Revati

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

INCOME TAX APPEAL NO.1378 OF 2018
WITH
INCOME TAX APPEAL NO.725 OF 2015
WITH
INCOME TAX APPEAL NO.763 OF 2015
WITH
INCOME TAX APPEAL NO.797 OF 2015
WITH
INCOME TAX APPEAL NO.800 OF 2015
WITH
INCOME TAX APPEAL NO.1661 OF 2014
WITH
INCOME TAX APPEAL NO.1662 OF 2014
WITH
INCOME TAX APPEAL NO.1658 OF 2014

VIACOM 18 MEDIA PVT LTD … Appellant
Zion Bizworld, Subhash Road,
A, Near Garware Office,
Vile Parle (East) Mumbai-400057.

Versus

Deputy Commissioner of Income Tax … Respondent
International Taxation-4(3)(1)
Air India Building, Nariman Point,
Mumbai-400021.

Mr Madhur Agrawal, Mr Atul Jasani, Mr Ketan Dave and Mr Pratik Shah i/b. Atul K Jasani for the Appellant.
Mr Subir Kumar a/w Ms Niyanta Trivedi, Ms. Akshata Chhabra and Mr. Darshil Desai for the Respondent.

CORAM : **M.S. Sonak &**
Jitendra Jain, JJ.

RESERVED ON: **6 May 2025**
PRONOUNCED ON : **8 May 2025**

Judgment (*Per Jitendra Jain, J.*):-

1. This group concerns different assessment years with respect to the same Appellant-Assesssee. Since it raises common substantial questions of law, it is disposed of by a common order with the parties' consent. Furthermore, by consent, Income Tax Appeal No.1378 of 2018 for the Assessment Year (AY) 2013-14 is taken as the lead matter.

2. The details of the appeals and the corresponding assessment years are as under: -

Sr. nos.	ITXA	A.Y.
1.	1378/2018	2013-2014
2.	725/2015	2011-2012
3.	763/2015	2012-2013
4.	797/2015	2012-2013
5.	800/2015	2013-2014
6.	1661/2014	2009-2010
7.	1662/2014	2010-2011
8.	1658/2014	2011-2012

3. On 29 January 2025, this Court admitted ITXA appeal No.1378 of 2018 on the following substantial questions of law:

i. Whether on the facts and in the circumstances of the case and in law, the consideration paid for transponder services is assessable as "royalty" under Section 9(1)(vi) of the Act and/or Article 12 of the India-USA DTAA?

ii. Whether on facts and in the circumstances of the case and in law, the retrospective amendment in the Act by

way of Explanations5/6 to Section 9(1)(vi) of the Act can be read into the DTAA?

iii. Whether on the facts and in the circumstances of the case and in law, the Appellant (payer) is required to deduct TDS under Section 195 of the Act from payment of transponder fees made to Intelsat Corp. even though the said payment is held to be not taxable in the hands of the payee (Intelsat Corp)?

Brief facts:

4. On 25 July 2012, the Appellant-Assesssee filed an application under Section 195 of the Income-tax Act 1961 (the Act) for AY 2013-14 seeking NIL deduction of tax at source on payments to be made to Intelsat Corporation of USA Corporation. The claim was made on the ground that the payment made under the agreement with Intelsat for transponder services does not constitute **'royalty' under Article 12 of the India–USA tax Treaty** (the Treaty).

5. In the said application, the Appellant also, without prejudice, submitted that the payment cannot be regarded as **'royalty'**, even under the Act as amended by the Finance Act, 2012. The Appellant also submitted that Intelsat does not have a PE in India, and the payment made is in the nature of business profits, which would not be taxable in India, and therefore, there is no liability to withhold tax under Section 195 of the Act. The Appellant also submitted that payment does not constitute **'fees for technical services'** as defined

under Section 9(1)(vii) of the Act. The Appellant, however, submitted that in the earlier years, i.e. AYS 2009-10, 2010-11, 2011-12 and 2012-13, such an application for NIL deduction certificate was rejected and an order was passed to withhold tax at the rate of 10%.

