive voice termination services on its ape or on behalf on third party clients.

4. 4 As regards the meaning of "royalty" as per DTAA the AD has observed that-"The sound "process" is not defined in the India USA DTAA Therefore, as per Article 323 of the Indie USA DTAA, the meaning of word "process" as defined under the domestic tax law of the contracting state which applies the treaty is to be applied while interpreting the provisions of the said DTAA. For the sake of brevity, the Article 312) of India USA DTAA is reproduced as under

2. As regards the application of the Convention by a Contracting State any term not defined therein shall, unless the context otherwise requires of the competent authorities agree to a common meaning pursuant to the provisions of Article 27 (Mutual Agreement Procedure), have the meanings which it has under the laws of that State concerning the taxes to which the Convention applies

“Explanation 4 to section 90 of the Act was also inserted wide Finance Act 2018 to clarify that any meaning of the "word" that is not defined under the DTAA would have the meaning as per the domestic law in Income tax Act. The said explanation is as under:

"Explanation 4.-For the removal of doubts, it is hereby declared that where any term used in an agreement entered into under sub-section (1) is defined under the said agreement, the said term shall have the same meaning as assigned to it in the agreement, and where the term is not defined in the said agreement, but defined in the Act, it shall have the same meaning as assigned to it in the Act and explanation, if any, given to it by the Central Government." The Income-tax Act in Explanation o to Section 9(1)(vi) has defined the term "process" to include the payment in respect of band width charges. That means the word "process" has to be understood to include the aforesaid services since the beginning when Explanation 2 defining the term royalty was introduced. Therefore, once the interpretation of provisions is made by reference to domestic law, it is incorrect to say that provisions of DTAA are beneficial. In fact, in such a situation, the beneficial provision is the domestic law. Second, harmonious reading of the relevant DTAA provisions and the provisions under the Income tax Act would result in no differential scope of taxation of royalty income in the nature of "bandwidth charges. Hence, the interpretation of the Hon'ble High Court that treaty provision is beneficial and therefore, to be applied as per section 90(2) of the Act is erroneous. Additionally, the provision is clarificatory in nature. There is no dispute that the explanation 6 to section 9(1)(vi) of the Act is not clarificatory. In a clarificatory provisions, no new law is enacted or the scope of old law is enlarged. Therefore, it is incorrect to say that the domestic law positions have changed after this amendment.

3. On receipt of the draft assessment order, the assessee preferred objection before the DRP.

3.1. The DRP after considering the submissions of the assessee observed and held as under:-

“4.7 The panel has considered the submissions. As regards the outbound call service the assessee company picks up the call from the PoP and transfers it to the relevant telecom operator on whose network the call needs to terminate. The Company is responsible for monitoring the necessary infrastructure, software and technology, etc for facilitating the call transfer. For inbound call service, the telecom players on whose network the call originates carries the call upto the assessee company's PoPs. The assessee company then hands over the call to RJIL. RJIL arranges for the call to be carried upto India and terminates it at the end recipient. The assessee has set up necessary PoP infrastructure and

telecommunication equipments like hub, switches, routers and other equipments, alongwith necessary software and technology in USA through which inbound and outbound services are facilitated to RJIL.. As per 9(1)(vi) of the Income Tax Act (Explanation -2) royalty includes consideration for

.....

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

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

4.8 Thus consideration for the use of a process is covered within the ambit of the definition of royalty as per section 9(1)(vi) of the Income Tax Act. Explanation 6 to section 9(1)(vi) further clarifies the meaning of process as under:

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

4.9 In the instant case the assessee is facilitating the process of inbound and outbound voice termination services by use of its all infrastructure, Pol and technology deployed by it at its own risk: Thrus the voice termination services provided by the assessee to RIIL as per Reciprocal Carrier Service Agreement clearly falls within the ambit of process royalty as per section 9(1)(vi) of the Income Tax Act. The transfer of any right to RIIL as contended by the assessee is not material as Explanation-5 clearly provides that royalty includes any consideration in respect of any right or information whether or not

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

b) Such right, property or information is used directly by the payer:

c) The location of such right, property or information is in India."

4.10 The assessee has also argued that the definition of royalty as per Article 12 of India-US DTAA is restricted and does not cover the kind of

consideration received by the assessee by the RJIL As per Article 12(3) of the DTAA "royalty" means:

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

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

4.11 Thus secret formula or process is very much included in the definition of royalty within the DTAA. Further the word process itself has not been defined in the DTAA and hence, the meaning of the same needs to be derived from the definition of the word "process" as per Income Tax Act. As stated above "process" includes transmission by satellite (including up-linking, amplification, conversion for down-linking of any signal), cable, optic fibre or by any other similar technology, whether or not such process is secret. Thus the facilitation by the assessee in transmission of inbound and outbound calls for RJIL through its own infrastructure, software technology and Pol' maintained at its own risk clearly falls within the definition of process, and hence, consideration received for the same is in the nature of royalty taxable in India. As regards the assessee's reliance on the judgment of Hon'ble Delhi High Court in the DIT vs New Skies Satellite BV and Others, the same has been dealt at length in para 6 of the DAO and the panel is in agreement with the observations and analysis of the AO. In view of the above, the panel finds no ground to interfere with AO's conclusion of taxing the receipts in the hands of the assessee on account of provision of voice termination services to RJIL as royalty, and consequently, the objection raised in ground no. 1 are rejected."

4. On receipt of the DRP direction, the Ld.AO passed the final assessment order by making addition in the hands of the assessee

Rs.23,20,70,453/- being the income from subscribers in India as Royalty.

Aggrieved by the order of the Ld.AO, the assessee is in appeal before this *Tribunal*.

5. At the outset the Ld.AR submitted that the assessee has raised legal issue in **Ground No.1** challenging validity of assessment order passed based on the decision of *Hon'ble Bombay High Court* in case of *Shelf Drilling Ron Tappmeyer Ltd. vs. ACIT in WP no. 2340 of 2021*.

5.1. He submitted that the assessee do not wish to press this issue at this stage.

5.2. Considering the submission, Ground No.1 raised by the assessee is not adjudicated and the same is left open. We accordingly reject the application seeking adjournment filed by the revenue.

6. Ground Nos. 2 - 4 raised by the assessee is against treating the receipts for voice termination services rendered by the assessee as Royalty under section 9(1)(vii) of the Act as well as Article 12 of India U/S. DTAA.

6.1. The Ld.AR submitted that the issue is now covered by various orders of this Tribunal, the details of which are as under:-

Sr. No.	Particulars	Page Nos.
1.	<i>Vodafone Idea Ltd. v. DDIT [2023] 457 ITR 189 (Kar HC)</i>	1-10
2.	<i>DDIT v. Vodafone Idea Ltd. [2024] 469 ITR 391 (SC)</i>	11-12
3.	<i>DDIT v. Vodafone Idea Ltd. [2025] 306 Taxman 267 (SC)</i>	13-15

4.	<i>Telefonica UK Ltd. v. DCIT [2023] 203 ITD 171 (Mumbai - Trib.)</i>	16-23
5.	<i>Telefonica Depreciation Espana SA v. ACIT(IT) [2023] 154 taxmann.com 436 (Bangalore - Trib.)</i>	24-38
6.	<i>Al Telekom Austria Aktiengesellschaft v. DCIT [2023] 156 taxmann.com 155 (Bangalore-Trib)</i>	39-59
7.	<i>DCIT v. Orange (formerly known as France Telecom) [2024] 158 taxmann.com 186 (Bangalore-Trib.)</i>	60-74
8.	<i>Bharti Airtel Ltd. v. ITO(TDS) [2016] 178 TTJ 708 (Delhi-Trib.)</i>	75-121
9.	<i>Vodafone Idea Ltd v. DCIT [2025] 177 taxmann.com 440 (Mumbai - Trib)</i>	122-164
10.	<i>DCIT(IT) v. Reliance Jio Infocomm Ltd. [2023] LT.A. No. 2866/Mum/2022 (Mumbai-Trib.)</i>	165-206
11.	<i>DCIT(IT) v. Reliance Jio Infocomm Ltd. [2019] LT.A. No.6331 to 6334/Mum/2018 (Mumbai-Trib.)</i>	207-227
12.	<i>PCCW Global Ltd. v. ACIT [2023] IT(IT)A No. 785/Bang 2022 (Bangalore</i>	228-248

6.2. He submitted that in the hands of the service recipient, this Tribunal has held that there was no obligation to deduct TDS on the payments made by *Reliance Jio Infocomm Ltd.*, in *ITA No.2866/Mum/2022 vide order dated 26/04/2023* for assessment year 2019-20. The Ld.AR also referred to the decion of coordinate bench *Reliance Jio Infocomm Ltd.*, in *ITA No.6331 to 6334/Mum/2018 vide order dated 15/09/2019* for assessment year 2018-19. We refer to the relevant observation of this Tribunal in case of *ITA No.6331 to 6334/Mum/2018 vide order dated 15/09/2019* for assessment year 2018-19 as under:-

“6. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of the applicable legal position.

