**IN THE INCOME TAX APPELLATE TRIBUNAL**
DELHI BENCH: SPECIAL BENCH: NEW DELHI

BEFORE SHRI VIMALGANDHI, HON'BLE PRESIDENT
SHRI I.P. BANSAL, JUDICIAL MEMBER
AND
SHRI R.C. SHARMA, ACCOUNTANT MEMBER

ITA Nos. 5385 to 5387/Del/2004
Assessment Years : 2000-01 to 2002-03

ITA Nos.2623 & 2624/Del/2008
Assessment Years : 2003-04 & 2004-05

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| New Skies Satellites N.V.,<br>(Now known as New Skies Satellites B.V.)<br>C/o Price Waterhouse Coopers Pvt. Ltd.,<br>Sucheta Bhawan,<br>11-A, Vishnu Digambar Marg,<br>New Delhi. | Vs. | Assistant Director of Income Tax,<br>International Taxation,<br>Circle 2 (1),<br>New Delhi. |

PAN : AABCN7763R

(Appellant) (Respondent)

Assessee by : Shri M.S. Syali, Sr. Advocate, Shri Tarandeep Singh, CA & Shri Sandeep Puri, CA
Revenue by : Shri Y.K. Kapoor, Standing Counsel & Shri Kanan Kapoor, Advocate

ITA Nos. 2598 to 2601/Del/2004
Assessment Years : 1998-99 to 2001-02

ITA Nos.4394 to 4397/Del/2005
Assessment Years : 2003-04 & 2004-05

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| Shin Satellite Public Company Limited,<br>Thaicom Satellite Station,<br>41/103, Rattanathibet Road,<br>Nonthaburi 11000, THAILAND. | Vs. | Dy. Director of Income Tax,<br>Circle 2 (2),<br>International Taxation,<br>New Delhi. |

PAN : AAGCS4481E

(Appellant) (Respondent)

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| Assessee by | : | Shri F.V. Irani, Advocate |
| Revenue by | : | Shri Y.K. Kapoor, Standing Counsel & Shri Kanan Kapoor, Advocate |

INTERVENOR

ITA Nos. 1484 to 1491/Del/2008
Assessment Years : 1998-99 to 2005-06

Asia Satellite Telecommunications Ltd.

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| Intervenor by | : | Shri S. Ganesh, Sr. Advocate |

O R D E R

PER I.P. BANSAL, JUDICIAL MEMBER:

This Special Bench has been constituted on the request of the revenue. The revenue vide its application dated 1st November, 2006 made a request for constitution of Special Bench to consider the following question:-

> *Whether on the facts and circumstances of the above mentioned cases the income from Bandwidth/transmission charges for uplinking/downlinking signals/data transmission through the use of transponders in the satellite is taxable in the hands of above mentioned foreign companies in accordance with provisions of the Income Tax Act read with relevant provisions of Tax treaties with respective countries."*

2. In the application it was submitted that reference to Special Bench is sought because there are conflicting decisions of ITAT in the case of Asia Satellite Telecommunications Company Ltd. 82 ITD 478∗ (for short "Asia Sat") and in the case of Pan Amsat International Systems Inc. 2 SOT 100∗ (for short "PanAm Sat). It was further

∗ should be 85 ITD 478
∗ should be 9 SOT 100

submitted in the application that the decision of the Tribunal in these two cases are inherently inconsistent and contrary to each other and the transactions involve huge revenue implications. The issue being of all India importance affecting all the satellite and telecommunication cases, Special Bench should be constituted to decide the substantial question of law involved. Hon'ble President on the said application of the revenue has passed order dated 18th December 2006, according to which the matter was to be placed before the regular Bench to consider the various contentions raised in the said application filed by the revenue. The Bench was asked to hear elaborate arguments of both the sides and then recommend to the President, ITAT that whether or not a Special Bench be constituted. In view of these directions of Hon'ble President, the Division Bench after considering the detailed arguments of the parties involved has passed order dated 14th March, 2008, in which following three questions were recommended to be referred to the Special Bench:-

1. *Whether on the facts and in the circumstances of the case, the services rendered by the assessees involved in these appeals, through their satellites for telecommunication or broadcasting, amount to 'secret process' or only 'process'?*

2. *Whether the term 'secret' appearing in the phrase 'secret formula or process' in Explanation 2 to Section 9(1)(vi) and in the relevant article of the Treaties, will qualify the word 'process' also? If so, whether the services rendered through secret process only will be covered within the meaning of royalty?*

3. *Whether, On the facts and in the circumstances of the case, the payment received by the assessees from their customers on account of use of their satellites for telecommunication and broadcasting, amounts to 'royalty' and if so, whether the same is liable to tax under section 9(1)(vi) of the Income Tax Act, 1961 read with relevant provisions of DTAA?*

3. Accordingly, these questions came up for consideration of this Special Bench.

4. During the course of hearing permission was given to M/s Asia Satellite Communication to join as intervener vide order dated 3rd March, 2009. The said order was challenged by the revenue before Hon'ble Delhi High Court in Civil Writ Petition,

which was decided on 20th April 2009. In the Civil Writ Petition two prayers were made by the revenue; first was with regard to quashing of the order dated 3rd March, 2009 and, the second was regarding a direction to be issued to the Tribunal for deciding the pending application of the revenue for "re-modulation of questions" prior to adjudication of the aforementioned questions. It may be pointed out here that the revenue during the course of hearing had requested the Special Bench for re-modulation of questions and such request of revenue was directed to be disposed of after giving opportunity of hearing to both the parties by the aforementioned order of the Hon'ble Delhi High Court dated 20th April, 2009. In this regard, we may mention here that a separate order dated 12.10.2009 has been passed and it has been held that there is no need for re-modulation of questions as sought for by the revenue.