6. On 11 December 2012, an order under Section 195(2) of the Act came to be passed disposing of the aforesaid application. The ADIT rejected the application on the ground that the payment made to Intelsat constitutes **'royalty'** under the Act by relying upon the Explanation inserted by the Finance Act, 2012. The ADIT also further stated that in Article 12 of the India USA tax Treaty, the term **'process'** is not defined and therefore, the meaning of the term **'process'** as explained in the Act needs to be imported for interpreting Article 12 and therefore, even under the Tax Treaty, the payment would constitute '**royalty**'. The ADIT further stated that the reliance placed by the Appellant on the decision of the Delhi High Court in the case of ***Asia Satellite Telecommunications Co. Ltd. Vs Director of Income-tax***[1] has not been accepted by the department, and the SLP has been preferred in that case.

7. On 4 April 2013, the Appellant filed an appeal under Section 248 of the Act, challenging the aforesaid order on the grounds that the payment did not constitute '**royalty**' under the Act as well as under the Treaty.

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1 [2011] 197 Taxman 263 (Delhi)

8. On 27 February 2015, the Commissioner of Income Tax (Appeal) disposed of the aforesaid appeal by upholding the order passed under Section 195(2) of the Act. The Commissioner (Appeal) followed the order of the Tribunal in the Appellant's own case for AY 2009-10.

9. Being aggrieved by the order described above, the Appellant preferred an appeal to the Income Tax Appellate Tribunal on 18 June 2015. The said appeal was numbered as ITA 3776/M/2015. On 7 August 2017, the Tribunal dismissed the Appellant's appeal by relying upon its own order for earlier years and the decision of the Madras High Court in the case of ***Verizon Communications Singapore Pte Ltd. Vs Income Tax Officer, International Taxation-I*** [2]**.** The Tribunal followed the decision of the Madras High Court and not the Delhi High Court in the case of ***Director of Income-tax Vs New Skies Satellite BV***[3].

10. It was against the above backdrop that the present appeal was instituted by the appellant, and it was admitted on 29 January 2025 on the substantial questions of law referred to above.

Submissions of the Appellant-Assessee:

11. Mr. Agrawal, learned counsel for the Appellant submitted that as per Section 90(2) of the Act, the provision which is more beneficial, when compared between the Act and the Treaty, should be adopted in cases where India has

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2 (2013) 39 taxmann.com 70 (Madras)

3 (2016) 68 taxmann.com 8 (Delhi)

entered into Double Taxation Avoidance Agreement (DTAA) with the foreign country. He, therefore, submitted that the reliance placed by the Authorities on the Explanations under the Act is erroneous. He submitted that the definition of 'royalty' under the Treaty should be applied to the transaction under consideration and if so applied, the payments made does not constitute royalty. He submitted that the amendment in the Act was made in 2012 and India has subsequent to 2012 entered into various Double Taxation Avoidance Agreement (DTAA) with various countries and wherever such type of transactions were to be roped in the definition of 'royalty' same formed part of the definition of 'royalty'. He further submitted that post 2012 India has entered into agreements with other countries where such type of transactions are not included in the definition of 'royalty'. He, therefore, submitted that this shows the intention of the legislature that the payments under consideration cannot constitute 'royalty' under the India-USA Treaty. He further submitted that Article 3(2) of the India-USA Treaty cannot be pressed into service since 'royalty' is specifically defined in the India-USA Treaty.

12. Mr. Agrawal distinguished the decision of the Madras High Court in the case of ***Verizon Communications Singapore Pte Ltd. (supra)*** on various grounds. Mr. Agrawal submitted that the transaction for which payment is made is neither for the use of equipment, nor does it constitute payment for secret process or process. Mr. Agrawal relied upon the

following judicial pronouncements in support of his above submissions:

I. *Engineering Analysis Centre of Excellence (P.) Ltd. Vs Commissioner of Income-tax*[4]

II. *Commissioner of Income-tax International Taxation Vs Telstra Singapore Pte Ltd.*[5]

III. *Union of India Vs Azadi bachao Andolan*[6]

IV. *PCIT Vs NEO Sports Broadcast (P.) Ltd.*[7]

V. *Director of Income-tax Vs New Skies Satellite BV (Supra)*

VI. *CIT Vs Reliance Industries ltd.*[8]

13. Mr. Agrawal, learned counsel for the Appellant in rejoinder submitted that for AY 2008-09, 2009-10 and 2010-11, there was 'Transponder Service Agreement' and based on such agreement and a copy of the order which is placed with the appeal memo, the application under Section 195 was processed. He, however, fairly admits that 'Transponder Service Agreement' is not annexed to the appeal memo. He, however, contended that nobody has disputed the nature of services and therefore there is no question of any remand to give the Revenue a second inning to improvise the impugned order.