7. A coordinate bench of this Tribunal, while dealing with the same issue in assessee’s own case for the assessment year 2016-17 and in the judgment reported as *DCIT Vs Reliance Jio Infocomm Ltd [(2019) 73 ITR (T) 194 (Mum)]*, has, speaking through one of us (i.e. the Judicial Member), observed, inter alia, as follows:

.....We find that our indulgence in the present appeal has been sought by the revenue to adjudicate as to whether the CIT(A) is correct in concluding that the amount paid by the assessee for availing bandwidth services to RJIPL did not constitute "royalty" and was its "business profits". Admittedly, as the revenue has not assailed the observations of the CIT(A) that the payments made by the assessee to RJIPL cannot be held as FTS, therefore, we confine ourselves to the issue to the extent the same has been assailed by the revenue before us. As is discernible from the record, the assessee pursuant to the terms of the 'agreement' had only received standard facilities i.e bandwidth services from RJIPL. In fact, as observed by the CIT(A), the assessee only had an access to services and did not have any access to any equipment deployed by RJIPL for providing the bandwidth services. Apart there from, the assessee also did not have any access to any process which helped in providing of such bandwidth services by RJIPL. As a matter of fact, all infrastructure and process required for provision of bandwidth services was always used and under the control of RJIPL, and the same was never given either to the assessee or to any other person availing the said services. We are persuaded to subscribe to the observations of the CIT(A) that as the process involved to provide the We have heard the authorized representatives for both the parties, perused the orders of the lower authorities and the material available on record and the judicial pronouncements relied upon by them. We find that our indulgence in the present appeal has been sought by the revenue to adjudicate as to whether the CIT(A) is correct in concluding that the amount paid by the assessee for availing bandwidth services to RJIPL did not constitute "royalty" and was its "business profits". Admittedly, as the revenue has not assailed the observations of the CIT(A) that the payments made by the assessee to RJIPL cannot be held as FTS, therefore, we confine ourselves to the issue to the extent the same has been assailed by the revenue before us. As is discernible from the record, the assessee pursuant to the terms of the 'agreement' had only received standard facilities i.e bandwidth services from RJIPL. In fact, as observed by the CIT(A), the assessee only had an access to services and did not have any access to any equipment deployed by RJIPL for providing the bandwidth services. Apart there from, the assessee also did not have any access to any process which helped in providing of such bandwidth services by RJIPL. As a matter of fact, all infrastructure and process required for provision of bandwidth services was always used and under the control of RJIPL, and the same was never given either to the assessee or to any other person availing the said services. We are persuaded to subscribe to the observations of the CIT(A) that as the process involved to provide the bandwidth services was not a "secret" i.e IPR in the process was not owned/registered in

the name of RJIPL, but was a standard commercial process that was followed by the industry players, therefore, the same could not be classified as a "secret process" which would have been required for charactering the aforesaid payment made by the assessee to RJIPL as "royalty" under the India-Singapore DTAA. We are further in agreement with the view taken by the CIT(A) that as the amount paid by the assessee to RJIPL was neither towards use of (or for obtaining right to use) Industrial, commercial or scientific equipment, nor towards use of (or for obtaining right to use) any secret formula or process, therefore, the same could not be classified as payment of "royalty" by the assessee. Insofar the ld. D.R had tried to press into service Explanation 6 to Sec. 9(1)(vi), in order to drive home his contention that the payment made by the assessee to RJIPL for availing the bandwidth services would fall within the sweep of "royalty" is concerned, we are unable to persuade ourselves to accept the same. In our considered view, the amendment in Sec. 9(1)(vi) will not have any bearing on the definition of "royalty" as contemplated in the India-Singapore DTAA. Our aforesaid view is fortified by the order of the Hon'ble High Court of Bombay in the case of The CIT v. Reliance Infocomm Ltd. (IT Appeal No. 1395 of 2016, dated 05.02.2019). The Hon'ble High Court in its aforesaid judgment had after referring to the judgments of the Hon'ble High Court of Delhi in the case of DIT v. New Skies Satellite BV [2016] 382 ITR 114/238 Taxman 577/68 taxmann.com 8 and CIT v. Siemens Aktiengesellschaft [2009] 310 ITR 320 (Bom)] had after deliberating on the amendment made available on the statute by the Explanation 6 to Sec. 9(1)(vi), observed that mere amendment in the I-T Act would not override the provisions of DTAA treaties. In the backdrop of our aforesaid observations, we shall now further deliberate on the definition of "royalty" as contemplated in the India-Singapore tax treaty. In our considered view there is substantial force in the contention advanced by the ld. A.R that though the term "royalty" as used in Article 12 of India-Hungary DTAA takes within its sweep "...transmission by satellite, cable, optic fibre or similar technology", however, the definition of "royalty" in the India-Singapore tax treaty with which we are concerned has a narrow meaning. In fact, we find that despite the fact that the India-Singapore tax treaty was amended by Notification No. SO 935(E), dated 23.03.2017, however, the definition of "royalty" therein envisaged had not been tinkered with and remains as such. We thus in terms of our aforesaid observations are of the considered view that the amount received by RJIPL from the assessee for providing standard bandwidth services could not be characterised as "royalty" as per the India- Singapore DTAA, and as rightly observed by the CIT(A), was in fact the "business profits" of RJIPL. Insofar the taxability of the aforesaid "business profits" is concerned, we find that as RJIPL did not have any business connection or a PE in India, therefore, the same as per Article 7 of the

India-Singapore DTAA could not have been brought to tax in India services was not a "secret" i.e IPR in the process was not owned/registered in the name of RJIPL, but was a standard commercial process that was followed by the industry players, therefore, the same could not be classified as a "secret process" which would have been required for charactering the aforesaid payment made by the assessee to RJIPL as "royalty" under the India-Singapore DTAA. We are further in agreement with the view taken by the CIT(A) that as the amount paid by the assessee to RJIPL was neither towards use of (or for obtaining right to use) Industrial, commercial or scientific equipment, nor towards use of (or for obtaining right to use) any secret formula or process, therefore, the same could not be classified as payment of "royalty" by the assessee. Insofar the ld. D.R had tried to press into service Explanation 6 to Sec. 9(1)(vi), in order to drive home his contention that the payment made by the assessee to RJIPL for availing the bandwidth services would fall within the sweep of "royalty" is concerned, we are unable to persuade ourselves to accept the same.

