

New Skies Satellites vs. ADIT-ITAT Delhi Special Bench -Section 9(1)(vi) of the Income Tax Act- Provisions of DTA vis-à-vis royalty.

The provision of the transponder through which the telecasting companies are able to uplink the desired images/data and downlink the same in the desired area is a “**process**”. **To constitute “royalty”, it is not necessary that the process should be a “secret process”**. The fact there is a ‘comma’ after the words “secret formula or process” in the DTAA does not mean that a different interpretation has to be given to the DTAA as compared to the Act;

(ii) The argument that there is no “use” of the satellite by the payer as it has no control or possession of the satellite is not acceptable. **To constitute “royalty”, it is not necessary that the instruments through which the “process” is carried on should be in the control or possession of the payer**. The context and factual situation has to be kept in mind to determine that whether the process was “used” by the payer. In the case of satellites physical control and possession of the process can neither be with the satellite companies nor with the telecasting companies. **The fact that the telecasting companies are enabled to telecast their programmes by uplinking and downlinking the same with the help of that process shows that they have “use” of the same**. Time of telecast and the nature of programme, all depends upon the telecasting companies and, thus, they are using that process;

(iii) The consideration paid by telecasting companies to satellite companies is for the purpose of providing “use of the process” and consequently assessable as “royalty” under the Act and the DTAA.