14. Mr Agarwal, in the rejoinder, further submitted that even assuming the provisions of the Domestic Tax Law

[4] (2021) 125 taxmann.com 42 (SC)

[5] [2024] 165 taxmann.com 85 (Delhi)

[6] (2003) 132 Taxman 373 (SC)

[7] (2019) 107 taxmann.com 17 (Bombay)

[8] ITXA 1655 OF 2018, 576 OF 2017, 591 OF 2017 AND 2129 OF 2011

applies, then by virtue of Section 90(2), since Explanation 6 cannot be made applicable in cases of withholding tax retrospectively, the Appellant-Assessee cannot be made liable for withholding tax. He further in rejoinder, relied upon the decisions cited above and strongly objected to the submission of the Respondent- Revenue on the matter being remanded for giving a factual finding on the nature of service and its applicability to the Treaty provision.

15. Mr. Agrawal also submitted that the Tribunal, in the case of Intelsat Corporation, held that they are not liable to be taxed in India, and, therefore, he submitted that there cannot be any withholding tax obligation on the Appellant-Assessee.

Submissions of the Respondent:

16. Mr. Subir Kumar, Learned Counsel appearing for the Respondent defended the orders passed by the ADIT and the appellate authorities.

17. Mr. Subir Kumar learned counsel submitted that Article 3(2) would be applicable since the definition of 'royalty' under the treaty does not explain the term 'process' or 'secret process' and to understand the said meaning recourse is taken to Explanation 6 to Section 9(1)(vi) of the Act. He referred to the ambulatory approach to be adopted for understanding the meaning of the term 'process' under the treaty. He submitted that agreement of 2011 entered into, was given a retrospective effect from 2008 and this agreement therefore

was not in existence for AY 2008-09, 2009-10 and 2010-11. He referred to various clauses of the agreements executed in 2011 and submitted that the services rendered would constitute 'secret process' under the treaty. He, however, fairly admitted that none of the authorities have examined the nature of the services rendered by Intelsat corporation to the Appellant-Assessee by referring to various clauses of the agreement. He submitted that on the examination of the agreement of 2011, it cannot be said that the payment made was not for 'secret process'.

18. Mr. Subir Kumar further submitted that even under the common parlance meaning of the phrase 'secret process', the services received by the Appellant-Assessee would fall within the meaning of the term 'royalty' under Article 12(3). He submitted that even in the case of ***Engineering Analysis Centre of Excellence Pvt. Ltd. (supra)*** the Supreme Court took the assistance of the local copyright law for interpreting the treaty. Mr. Subir Kumar distinguished the decisions relied upon by the Appellant and in support of his submissions relied upon the decision of the Madras High Court in the case of ***CIT versus Neyveli Lignite Corporation***[9], Calcutta High Court in the case of ***N.V.Philips Vs CIT***[10], ***Poompuhar Shipping Corporation Ltd. Vs ITO***[11].

19. Mr. Subir Kumar relied upon the written submissions in support of his arguments and submitted that the payments

[9] (2000) 243 ITR 459 (Mad.)

[10] (1988) 172 ITR 521(Cal.)

[11] (2014) 360 ITR 257

would constitute 'royalty' under the domestic law as well as under the treaty. In any case, in the alternative, he submitted that the matter be remanded back for factual determination of the nature of services rendered under the agreement which were prevailing for each of these years and its applicability to the meaning of the term 'royalty', since there is no factual determination by any of the authorities or the analysis of the agreement prevailing in the relevant assessment of by any of the authorities.

Analysis & Conclusion:-

20. We have heard learned counsel for the Appellant and the Respondent and with their assistance have perused the documents brought to our notice.