In our considered view, the amendment in Sec. 9(1)(vi) will not have any bearing on the definition of "royalty" as contemplated in the India-Singapore DTAA. Our aforesaid view is fortified by the order of the Hon'ble High Court of Bombay in the case of *The CIT v. Reliance Infocomm Ltd.* (IT Appeal No. 1395 of 2016, dated 05.02.2019). The Hon'ble High Court in its aforesaid judgment had after referring to the judgments of the Hon'ble High Court of Delhi in the case of *DIT v. New Skies Satellite BV* [2016] 382 ITR 114/238 Taxman 577/68 taxmann.com 8 and *CIT v. Siemens Aktiengesellschaft* [2009] 310 ITR 320/177 Taxman 8/(Bom.) had after deliberating on the amendment made available on the statute by the Explanation 6 to Sec. 9(1)(vi), observed that mere amendment in the I-T Act would not override the provisions of DTAA treaties. In the backdrop of our aforesaid observations, we shall now further deliberate on the definition of „royalty“ as contemplated in the India-Singapore tax treaty. In our considered view there is substantial force in the contention advanced by the ld. A.R that though the term "royalty" as used in Article 12 of India-Hungary DTAA takes within its sweep "...transmission by satellite, cable, optic fibre or similar technology", however, the definition of "royalty" in the India-Singapore tax treaty with which we are concerned has a narrow meaning. In fact, we find that despite the fact that the India-Singapore tax treaty was amended by Notification No. SO 935(E), dated 23.03.2017, however, the definition of "royalty" therein envisaged had not been tinkered with and remains as such. We thus in terms of our aforesaid observations are of the considered view that the amount received by RJIPL from the assessee for providing standard bandwidth services could not be characterised as "royalty" as per the India- Singapore DTAA, and as rightly observed

by the CIT(A), was in fact the "business profits" of RJIPL. Insofar the taxability of the aforesaid "business profits" is concerned, we find that as RJIPL did not have any business connection or a PE in India, therefore, the same as per Article 7 of the India-Singapore DTAA could not have been brought to tax in India

8. Learned Departmental Representative's armoury is, however, not exhausted.

9. Learned Departmental Representatives basic stand is that the specific issues raised in the grounds of appeal, which go to the root of matter and conclusively uphold the stand of the Assessing Officer, are not dealt with in the judicial precedents relied upon. As we have noted earlier as well, and as evident from the specific grounds of appeal, the specific plea taken in this appeal is that the Explanation 5 and 6 to Section 9(1)(vi) must hold the field, in the context of interpretation of Article 12 of the Indo Singapore tax treaty so far connotations of undefined expressions therein are concerned, in view of the specific provisions of article 3(2) of Indo Singapore tax treaty itself and in the light of, as the grounds of appeal point out, Hon'ble Supreme Court's judgment in the case of Vatika Township Pvt Ltd (supra).

10. It is only in exceptional cases that there is an occasion to deviate from the decisions of the coordinate benches, but that does not mean that in the covered cases all doors are shut on the parties. When a coordinate bench judgment does not appeal to another coordinate bench, or when the coordinate bench discovers that the judicial precedent is rendered per incurium, it could indeed be open to the coordinate bench to refer the matter for the consideration of a larger bench, or, in a fit case, hold that the judicial precedent, for the specific reasons set out, is not a binding judicial precedent. Let us also not lose sight of the fact that, as pointed out by the learned Departmental Representative, there is a direct decision of Hon'ble jurisdictional High Court in the case of CIT Vs Siemens Aktiengesellschaft [(2009) 310 ITR 320 (Bom)], upholding ambulatory approach to domestic law meaning of undefined terms under article 3(2), and, if the same approach is adopted in the present case for certain expressions appearing in the definition in the royalty, the plea of the revenue, at least on the face of it, does not seem to be totally devoid of legally sustainable merits. In any event, even though the decision relied upon refers to the aforesaid decision, it does not at all deal with the interplay of domestic law definitions, under article 3(2), with undefined treaty expressions. Of course, that is only one of the aspects of the matter and there are many other nuances of the matter which need to be taken note of, analysed and taken a conscious call on. Let us, in this backdrop, neatly identify and then deal with the

core issue, as being raised before us now, and that core issue is the interpretation to be assigned to the expression “process” for the purpose of Article 12(3)(a) which provides that “The term “royalties” as used in this Article means payments of any kind received as a consideration for the use of, or the right to use: (a) any copyright of a literary, artistic or scientific work, including cinematograph film or films or tapes used for radio or television broadcasting, any patent, trade mark, design or model, plan, secret formula or process (Emphasis, by underlining, supplied by us now), or for information concerning industrial, commercial or scientific experience, including gains derived from the alienation of any such right, property or information”. The expression “process”, which finds mention in this treaty provision, is not defined in the treaty itself. Learned Departmental Representative’s contention is that in the light of article 3(2) of the treaty, which states that “(a)s regards the application of the Agreement by a Contracting State, any term not defined therein shall, unless the context otherwise requires, have, the meaning which it has under the law of that State concerning the taxes to which the Agreement applies”, the domestic law meaning of the expression “process”, which is set out in Explanation 6 to Section 9(1)(vii), must hold the filed. Explanation 6 to Section 9(1)(vii), which was inserted vide the Finance Act 2012 with retrospective effect from 1st June 1976, provides that “(f)or the removal of doubts, it is hereby clarified that the expression “process” includes and shall be deemed to have always included transmission by satellite (including up-linking, amplification, conversion for down-linking of any signal), cable, optic fibre or by any other similar technology, whether or not such process is secret”. In plain words, going by the complex web of this line of argument, thus, in the absence of any specific definition of “process” in the Indo Singapore tax treaty, the domestic law meaning of this expression must law prevail under article 3(2), and, going by the domestic law meaning under Explanation 6 to Section 9(1)(vii), any transmission by satellite (including (including up-linking, amplification, conversion for down-linking of any signal), cable, optic fibre or by any other similar technology, whether or not such process is secret, is covered by the definition of “royalty’ under article 13(3)(a) of the Indo Singapore tax treaty, and since the bandwidth services, on the facts of this case, are transmitted by satellite, cable, optic fibre or other similar technology, the bandwidth services constitutes ‘royalty’ for the purpose of article 13(3)(a). As for the reference to Vatika Township decision (supra), it is contended, as stated in so many words in the fourth ground of appeal, the insertion of Explanation 5 and 6, though by the virtue of Finance Act 2012, is only a “declaratory and clarificatory amendment explaining the law as existing from 01.06.1976”. A lot of emphasis has been placed on the interplay of article 3(2) with domestic law meaning of a term used in,

but not defined in, the Indo Singapore tax treaty. The thrust of learned Departmental Representative's argument is that in such a situation, i.e. when a term used in a treaty is not defined in the treaty, domestic law meaning of the term must prevail. The expression "process", on the basis of this argument and on the strength of article 3(2) of treaty itself, is claimed to cover "transmission by satellite (including up-linking, amplification, conversion for down-linking of any signal), cable, optic fibre or by any other similar technology, whether or not such process is secret" as is the case of bandwidth services provided by RJ-S. It is also pointed out that the adoption of domestic law meaning for treaty purposes, as it is mandated by the treaty itself vide article 3(2), remains unaffected by the provisions of Section 90(2). The question of treaty superiority, under the provisions of the Indian Income Tax Act 1961, comes into play only when the domestic law meaning is not assigned by the treaty itself.

11. There is a fundamental fallacy, in our humble understanding, in this argument, and the fallacy lies in the proposition that the expression "process" is a treaty term for which article 3(2) can be invoked. Of course, even without article 3(2), when meanings of an expression, whether a treaty term or not, are to be explored, all sources of meanings, including in the domestic law, will be relevant but then, in such a situation, the binding force of article 3(2) will be missing in the sense that it will not be necessary to establish, before adopting a meaning other than the domestic law meaning, that it's the compulsion of context requiring that the domestic law meaning is to be discarded.

12. It's important to note that the provisions of Article 3(2) come into play for domestic law meaning of "any term not defined (emphasis, by underlining, supplied by us)" in the tax treaty. To invoke the provisions of Article 3(2), the first thing to be seen is whether the undefined expression can be said to be a treaty term. The expression "term" is defined as "a word or phrase used to describe a thing or to express a concept, especially in a particular kind of language or branch of study". A "term" is thus a word that has meaning and refers to objects, ideas, events or a state of affair. A term is thus, in addition to being a word, some kind of a point of reference, whereas a word is only a constituent of language. As a corollary to these discussions, Article 3(2) will come into play only in respect of the undefined treaty terms, which are in the nature of reference points and which have some peculiar significance as a term employed in the treaty, and not all the undefined words and expressions used in a treaty. To put a question to ourselves, does the expression "process", in its own right, has any relevance for the tax treaties or can "process" to be said to

be a term employed in tax treaties? The answer is in negative. If at all the expression “process” has any relevance, it is in defining a treaty term i.e. “royalty”. To look for statutory definitions of each word employed in a definition of the treaty term, and then construct the definition of treaty term as an assembly of the statutory definitions of all these words taken together will be too hyper technical an approach, and, in any case, beyond the mandate of article 3(2). That does not appeal to us. It is even more inappropriate because “process” is judicially explained but the statutory definition is being invoked, under article 3(2), to dislodge the judicial interpretation. Quite clearly, therefore, but for the binding force of article 3(2), this statutory definition does not come to the rescue of Assessing Officer’s case, and it is this binding force of article 3(2) which does not come into play in explaining the word “process” used in definition of a treaty term i.e. royalty. Of course, “royalty” is a treaty term but since it is well defined term in the treaty, its domestic law meaning is not relevant for treaty purposes. The expression “process” is defined in the domestic law but this definition is in the limited context of explaining the term “royalty” under the domestic law, it cannot be borrowed in the treaty for understanding connotations of “royalty” under the treaty. It cannot be, in our humble understanding, open to pick up a part of the definition of royalty under the domestic law and supply the same to an undefined expression in the definition of royalty under the treaty. The expression ‘process’ is not a treaty term per se, or a reference point, used in the treaty, rather it is an expression or word used in defining the treaty term ‘royalty’. The expression “process” is used in the treaty in that limited context and it does not have an independent existence. The definition of “royalty” under the domestic law, as it stands now, is more exhaustive inasmuch as the expression “process” used in the definition is further elaborated upon in Explanation 6 to Section 9(1)(vi) which does not, in any case, provide a universal rule as it is in the context of this particular sub section dealing with the “income by way of royalty”. The definition of expression ‘process’ is thus not a standalone definition which can be imported in treaty under article 3(2).