21. Mr. Agrawal relying upon the Tribunal's order in the Appellant-Assessee's own case for AY 2015-2016 which is a subject matter of ITXA No.1415 of 2019 submitted that since the Tribunal for that year has concluded that Intelsat Corporation was not liable to pay tax, there is no question of the Appellant-Assessee being fastened with withholding tax liability. Mr. Agrawal fairly stated that this was not the reasoning given by the Tribunal in the present appeals. He attempted to tender the orders passed in the case of Intelsat Corporation for the years under consideration after the Respondent-Revenue had started their arguments. This Court refused to take the same on record since it would not be proper for this Court to verify this factual position, whether in

the years before this Court, there is a final determination in the case of Intelsat Corporation that they are not liable to pay tax. This would require verification before the lower authorities. However, in the interest of justice if the orders passed in the case of Intelsat Corporation holds that they are not liable for tax in India for the years which are subject matter of the present appeals and the payments made by the Appellant-Assessee has been considered before giving such a finding, then there cannot be any withholding tax liability on the Appellant-Assessee. However, such an order in the case of Intelsat Corporation should have attained finality.

22. Therefore, we remand the matter back to the CIT (A) file for verifying this aspect. If the Appellant-Assessee is able to show that in the case of Intelsat Corporation for the years for which the present appeals are filed, there is a final determination by the tax authorities that the Intelsat Corporation is not liable to pay tax and such a determination is given after considering the payments made by the Appellant-Assessee to Intelsat Corporation, then there cannot be any withholding tax liability on the Appellant-Assessee. If the Appellant-Assessee succeeds in showing the same, then whether such payments constitute 'royalty' under the DTAA or under the domestic law would not arise and would be an academic exercise. Therefore, the CIT(A) should first verify this aspect and only if the Appellant-Assessee fails to show that there is no tax liability in the case of Intelsat Corporation

then the issue whether such payment constitutes 'royalty' under the Domestic Tax Law or DTAA would arise.

23. Assuming the Appellant-Assessee fails on the above, the issue would arise whether the subject payment can be constituted a 'royalty' under the Treaty's domestic law.

24. The relevant provisions of the Act and the India-USA Treaty, which are relevant, are reproduced hereunder:

Section 90. Agreement with foreign countries or specified territories.

(1) .....

(2) Where the Central Government has entered into an agreement with the Government of any country outside India or specified territory outside India, as the case may be, under sub-section (1) for granting relief of tax, or as the case may be, avoidance of double taxation, then, in relation to the Assessee to whom such agreement applies, the provisions of this Act shall apply to the extent they are more beneficial to that Assessee.

Section 9. Income deemed to accrue or arise in India.

(1) The following incomes shall be .....

(i) to (v) .....

(vi) income by way of royalty payable .....

Explanation 2- *For the purpose 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 gain') for-*

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

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

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

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

v. *the transfer of all or any rights (including the granting of a licence) in respect of any copyright, literary, artistic or scientific work including films or video tapes for use in connection with television or tapes for use in connection with radio broadcasting;*

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

Explanation 3- *For the purposes of this clause, "computer soft-ware" means any computer programme recorded on any disc, tape, perforated media or other information storage device and includes any such programme or any customized electronic data.*

Explanation 4- *For the removal of doubts, it is hereby clarified that the transfer of all or any rights in respect of any right, property or information includes and has always included transfer of all or any right for use or right to use a computer software (including granting of a licence) irrespective of the medium through which such right is transferred.*

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;*

INDIA-USA Treaty ARTICLE 12

1. Royalties and fees for included services .....

.....

(3). The term 'royalties' as used in this Article means :

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

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

25. For the assessment year under consideration, AY 2013-14, the Appellant-Assessee entered into an agreement on 19 August 2011 with Intelsat Corporation. The agreement provides for the provision of 24 hour fixed-term preemptible satellite signal reception and re-transmission service by Intelsat to the Appellant-Assessee. This service was to be supplied from one transponder located at 68.5° East longitude.