13. *The domestic law meaning under article 3(2) is relevant only when the treaty term itself is undefined, as noted by Hon’ble Delhi High Court in the case of DIT Vs New Skies Satellite BV [(2016) 328 ITR 114 (Del)]. When the expression ‘royalty’ is a defined expression under the applicable tax treaty, there cannot be any occasion to invoke article 3(2) for further dissecting the issue and explore the domestic law meaning of each expression used in this definition for coming at the conclusions about connotations of royalty. It cannot, therefore, be open to invoke article 3(2) to import domestic law meaning, even partly, when the treaty term has received a definition under the treaty. It is for this reason that Explanation 6 to Section*

9(1)(vi), in our humble understanding, has no role, under article 3(2) of the treaty, in explaining the expression “process”, in the context of defining royalty under the Indo Singaporean tax treaty. This statutory provision, under the domestic law, is relevant only when the definition of royalty under section 9(1)(vi) of the Income Tax Act, 1961, is subject matter of consideration, as it specifically states that said definition is for the purpose of “for the purpose of this clause [i.e. Section 9(i)(v)]”.

14. Even if we proceed on the basis that “process” can be treated as an undefined treaty term, which, in our humble understanding, it is not, and that Explanation 6 to Section 9(1)(vi) can have a role in assigning domestic law meaning to the expression “process”, the next fundamental question, however, that we must consider is whether, on the facts and in the circumstances of this case, assignment of the domestic law meaning under article 3(2), to an undefined treaty term, is to be done by way of static interpretation or by way of dynamic or ambulatory interpretation. In plain words, the meaning to be assigned to the undefined treaty terms should be given in the light of the law as it stood at the point of time when treaty was entered into or the law as it stands at the point of time when related taxes are levied. If the static interpretation is to be given, it does not come to the rescue of the revenue’s case. The expression “process” was not, at the point of time relevant to static interpretation, not statutorily defined, and if the judicial interpretation of term “process”, without the aid of Explanation 6 to Section 9(1)(vi), is to be taken into account, it does not support the case of the revenue either. There is no dispute on this fundamental position. It is also elementary that when Hon’ble Courts lay down the law, or when a judicial interpretation is given, it is not from prospective effect, and it relates back to the point of time when law was legislated. Effectively, therefore, judicial ruling, without taking into account Explanation 6 to Section 9(1)(vi) will hold the field, and undisputedly these rulings do not help the case of the revenue. However, apart from emphasis on ambulatory interpretation in Model Conventions and their Commentaries, and conceptual justification for that approach in general, there are certain observations made by Hon’ble jurisdictional High Court, in the case of Siemens Aktiengesellschaft (supra) which give an impression that such an exercise can only be ambulatory exercise. Let us, therefore, deal with this judicial precedent in some detail.

15. Hon’ble jurisdictional High Court had, in the case of CIT Vs Siemens Aktiengesellschaft [(2009) 310 ITR 320 (Bom)] had an occasion to consider the question whether the domestic law meaning to be supplied to a treaty provision should be the meaning as prevailing at the point of time when agreement was entered into or as

prevailing at the point of time when taxes are levied, i.e. whether such an interpretation should be static interpretation or ambulatory interpretation. Rejecting the plea of the assessee seeking static interpretation, Hon'ble High Court, having noted the argument against the assessee that "considering article II(2), the expression "laws in force" [emphasis, by underlining, supplied by us now] as contained in DTAA, the ambulatory interpretation will have to be accepted" has held that "Considering the express language of article II(2) it is not possible to accept the broad proposition urged on behalf of the assessee that the law would be the law as was applicable or as defined when the DTAA was entered into". Interestingly, the words employed in Article II(2) of the old Indo German tax treaty, which is what Their Lordships were dealing with, were to the effect that "In the application of the provisions of this agreement in one of the territories any term not otherwise defined in this agreement shall, unless the context otherwise requires, have the meaning which it has under the laws in force in that territory (emphasis, by underlining, supplied by us now) relating to the taxes which are the subject matter of this agreement", and these words were slightly different than the words employed in the Indo Singapore tax treaty, that we are dealing with, which are as follows: "As regards the application of the Agreement by a Contracting State, any term not defined therein shall, unless the context otherwise requires, have, the meaning which it has under the law of that State concerning the taxes to which the Agreement applies". While in the former, there is emphasis on "laws in force", which is what Their Lordships have taken very careful note of, in the latter it simply refers to "meaning which it has under the law of that State" without making any specific reference to the laws in force or the laws as they prevailed at any other point of time. We may also add that Their Lordships were dealing with Old German (i.e. India- Federal Republic of Germany) tax treaty [(1960) 40 ITR (St) 21] in which the expression 'royalty' itself was not defined, and the question, therefore, arose whether the definition of 'royalty', as it stood at the point of time when taxes were levied, could be adopted.

16. *Apart from the fact that "royalty" is a neatly defined expression in the current Indo Singapore tax treaty that we are concerned with, the expression "laws in force", which was subject matter of focus of judicial analysis in the said case, does not find place in the treaty before us. That is, however, not really true of all the tax treaties currently in force. There are tax treaties which still use the same expression. Our attention was, for example, invited to India Australia Double Taxation Avoidance Agreement [(1992) 194 ITR (Statute) 91; Indo Australian tax treaty, in short] which also specifically provide that the assignment of domestic law meaning to*

an undefined treaty term is an ambulatory exercise inasmuch as article 3(2) therein specifically provides that “(i)n the application of this Agreement by a Contracting State, any term not defined in this Agreement shall, unless the context otherwise requires, have the meaning which it has under the laws of that State from time to time in force (Emphasis, by underlining, supplied by us) relating to the taxes to which this Agreement applies”. We are not really concerned with this tax treaty at present and we must not, therefore, get into the academic delights of taking a call on what the legal position will be in such a case, in case one is to proceed on the basis that the expression “process” is a treaty term and the article 3(2) can be invoked in respect of the same.

17. *So far as our purposes are concerned, it is sufficient to take note of the fact that the provisions of Article 3(2) of Indo Singaporean tax treaty are differently worded vis-à-vis the old Indo German tax treaty that Hon’ble jurisdictional High Court were dealing with in Siemens Aktiengesellschaft’s case (supra) and the crucial words “laws in force” on which so much emphasis was placed in judicial analysis by Hon’ble jurisdictional High Court do not find place in this treaty. Strictly speaking, therefore, the judicial sanction for the theory of ambulatory interpretation, for the purpose of article 3(2), does not, therefore, necessarily extend to Indo Singaporean tax treaty that we are concerned with.*

18. *Of course, even without the words “meaning which it has under the laws of that State from time to time in force”, one could still justify the ambulatory interpretation in the normal course of interpretation—though without the binding force of judicial precedents, but then, for the reasons we will set out now, there is a strong conceptual basis for not adopting the ambulatory interpretation on peculiar facts of this case.*

19. *While it is indeed true, as held by Hon’ble jurisdictional High Court in the case of Siemens Aktiengesellschaft’s, that “the rule of referential incorporation or incorporation cannot be applied when we are dealing with a treaty (DTAA) between two sovereign nations” because “it is open to a sovereign legislature to amend its laws”, Their Lordships have put in a word of caution by suggesting an element of “reasonableness” in construing the treaty superiority vis-à-vis the domestic law by observing that “a DTAA entered into by the Government in exercise of the powers conferred by section 10(1) [sic-section 90(1)] while considering section 10(2) [sic-section 90(2)] has to be reasonably construed [Emphasis, by underlining, supplied by us now]”. In the Siemen’s decision (supra) itself, while quoting, with approval, Hon’ble Supreme Court of Canada’s decision in the case of Her Majesty The Queen v. Melford Developments Inc. 82 DTC 6281,*

Their Lordships had also observed that “The ratio of that judgment, in our opinion, would mean that by an unilateral amendment it is not possible for one nation which is party to an agreement to tax income which otherwise was not subject to tax”. Quite clearly, therefore, whatever be the approach adopted, for the purpose of article 3(2) i.e. static or ambulatory, a unilateral treaty override, howsoever subtle, is not really permissible.