26. Clause 1 of the agreement refers to the nature of the technical service as per specification in Clause 1.1 read with Appendix A. As per Clause 1.2, the service provided by Intelsat by a particular transponder shall be in the beams identified in Appendix A and Intelsat would enter into agreement with respect to such transponder on the same beam as the service transponder so that a majority of the

transponders on these beams will be used primarily for television service. As per Clause 1.3(c), Appellant-Assessee would remain responsible to Intelsat for the use of the transponder service. Similarly, Clause 1.4 deals with obligation of Intelsat for coordination with other satellites and Clause 1.5 deals with transmission plans. Clause 3 deals with monthly fees to be paid by the Appellant to Intelsat and the manner of such payment and the consequences of late payment. Clause 3.5 provides that the Appellant-Assessee would be solely responsible for any taxes levied under the local laws. Clause 4 deals with the obligations of the Appellant-Assessee. Clause 5 deals with confirmed outage of a service transponder if service on such transponder fails to meet the service specification. Clause 6 deals with pre-emptive rights in abnormal circumstances for Intelsat to pre-empt or interrupt service to the Appellant-Assessee in order to protect the overall health and performance of the satellite. Article 6A provides for replacement of satellite. Clause 7 deals with termination and there are other clauses which usually find place in any commercial contract like termination, confidentiality etc.

27. We may observe that the Appellant-Assessee had entered into an agreement with Intelsat Corporation. The agreement provides for the scope of services to be rendered by Intelsat to the Appellant. We have stated some of the clauses of the agreement in the earlier paragraphs. On a perusal of the orders passed by the authorities i.e. original

authority and the appellate authorities, we observe that none of the authorities have examined and analysed various clauses of the agreement to ascertain what exactly does the Intelsat Corporation render the services to the Appellant-Assessee and how the definition of 'royalty' under the Act or under Article 12(3) of the Treaty can be made applicable to such services. We do not find any analysis or discussion on the nature of services specified in the agreement and its applicability to the definition of 'royalty' under the Act and Article 12(3) of the Treaty.

28. In our view, the present appeal is under Section 260A of the Act on substantial questions of law. It was incumbent upon the three authorities, i.e. the original authority and the appellate authorities, to have examined and analysed the nature of services as agreed upon by the parties in the agreement. It was also incumbent upon these authorities to thereafter give a finding of fact on this issue and then apply the definition of 'royalty' under the Act or under Article 12(3) of the Treaty. How these services are covered by the Act or the Article 12(3) is not discussed. There is an absence of foundational facts in the orders of all the three authorities on this issue. The orders are non-speaking orders.

29. This Court under Section 260A of the Act cannot take upon itself the factual determination of the nature of service. Any exercise by this Court on the factual determination, in the absence of the said exercise being carried out by three authorities below, would set a wrong precedent and would be

contrary to the provisions of Section 260A of the Act. This fact was specifically brought to the notice of the learned counsel for the Appellant-Assessee and he was unable to controvert the same.

30. The questions raised by the Appellant-Assessee and admitted by this Court cannot be answered without there being the findings of the lower authorities on the nature of the services rendered under the agreement by Intelsat Corporation to the Appellant-Assessee and the analysis of the phrase 'secret process/process' used in the Act and the Treaty.

31. We do not agree with the submission of the learned counsel for the Appellant- Assessee that since much time has lapsed this Court should examine the issue on facts as well as this Court should allow the appeal since the authorities have not based their decisions on Article 12(3) but has only relied upon the Domestic Tax Law. The authorities have held the payment to constitute ‘royalty’ under the domestic law as well as under the Treaty, but by holding the said payment is towards ‘royalty’ under the Treaty, the revenue has relied upon the definition of 'process' under the domestic law. Therefore, to say that the revenue has only held against the Assessee on the ground of domestic law and not the Treaty is not correct.

32. The authorities should have independently analysed and examined how the services rendered under the agreement would fall within the phrase ‘process’ or ‘secret

process' as per the Act or Article 12(3). The authorities have not analysed what is 'process' or 'secret process' and how it applies to the services rendered under the agreement.