20. *It is important to bear in mind the fact that the insertion of Explanation 6 to Section 9(1)(vii) was admittedly to nullify certain judicial rulings, which gave an interpretation, unfavourable to the tax administration, to the expression “process”. The Memorandum to the Finance Bill 2012 specifically stated that “Considering the conflicting decisions of various courts in respect of income in nature of royalty and to restate the legislative intent, it is further proposed to amend” “section 9(1)(vi) to clarify that the term “process” includes and shall be deemed to have always included transmission by satellite (including up-linking, amplification, conversion for down-linking of any signal), cable, optic fibre or by any other similar technology, whether or not such process is secret”.*

21. *Let us appreciate the nature of development, from the treaty perspective, in case one is to hold that the retrospective amendments defining the expression ‘process’ would be equally applicable for definition of ‘royalties’ under the tax treaty. Thus viewed, situation could be like this. There are judicial rulings which decide something in favour of the residence jurisdiction, and the source jurisdiction is not happy with that outcome, and it’s a coincidence, coincidence if it is, that the source jurisdiction changes the domestic law in a way that, once that amended domestic law is applied in the context of article 3(2), a different outcome to the same treaty provision, which favours the source jurisdiction, is possible. In effect, thus, what was not taxable in the source jurisdiction in pre domestic law amendment situation becomes taxable in source jurisdiction post domestic law amendment. Undoubtedly, legislation is a sovereign function and it is indeed open to any jurisdiction to amend, even retrospectively, its domestic laws to bring new incomes to taxability in the source jurisdiction, but so far as the source jurisdiction taxability under the treaty provisions is concerned, legal amendments so as to influence the taxability even under the treaty situation, by the source jurisdictions unilaterally, are impermissible. That is a classic case of a subtle unilateral treaty override. While, in India, the expression ‘treaty override’ is often loosely used for the situations where the provisions of tax treaty prevails over any inconsistent provisions of domestic law, this approach seems to be at variance with the international practices wherein connotations of ‘treaty override’ refer to a situation in which domestic legislation of a treaty partner*

jurisdiction overrules the provisions of a single treaty or all treaties hitherto having had effect in that jurisdiction. That will be the end result of a domestic law amendment of an undefined treaty term, in departure from the current position, and import such amended meaning of that term, under article 3(2), in the treaty situations as well. Such an approach, on the first principles, is unsound inasmuch as it is well settled in law that the treaty partners ought to observe their treaties, including their tax treaties, in good faith. Article 26 of Vienna Convention on Law of Treaties provides that, "Pacta sunt servanda: Every treaty in force is binding on the parties to it and must be performed by them in good faith". What it implies is that whatever be the provisions of the treaties, these provisions are to be given effect in good faith. Therefore, no matter how desirable or expedient it may be from the perspective of the tax administration, when a tax jurisdiction is allowed to amend the settled position with respect to a treaty provision, by an amendment in the domestic law and admittedly to nullify the judicial rulings, it cannot be treated as performance of treaties in good faith. That is, in effect, a unilateral treaty over-ride which is contrary to the scheme of Article 26 of Vienna Convention on Law of Treaties. As observed by Hon'ble Delhi High Court, in the case of DIT Vs New Skies Satellite BV [(2016) 328 ITR 114 (Del)], "the Vienna Convention on the Law of Treaties, 1969 ("VCLT") is universally accepted as authoritatively laying down the principles governing the law of treaties". Even though India is not a signatory to the Vienna Convention, Hon'ble Supreme Court has referred to the same time and again and, in the case of Ram Jethmalani Vs Union of India [(2011) 339 ITR 107 (SC)], observed that "it contains many principles of customary international law" and the rules set out therein provides "a broad guideline as to what could be an appropriate manner of interpreting a treaty in the Indian context also". In our humble understanding, therefore, the additional test that is required to be put, while adopting the ambulatory interpretation in such a situation, is whether the amendment is domestic law ends up unsettling a conclusion arrived at under the pre domestic law amendment position i.e. reversing the judicial rulings in favour of the residence jurisdiction, and, if the answer is in the positive, the ambulatory interpretation is to be discarded because that approach would patronise, and legitimise, a unilateral treaty override, and the outcome of ambulatory interpretation in such a case will be incompatible with the fundamental principles of treaty interpretation under the Vienna Convention. The approach is justified on the first principles on the ground that when two approaches are possible for incorporation of domestic law provisions in the tax treaties and one of these approaches is compatible with Article 26 of the VCLT while the other is incompatible with the same, the approach compatible with the VCLT provisions is to be adopted."

6.3. It is noted that the treaty involved in the above assessment year was of India Singapore DTAA. The treaty to be considered for the year under consideration is India US DTAA. Both sides agree that the relevant article in both the treaties are *pari-materia* with each other.

6.4. We refer to the decision of *Hon'ble Karnataka High Court* in case of *Vodafone Idea Ltd.(supra)* wherein the observed that a non-resident telecom operator cannot be held to be taxable as “right” and “process” appearing in the clarificatory Explanation 2,5 and 6 of section 9(1)(vi) of the act. He also referred to the decision of *Coordinate Bench of this Tribunal* in case of *M/s. Telefonica Depreciation Espana S.A, vs. DCIT in IT(IT)A Nos. 215 & 216/Bang/2023* by order dated 17.08.2023 wherein this *Tribunal* observed and held as under:-

“10. We have heard the rival submission and perused the material on record. At the outset, we notice that Assessment Year 2010-11 has been considered by the AO as the base year and has been followed in the subsequent Assessment Years. The Tribunal in ITA Nos. 2657/Bang/2019, 180/Bang/2021 and 817/Bang/2022 for Assessment Years 2010-11 to 2012-13 has decided the issue in favour of the assessee vide order dated 10 August 2023. The Tribunal has passed a detailed order after considering several judicial precedents including the *Hon'ble Karnataka High Court* judgments in the case of *Vodafone* in ITA No. 161/2015 and *Vodafone South Ltd. (2016) 72 taxmann.com 347* which have held that interconnectivity charges are not taxable as royalty and FTS respectively. The relevant portion of the Tribunal order is extracted before ready reference:

Tribunal Findings / Observations	Page no. / Para
It is an admitted fact that there is no transfer of any intellectual property rights or any exclusive rights that has been granted by the assessee to the service recipients for using such intellectual property. Therefore Explanation 2 to section 9(1)(vi) cannot be invoked.	Page 10 Para 5.2.7

All these changes in Act (insertion of Explanation 5 & 6) do not affect the definition of Royalty as per DTAA	Page 10 Para 5.2.9
On perusal of agreement, it is noted that installation and operation of sophisticated equipment are with the view to earn income by allowing the users to avail the benefits of such equipment or facility and does not tantamount to granting the "use or right to use" the equipment or process so as to be considered as royalty	Page 21 Para 5.2.16
At no point of time, any possession or physical custody, control or management over any equipment is received by the end users/customers.	Page 21 Para 5.2.17
Process involved in providing the services to the end users/customers is not "secret" but a standard commercial process followed by the industry players. Hence, same cannot be classified as "secret process" as per clause 3 of Article 13 of India-Spain DTAA	Page 21 Para 5.2.17
We hold that payments received by assessee towards interconnectivity utility charges from Indian customers / end users cannot be considered as Royalty / FTS to be brought to tax in India under section 9(1)(vi)/(vii) of the Act and also as per DTAA	Page 26 Para 5.2.20
The payment received by the non-resident assessee amounts to be the business profits of the assessee which is taxable in the resident country and is not taxable in India under Article 5 of the DTAA as there is no case of permanent establishment of the assessee that has been made out by the revenue in India.	Page 26- 27 Para 5.2.21

Referring to another decision of Coordinate Bench of this Tribunal in case of *Telefonica De Espana S.A, vs. ACIT(IT)/DCIT(IT) in IT(IT)A Nos. 2657/Bang/2019, 180/Bang/2021 & 817/Bang/2022* by order dated 10.08.2023, he submitted that a detailed analysis of taxability of such payment under the Income Tax Act has been made by observing as under:

“5.1 We note that the revenue characterised the payments received by assessee towards interconnectivity utility charges as Royalty since the payment is made to “use the process” or “an equipment”.

5.2 It is an admitted fact that various service providers in India entered into agreement with assessee for international carriage and connectivity services against which an interconnectivity charges are received by the assessee. We refer to the term "Process" occurs under clause (i), (ii) and (iii) to Explanation 2 to Section 9(vi). It reads as under:—

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

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

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

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

5.2.1 The term "process" used under Explanation 2 to section 9(1)(vi) in the definition of 'royalty' does not imply any 'process' which is publicly available. The term "process" occurring under clauses (i), (ii) and (iii) of Explanation 2 to section 9(1)(vi) means a "process" which is an item of intellectual property. Clause (iii) of the said Explanation reads as follows:

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

Clauses (i) & (ii) of the said explanation also use identical terms.

5.2.2 The words which surround the word 'process' in clauses (i) to (iii) of Explanation 2 to section 9(1)(vi), refer to various species of intellectual properties such as patent, invention, model, design, formula, trade mark etc. The expression 'similar property' used at the end of the list, further fortifies the stand that the terms 'patent, invention, model, design, secret formula or process or trade mark' are to be understood as belonging to the same class of properties viz. intellectual property.

5.2.3 We also note that 'Intellectual property' as understood in common parlance means, Knowledge, creative ideas, or expressions of human mind that have commercial value and are protectable under copyright, patent, service mark, trademark, or trade secret laws from imitation, infringement, and dilution. Intellectual property includes brand names, discoveries, formulas, inventions, knowledge, registered designs, software, and works of artistic, literary, or musical nature.

5.2.4 We refer to the commentary in Prof.Klaus Vogel's Commentary on Double Taxation Convention, wherein, the term 'Royalty' is defined as under:

"Paragraph 2 contains definition of the term 'royalties'. These relate, in general, to rights or property constituting different forms of literary and

artistic property, the elements of intellectual property specified in the text and information concerning industrial, commercial or scientific experience. The definition applies to payments for the use of, or the entitlement to use, rights of the kind mentioned, whether or not they have been, or are required, registered in a public register. The definition covers both payments made under a license and compensation which a person would be obliged to pay for fraudulently copying or infringing the right."

5.2.5 Thus the word "process" thus must also refer to specie of intellectual property, applying the rule of, *ejusdem generis* or *noscitur a sociis*, as held by Hon'ble Supreme Court in case of *CIT vs. Bharti Cellular* reported in (2011) 330 ITR 239.

5.2.6 We refer to the decision of Hon'ble Madras High Court in case of *CIT vs. Neyveli Lignite Corpn. Ltd.* reported in (2000) 243 ITR 459 wherein Hon'ble High Court observed as under:

"10. The term (royalty) normally connotes the payment made to a person who has exclusive right over a thing for allowing another to make use of that thing which may be either physical or intellectual property or thing. The exclusivity of the right in relation to the thing for which royalty is paid should be with the grantor of that right. Mere passing of information concerning the design of machine which is tailor-made to meet the requirement of a buyer does not by itself amount to transfer of any right of exclusive user, so as to render the payment made therefor being regarded as royalty".

5.2.7 It is an admitted fact that there is no transfer of any intellectual property rights or any exclusive rights that has been granted by the assessee to the service recipients for using such intellectual property. Therefore Explanation 2 to section 9(1)(vi) cannot be invoked.

5.2.8 Further we note that by Finance Act, 2012, Explanation 5 & 6 were added with retrospective effect from 1.6.1976 which reads as under:—

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

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

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

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

5.2.9 *By insertion of Explanation 5 & 6, meaning of word 'Process' has been widened. As per these explanations, the word 'Process' need not be 'secret', and situs of control & possession of right, property or information has been rendered to be irrelevant. However, in our opinion, all these changes in the Act, do not affect the definition of 'Royalty' as per DTAA. The word employed in DTAA is 'use or right to use', in contradistinction to, "transfer of all or any rights" or 'use of', in the domestic law. As per Explanation 5 & 6, the word 'process' includes and shall be deemed to included, transmission by satellite (including up-linking, amplification, conversion for down-linking of any signal), cable, optic fibre or by any other similar technology, whether or not such process is secret. However, the Explanation does not do away with the requirement of successful exclusivity of such right in respect of such process being with the person claiming 'royalty' for granting its usage to a third party.*

5.2.10 *We may also refer to the following decisions of AAR wherein meaning of the phrase "use" or "right to use" has been explained.*

The meaning attached to phrase "use" or "right to use" has been explained in following decisions:

- *Decision of Authority For Advance Ruling(hereinafter referred to as AAR), in case of Cable & Wireless Networks India(P.)Ltd., In re, reported in (2009) 182 Taxman 76*
- *Decision of AAR in case of ISRO Satellite Centre reported in 2008) 307 ITR 59*
- *Decision of AAR in case of Dell International Services (India) P. Ltd.In.re. reported in (2008) 172 Taxman 418.*

5.2.11 *The above decisions, lay down that, in order to satisfy 'use or right to use', the control and possession of right, property or information should be with payer.*

5.2.12 *In the decision of Authority For Advance Ruling, in case of Cable & Wireless Networks India(P.)Ltd., In re(supra), a similar issue was considered wherein Cable & Wireless Networks India(P.)Ltd was a company incorporated in India part of Cable & Wireless Group of companies. Cable & Wireless Networks India(P.)Ltd., was engaged in providing international long distance and domestic long distance telecommunication services in India. As per the agreement Cable & Wireless Networks India(P.)Ltd., would provide the Indian leg of service of using its own network and equipments and network of other domestic operators. Similarly, the international leg of services would be provided by the UK group company using its international*

infrastructure and equipments. The Cable & Wireless Networks India(P.)Ltd., sought for advance ruling in respect of nature of payments made by Cable & Wireless Networks India(P.)Ltd., to the UK Group company, whether the payment is taxable as 'royalty' or 'FTS' under section 9(1)(vi)/(vii). The AAR relied on following decisions:

- Decision of Hon'ble Supreme Court in case of BSNL vs. UOI reported in (2006) 3 STT 245
- Decision of AAR in case of Dell International Services India Ltd. In.re reported in (supra)
- Decision of Hon'ble Madras High Court in case of CIT vs. Neyveli Lignite Corpn. Ltd. reported in (2000) 243 ITR 459
- Decision of coordinate bench of this Tribunal in case of WIPRO Ltd. Vs. ITO reported in (2003) 86 ITD 407.

5.2.13 The AAR relying on its view in case of Dell International Services India Ltd. In., held as under:

12.5 It seems to us that the two expressions 'use' and 'right to use' are employed to bring within the net of taxation the consideration paid not merely for the usage of equipment in praesenti but also for the right given to make use of the equipment at future point of time. There may not be actual use of equipment in praesenti but under a contract the right is derived to use the equipment in future. In both the situations, the royalty clause is invocable. The learned senior counsel for the applicant sought to contend, relying on the decision of Andhra Pradesh High Court in the case of Rashtriya Ispat Nigam Ltd. v. CTO [1990] 77 STC 182 which was affirmed by the Supreme Court, that mere custody or possession of equipment without effective control can only result in use of the equipment whereas a right to use the equipment implies control over the equipment. We do not think that such distinction has any legal basis. In the case of Rashtriya Ispat Nigam Ltd. (supra), what fell for consideration was the expression "transfer of right to use any goods" occurring in a sales-tax enactment. Obviously, where there is a transfer, all the possessory rights including control over the goods delivered will pass on to the transferee. It was in that context, emphasis was laid on 'control'. The Supreme Court affirmed the conclusion of the High Court that the effective control of machinery even while the machinery was in use of the contractor remained with RIN Ltd. which lent the machinery. The distinction between physical use of machinery (which was with the contractor) and control of the machinery was highlighted. The ratio of that decision cannot be pressed into service to conclude that the right of usage of equipment does not carry with it the right of control and direction whereas the phrase 'right to use' implies the existence of such control. Even in a case where the customer is authorized to use the equipment of which he is put in possession, it cannot be said that such right is bereft of the

element of control. We may clarify here that notwithstanding the above submission, it is the case of applicant that, it has neither possession nor control of any equipment of BTA.