33. The present proceedings arise out of an application made by the Appellant-Assessee to the ADIT under Section 195(2) of the Act. Such an application is in the nature of an advance ruling or a decision-in-invitum by an Assessee for ascertaining its liability to withhold tax. These proceedings are different from the regular assessment proceedings. The Appellant-Assessee having made an application to invite a decision on the basis that the payments under the agreement does not constitute 'royalty' as per the Act or the Treaty cannot now be heard to say that since the revenue's decision was based on Domestic Tax Law and same being contrary to various decisions, consequently it should be held that the payment does not constitute 'royalty' under the Treaty.

34. It was the claim of the Appellant-Assessee that they do not fall within the definition of 'royalty' under the Treaty, and in the absence of any permanent establishment of Intelsat in India, there is no liability to withhold tax. In our view, this issue is required to be answered by the authorities since the claim of the Appellant-Assessee is based on this submission, which has not been done by any of the authorities by analysing the agreement and ascertaining its applicability to the definition of 'royalty' under the Act or the Treaty. There is no finding by the authorities that Intelsat does not have a P. E. in India.

35. Therefore, in our view, it would be in the interest of justice, the issue whether the payments made for services rendered by Intelsat to the Appellant-Assessee under the agreement constitutes 'royalty' under the Act or the Treaty is remanded back to the CIT(A) to give finding on whether the services are in the nature of that specified in the Act or Article 12(3) and whether Intelsat has a permanent establishment in India. The appellate authority is directed to examine the agreement and the definition under the Act and Article 12(3) of the Treaty to conclude in this regard.

36. It is well settled that where the Central Government has entered into an agreement with a foreign country for granting relief of tax or for avoidance of double taxation, then in relation to the Assessee to whom such agreement applies, the provisions of the Act shall apply to the extent they are more beneficial to that Assessee. Meaning thereby, that between the Act and the tax Treaty, whichever is more beneficial to the Assessee to whom such Treaty applies, same would be applicable. This proposition is now no more *res integra* and well settled and is concluded by the decision of the Supreme Court in the case of ***Azadi Bachao Andolan (supra) and Engineering Analysis Centre of Excellence Pvt. Ltd. (supra)***

37. Mr. Agrawal, with respect to Income Tax Appeal Nos. 725, 763, 797 of 2015 and 1661, 1162 and 1658 of 2014 are concerned, submitted that assuming Explanation 6 to Section 9(1)(vi) is applicable, since the payments in these appeals have been made prior to the insertion of the Explanation by

the Finance Act 2012, the Appellant-Assessee cannot be fastened with the liability of withholding the tax and for this submission, he relied upon the decision in the case of ***Reliance Industries (supra), Commissioner of Income Tax vs. NGC Network India Limited*** in ITXA No.397 of 2015 decided on 29 January 2018 and ***Sedco Forex International Drilling Inc. As Agent vs. Department of Income Tax***[12].

38. We may observe that the appeals before us are for various assessment years, the issue of which revolves around payments made under the agreement with Intelsat Corporation USA. Income Tax Appeal Nos.1661, 1662 and 1658 of 2014 and 725 of 2015 are for assessment years 2009-2010, 2010-2011 and 2011-2012 relevant to previous year 2008-2009, 2009-2010 and 2010-2011. In the appeal memo filed before this Court in all these appeals, the Appellant-Assessee has annexed an agreement dated 19 August 2011 with Intelsat Corporation. The said agreement would be relevant for the appeals for AY 2012-2013 which are numbered as 763 and 797 of 2015 and AY 2013-2014 ITXA No.800 of 2015. We failed to understand as to how for the assessment years 2009-2010, 2010-2011 and 2011-2012, the agreement dated 19 August 2011 would be relevant since same cannot be said to be in existence during the previous years 2008-2009, 2009-2010, and 2010-2011. However, Mr Agrawal attempted to justify the retrospective operation of 2011 agreement.