12.6 The other case cited by the learned counsel for applicant to explain the meaning of expressions 'use' and 'right to use' is that of *BSNL v. UOI* (2006) 3 STT 245 (SC). Even that case turned on the interpretation of the words "transfer of right to use the goods" in the context of sales-tax Acts and the expanded definition of sale contained in clause (29A) of section 366 of the Constitution. The question arose whether a transaction of providing mobile phone service or telephone connection amounted to sale of goods in the special sense of transfer of right to use the goods. It was answered in the negative. The underlying basis of the decision is that there was no delivery of goods and the subscriber to a telephone service could not have intended to purchase or obtain any right to use electro-magnetic waves. At the most, the concept of sale in any subscriber's mind would be limited to the handset that might have been purchased at the time of getting the telephone connection. It was clarified that a telephone service is nothing but a service and there was no sale element apart from the obvious one relating to the handset, if any. This judgment, in our view, does not have much of bearing on the issue that arises in the present application. However, it is worthy of note that the conclusion was reached on the application of the well-known test of dominant intention of the parties and the essence of the transaction.

The word 'use' - what it means:

12.7 Let us now explore the meaning of the key word 'use'. The expression 'use' has a variety of meanings and is often employed in a very wide sense, but the particular meaning appropriate to the context should be chosen. In *S.M. Ram Lal & Co. v. Secretary to Government of Punjab* [1998] 5 SCC 574, the Supreme Court noted that 'in its ordinary meaning', "the word 'use' as a noun, is the act of employing a thing;

putting into action or service, employing for or applying to a given purpose". In the New Shorter Oxford Dictionary, more or less the same meaning is given. The very first meaning noted there is: "the action of using something; the fact or state of being used; application or conversion to some purpose". Another meaning given is "Make use of (a thing), especially for a particular end or purpose; utilize, turn to account... cause (an implement, instrument etc.) to work especially for a particular purpose; manipulate, operate". The various shades of meanings given in the decided cases in America are referred to in Words and Phrases, Permanent Edition Vol. 43A. Some of them are quoted below :

"The word 'use' means to make use of; convert to one's service; to avail oneself of; to employ". (Miller v. Franklin County)

"The word 'use' means the purpose served, a purpose, object or end for useful or advantageous nature". (Brown v. Kennedy)

"Use' means to employ for any purpose, to employ for attainment of some purpose or end, to convert to one's service or to put to one's use or benefit. (Beach v. Liningston)

"Use', as a noun, is synonymous with benefit and employment and as a verb has meaning to employ for any purpose, to employ for attainment of some purpose or end, to avail one's self, to convert to one's service or to put to one's use or benefit". (Esfeld Trucking Inc. v. Metropolitan Insurance Co.)

12.8 The word 'use' in relation to equipment occurring in clause (iva) is not to be understood in the broad sense of availing of the benefit of an equipment. The context and collocation of the two expressions 'use' and 'right to use' followed by the words "equipment" suggests that there must be some positive act of utilization, application or employment of equip-ment for the desired purpose. If an advantage is taken from sophisticated equipment installed and provided by another, it is difficult to say that the recipient/customer uses the equipment as such. The customer merely makes use of the facility, though he does not himself use the equipment.

13. It is the contention of the revenue that dedicated private circuits have been provided by BTA through its network for the use of the applicant. The utilization of bandwidth upto the requisite capacity is assured on account of this. The electronic circuits being 'equipment' are made available for constant use by the applicant for transmission of data. The access line is installed for the benefit of the applicant. Therefore, the consideration paid is towards rent for circuits and the physical components that go into the system. It is further contended that rendition of service by way of maintenance and fault repairs is only incidental to the dominant object of renting the automated telecommunication network.

13.1 There is no doubt that the entire network consisting of under-sea cables, domestic access lines and the BT equipment - whichever is kept at the connecting point, is for providing a service to facilitate the transmission of voice and data across the globe. One of the many circuits forming part of the network is devoted and earmarked to the applicant. Part of the bandwidth capacity is utilised by the applicant. From that, it does not follow that the entire equipment and components constituting the network is rented out to the applicant or that the consideration in the form of monthly charges is intended for the use of equipment owned and installed by BTA. The questions to be asked and answered are: Does the availing of service involve user of equipment belonging to BT or its agent by the applicant ? Is the applicant required to do some positive act in relation to the equipment

such as operation and control of the same in order to utilize the service or facility ? Does the applicant deal with any BT equipment for adapting it to its use ? Unless the answer is 'yes', the payment made by the applicant to BTA cannot be brought within the royalty clause (iva). In our view, the answer cannot be in the affirmative. Assuming that circuit is equipment, it cannot be said that the applicant uses that equipment in any real sense. By availing of the facility provided by BTA through its network/circuits, there is no usage of equipment by the applicant except in a very loose sense such as using a road bridge or a telephone connection. The user of BT's equipment as such would not have figured in the minds of parties. As stated earlier, the expression 'use' occurring in the relevant provision does not simply mean taking advantage of something or utilizing a facility provided by another through its own network. What is contemplated by the word 'use' in clause (iva) is that the customer comes face to face with the equipment, operates it or controls its functioning in some manner, but, if it does nothing to or with the equipment (in this case, it is circuit, according to the revenue) and does not exercise any possessory rights in relation thereto, it only makes use of the facility created by the service provider who is the owner of entire network and related equipment. There is no scope to invoke clause (iva) in such a case because the element of service predominates.

13.2 Usage of equipment connotes that the grantee of right has possession and control over the equipment and the equipment is virtually at his disposal. But, there is nothing in any part of the agreement which could lead to a reasonable inference that the possession or control or both has been given to the applicant under the terms of the agreement in the course of offering the facility. The applicant is not concerned with the infrastructure or the access line installed by BTA or its agent or the components embedded in it. The operation, control and maintenance of the so-called equipment, solely rests with BTA or its agent being the domestic service provider. The applicant does not in any sense possess nor does it have access to the equipment belonging to BTA. No right to modify or deal with the equipment vests with the applicant. In sum and substance, it is a case of BTA utilizing its own network and providing a service that enables the applicant to transmit voice and data through the media of telecom bandwidth. The predominant features and underlying object of the entire agreement unerringly emphasize the concept of service. The consideration paid is relatable to the upkeep and maintenance of specific facility offered to the applicant through the BTA's network and infrastructure so that the required bandwidth is always available to the applicant. The fact that the international circuit as well as the access line is not meant to offer the facility to the applicant alone but it enures to the benefit of various other customers is another pointer that the applicant cannot be said to be the user of equipment or the grantee of any right to use it. May be, a fraction of the equipment in visible form may find its place at the applicant's premises for the purpose of establishing connectivity or otherwise. But, it cannot be

inferred from this fact alone that the bulk of consideration paid is for the use of that item of equipment.

13.3 In cases where the customers make use of standard facility like telephone connection offered by the service provider, it does not admit of any doubt that the customer does not use the network or equipment of the service provider. But, where the service provider, for the purpose of affording the facility, has provided special infrastructure/network such as a dedicated circuit (as in the instant case), controversies may arise as to the nature of payment received by the service provider because it may not stand on the same footing as standard facility. However, even where an earmarked circuit is provided for offering the facility, unless there is material to establish that the circuit/equipment could be accessed and put to use by the customer by means of positive acts, it does not fall under the category of 'royalty' in clause (iva) of Explanation 2.