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[12] 2005 149 taxman 352

39. Mr. Agrawal in response to the above issue submitted that for the years prior to 2012-2013, there was a transponder service agreement and the customers order which is annexed to the appeal for the years prior to A.Y. 2012-2013 and which was the basis for making application under Section 195(2) of the Act. He, however, fairly admits that the transponder service agreement for the assessment years prior to 2012-2013 is not annexed to the appeal memo. In our view, if the case of the Appellant-Assessee is that the payments made under such transponder service agreement is not a 'royalty', then it would be necessary that such an agreement ought to have been annexed to the appeal memo. We also observe that the original authority and the appellate authorities have not examined this transponder service agreement to conclude that the payments constitute 'royalty' either under the domestic law or under the Treaty. Since we are remanding the matter back as observed above, we direct the authorities to examine this agreement and give a factual finding on the nature of the agreement and whether it constitutes 'royalty' under the Act and/or under Article 12(3) of the Treaty.

40. The authorities should examine whether the payments made under the agreements constitute 'royalty' under the Domestic Tax Law and Treaty by examining the agreement and the meaning of the term 'process/secret process'. If assuming that the revenue comes to a conclusion that it constitutes 'royalty' under the domestic law then, for the

payments made prior to the insertion of Explanation 6 by the Finance Act, 2012 it cannot be subjected to withholding tax, since at the time when the payments were made such an explanation was not in existence. The Co-ordinate Bench of this Court ***in Reliance Industries Limited (supra)*** has held that retrospective amendment cannot fasten withholding tax liability if payments were made prior to the amendment. Therefore, for those assessment years where the payments have been made prior to the insertion of Explanation 6 to Section 9(1)(vi) of the Act same would not be exigible to withholding tax liability. This aspect should be examined by the CIT(A) and an appropriate relief be given after verifying the facts for those assessment years prior to the enactment of Finance Act. 2012.

41. The above direction is given as per Section 90(2) of the Act, which states that between the Act and the DTAA, what is beneficial is to be made applicable to the Assessee.

42. For the payments made post the Finance Act 2012, the CIT(A) is directed to examine the agreements and give a factual finding on the nature of services rendered under the agreements and how the phrase 'secret process' is to be interpreted to ascertain whether the payments constitute 'royalty' under Treaty. This exercise has not been done in the instant case by the authorities. Therefore, we direct them to do the same in the remand proceedings.

43. The Appellant-Assessee and the Respondent-Revenue have relied upon various judgments and commentaries dealing with the issue on the merits and the interpretation to be given to the definition of the term 'royalty'. The applicability or non-applicability of these decisions would arise only after a factual determination of the nature of service rendered which is a subject matter of present proceedings. For this, we have remanded the matter back to the file of the CIT(A). Both the parties would be entitled to rely upon the case laws and any other material in support of their submissions before the CIT(A). Since we are not adjudicating the issue on merits, we refrain from dealing with the precedents and the commentaries relied upon by both parties.

44. The CIT(A) is requested to dispose of the appeals as expeditiously as possible and in any case on or before 31 December 2025. We make it clear that we have not expressed any opinion on the merits of the case and on the applicability of Article 12(3) to the nature of services under consideration is concerned. It would be open to the Appellant-Assessee and the revenue to raise all the contentions on the taxability under the Act and the Treaty. None of our observations in the present order should be considered as our views or findings on the adjudication under the Act or Article 12(3) of the Treaty on merits.

45. In view of the above, we remand the appeals back to the file of the CIT(A) with the following directions:-

(i) If the Appellant-Assessee is able to show that there is a final determination of no taxability in the hands of Intelsat Corporation on payments made by the Appellant-Assessee, then there would be no withholding tax liability ;

(ii) If the payments are made prior to the Finance Act, 2012 then, then following decision of this Court in the case of ***Reliance Industries Limited (supra)***, no withholding tax liability can be imposed based on retrospective amendment ;

(iii) For payments made after the enactment of Finance Act, 2012, the CIT(A) to examine the nature of agreements for each assessment year and determine whether same constitutes 'royalty' under the domestic law or the Treaty and if same does not constitute 'royalty' then there would be no withholding tax liability after considering provisions of Section 90(2) of the Act.

46. Since we are remanding the matter back to the CIT(A) 's file, we do not propose to answer the question on merits but keep it open for the CIT(A) to adjudicate.

47. The appeals of the Appellant-Assessee are disposed of in the above terms. No costs.

(Jitendra Jain, J) **(M.S. Sonak, J)**