We also refer to the commentary relied by the Ld. Counsel from Prof. Klaus Vogel's Commentary on Double Taxation Convention, wherein 'Secrete formulae or process' is defined as under:

Secret formulae or processes: This covers Know-how in the narrower sense of the term viz., all business, secrets of a commercial or industrial nature. In most of the countries, they enjoy at least relative protection or are capable of being protected. That is why Article 12(2) very properly use, in connection with such formulae, etc., the criterion 'right to use', which is pertinent to them (letting) as it is in the case of absolute proprietary rights. As a rule, the 'right to use' already come into existence in these instance by authorized information (legitimate disclosure of secrets). It may be restricted in the point of time in respect of the period following the expiry of the license. On the difference between a product with relatively simple technology, and a business secret.

We note that, in case of DCIT v. PanAmSat International Systems Inc., reported in (2006) 9 SOT 100, Hon'ble Delhi High Court distinguished the decision of Asia Satellite Telecommunication Co. Ltd. v. Dy. CIT reported in (2003) 85 ITD 478 and held as under:—

19. The question that first comes up for consideration is whether section 9(1)(vi) of the Income-tax Act, read with the Explanation 2 below thereto, is applicable. This also involves the subsidiary question whether the issue is covered by the order of the Delhi Bench of the Tribunal in the case of Asia Satellite Telecommunication Co. Ltd. (supra) which is also a case of a non-resident company based in Hongkong which owned a transponder and allowed it to be used by broadcasters. Both issues are interlinked in the sense that in the above order the Tribunal has held in the context of the provisions of clause (iii) of Explanation 2 below section 9(1)(vi), that a "process" is involved when the signals that are uplinked through the earth stations to the transponder get converted into different frequencies and fit

for being down-linked via earth stations over the footprint area. It was therefore held that the payment was for the use of a "process" and hence royalty within the meaning of the aforesaid clause. The clause reads as follows :

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

It was not disputed before us on behalf of the assessee that the nature of the activity carried on by it is the same as in the case of Asia Satellite Telecommunication Co. Ltd. (supra). If that is so, we have to hold, respectfully following the order of the co-ordinate Bench, that there is a "process" involved in the activity carried on by the assessee before us. In Asia Satellite Telecommunication Co. Ltd.'s case (supra) it was further held that the word "secret" appearing in clause (iii) above qualifies only the word "formula" but not the word "process" and therefore even if the process involved in the operation of the transponder is in the public domain and no longer a secret known only to a few, the payment for the process would still be taxable as royalty. The reason or logic given in paragraph 6.18 of the order by the Tribunal to hold that the word "secret" does not qualify the word "process" is that "there is no comma after the use of the word 'secret' till the end of clause (iii) and if the intention has been to apply the word 'secret' before the word 'process' also, then a comma would have been used after the word 'formula'" and further that the word "secret" cannot also be applied to the word "trademark" because once registered there is nothing secret about the trademark and the impossibility of reading the word "secret" before the word "trademark" further strengthens the view that the word "secret" cannot be read before the word "process" also. This naturally takes us to the question whether there is anything in article 12.3(a) of the DTAA between India and USA which militates against such a view. It must be remembered that India had no DTAA with Hongkong and hence the view taken by the Tribunal (supra) with regard to the clause (iii) of Explanation 2 below section 9(1)(vi) would apply if we were to also interpret the same provision. But article 12.3(a) is worded as below :

"The term 'royalties' as used in this article means :

(a) payments of any kind received as consideration for the use of, or the right to use, any copyright of a literary, artistic, or scientific work, including cinematograph films or work on film, tape or other means of reproduction for use in connection with radio or television broadcasting, any patent, trademark, design or model, plan, secret

formula or process, or for information concerning industrial, commercial or scientific experience, including gains derived from the alienation of any such right or property which are contingent on the productivity, use or disposition thereof; and"

In Asia Satellite Telecommunication Co. Ltd.'s case (supra) the Tribunal pointed out, while repelling the argument that the word "secret" also qualifies the word "process" appearing in clause (iii) of Explanation 2, that there is no comma after the word "secret" till the end of the clause and had the intention been to qualify the word "process" also with the word "secret" there would have been a comma after the word "process" (by mistake mentioned in the order as "formula"). The Tribunal was thus prepared, with respect, to accept the argument that both the words "formula" and "process" can be said to be qualified by the word "secret" had the clause been drafted as under :

"the use of any patent, invention, model, design, secret formula or process, or trademark or similar property"

What the Tribunal has pointed out stands fulfilled in article 12.3(a) of the treaty with USA. From the article quoted above, it may be seen that there is a comma after the words "secret formula or process" which indicates that both the words "formula" and "process" are qualified by the word "secret". The requirement thus under the treaty is that both the formula and the process, for which the payment is made, should be a secret formula or a secret process in order that the consideration may be characterised as royalty. We do agree with the argument of the Special Counsel for the Department, on the strength of the several authorities cited by him, that normally punctuation by itself cannot control the interpretation of a statutory provision and in fact the learned counsel for the assessee did not seriously dispute the proposition. However, the punctuation the use of the comma coupled with the setting and words surrounding the words under consideration, do persuade us to hold that under the treaty even the process should be a secret process so that the payment therefore, if any, may be assessed in India as royalty. The Tribunal in Asia Satellite Telecommunication Co. Ltd.'s case (supra) have recognized that all the items referred to in clause (iii) of Explanation 2 such as patent, invention, model, formula and process etc. are intellectual properties. Similarly, the words which surround the words "secret formula or process," in article 12.3(a) of the treaty refer to various species of intellectual properties such as patent, trademark, design or model, plan, etc. Thus the words "secret formula or process" must also refer to a specie of intellectual property applying the rule of ejusdem generis or noscitur a socii.

20. That takes us to a consideration of the question whether the process carried on by the assessee is a secret process. On this question, we have weighed the elaborate arguments advanced by both the sides carefully and hold that so far as the transponder technology is concerned there appears

to be no "secret technology", known only to a few. There is evidence adduced before us to show that the technology is even available in the form of published literature/book from which a person interested in it can obtain knowledge relating thereto. There is no evidence led from the side of the Department to show that the transponder technology is secret, known only to a few, and is either protected by law or is capable of being protected by law. This aspect of the matter was not required to be considered by the Tribunal in the case of Asia Satellite Telecommunication Co. Ltd. (supra) because the view taken by the Tribunal was that there was no requirement in clause (iii) of Explanation 2 below section 9(1)(vi) of the Act that the process involved, for which the payment is being made, should be a secret process. But in the view we have taken on the language employed by article 12.3(a) of the treaty coupled with the punctuation and the setting and surrounding words, the payment would be considered as royalty only if it is made for the use of a secret process. Since there is nothing secret about the process involved in the operation of a transponder, the payment for the use of the process assuming it to be so does not amount to royalty.

5.2.14 Similar issue came up before Hon'ble Delhi Tribunal in case of Bharti Airtel vs. ITO (TDS) reported in (2016) 67 taxmann.com 223. The issue considered therein was in respect of payment towards call interconnectivity charged for call transmission on foreign network. The Tribunal therein, on applying ratios pronounced in the above referred decisions, held it not as 'Royalty'.

Therefore in our opinion, the Payments made by the assessee in lieu of services provided by the assessee cannot fall within the ambit of 'Royalty' under section 9(1)(vi) Explanation 5 & 6."

6.5. On the contrary, the Ld.DR relying on the orders passed by the authorities below vehemently argued the observations as recorded by the Ld.AO/DRP in their orders. Nothing was brought on record to take different view from the view taken hereinabove in assessee's own case. Respectfully following the aforesaid views and the decision of *Hon'ble Karnataka High Court* in case of *Vodafone Idea Ltd. (supra)*, we hold that the receipts in the hands of the assessee could be taxed as business profits as per the applicable laws of U.S. and cannot be brought to tax either as FTS or Royalty under the Income Tax Act in India.

Accordingly, Grounds 2-4 raised by the assessee stands allowed.

In the result appeal filed by the assessee stands allowed.

Accordingly, grounds raised by the assessee is allowed.

In the result the appeal filed by the assessee stands allowed.

Order pronounced in the open court on 17/04/2026

Sd/-

(BIJAYANANDA PRUSETH)
Accountant Member

Sd/-

(BEENA PILLAI)
Judicial Member

Mumbai

Dated: 17/04/2026

Karishma J. Pawar, Sr. P.S.

Copy of the order forwarded to:

- (1) The Appellant
- (2) The Respondent
- (3) The CIT
- (4) The CIT (Appeals)
- (5) The DR, I.T.A.T.

True Copy
By order

(Asstt. Registrar)
ITAT, Mumbai