5. Before proceeding further, it will be relevant to mention the common facts involving in these appeals. The assesses are non-residents and are earning income from telecasting companies for providing them transponder capacity. These assesses are engaged in operating telecommunication satellites which are called geostationary satellites and are placed at the distance of around 36000 Kms from the equator. Each satellite rotates in the same direction as earth at a velocity that matches the earth's rotation. Under these conditions the satellite appears to be stationary directly above a place on the equator. The special orbit which exists as a circular line around the earth is called geostationary. Satellite has the solar panels which contains solar cells to convert sunlight into electrical power, a battery system to store energy and power in the satellite during periods when sunlight is blocked by the earth or moon, gyros to stabilize satellite to keep the stabilization system keeping the satellite oriented and the footprint properly aligned on the ground and a structure to contain and protect the repeater during launch and after operations begin on orbit. A satellite can typically consist of 20 to 30 transponders, each operating on a particular frequency within a frequency range allocated to that satellite. Typical bandwidths of a transponder are 27, 33, 36, 54 and 72 MHz. Frequency plan and transponder layout is provided in Technical User's Guide for each satellite. Each transponder ID represents different up-linking pair of transmitting and down-linking receiving frequencies i.e., a transponder ID will have different uplinking

frequencies. The different frequencies are there to avoid the interference with other transponders as well as uplink and downlink footprints. The area, which is covered by satellite down linking facility, is called "footprint area". Through such transponder installed at satellite, the assessees in the present cases are providing transponders capacity of data transmission to their customers, which are telecasting companies/telecom operators. In turn, the telecasting companies/telecom operators provide broadcasting/telecommunication services to their customers. The telecasting companies/telecom operators while relaying the programmes whether live or recorded to their customers uses their earth stations to uplink the data to satellite which is also received by their earth stations in the down linking process from where these telecasting companies/telecom operators provide the telecasting facilities to their customers. These telecasting companies/telecom operators have entered into an agreement with these assessees for obtaining transponder's capacity to enable themselves to up-link and down-link the programmes to be telecasted. For obtaining such transponder's capacity an agreed amount is to be paid periodically as stated in the respective agreements. The issue arises in the present appeals is regarding taxability or otherwise of such consideration received by the satellite companies from telecasting companies/telecom operators. These receipts have been taxed by the revenue as "royalty" either under the provisions of Income-tax Act, 1961 (Act) or under the provisions of respective Double Taxation Avoidance Agreement (DTAA).

BRIEF FACTS IN THE CASE OF NEW SKIES SATELLITE CORPORATION (NSSC)

6. In this case, the assessee is a company incorporated under the laws of Netherlands and the said company is a tax resident of the Netherlands. It provides transponder's capacity (segment capacity) from the satellite operated by it in the orbit, to enable its customers for transmission of voice/data and programmes to the customers around the world under various contracts. According to this company, all the equipments i.e., satellites as well as the operating facilities (to control, monitor and operate the satellites) are owned and maintained and controlled by it from outside India. For Assessment Years

2000-01, 2001-02 and 2002-03, the Assessing Officer has taxed such receipts in India by taking a view that the receipts of the assessee are in the nature of royalty u/s 9(1)(vi) of the Income-tax Act as well as under Article 12.4 of DTAA with Netherlands for the reason that there is a "process" involved in the satellite which has been used by the customers of the assessee." The Ld. CIT (A) by way of consolidated order in respect of three years has upheld the contention of the Assessing Officer. It is the case of the assessee that these receipts cannot be assessed either under Income-tax Act or under Article 12.4 of DTAA as the consideration received by it is not in the nature of 'royalty'.

THE FACTS IN THE CASE OF SHIN SATELLITE PUBLIC COMPANY LTD.

7. In this case, the company is incorporated under the laws of Thailand. The assessee is a licensee of three satellites owned by the Thailand Government viz., Thaicom I, Thaicom II and Thaicom III. Thaicom III is being used for the purpose of up-linking and down-linking the programmes. It is the case of the assessee that the amount received by it from the telecasting companies could not be taxed in India as it does not have any man, material or machinery or combination thereof, which is situated in India for the operation carried out by it in India. Therefore, it is the case of the assessee that the income has neither accrued nor has arisen to it in India, which can be considered as income deemed to accrue or arise to it under Indian Income-tax Act. It is also the case of the assessee that otherwise such receipts are not taxable, as they could not be taxed under the DTAA of India with Thailand. It is the case of the Assessing Officer that the amount received by the assessee is an income deemed to accrue or arise in India as per Section 9(1)(vi) of the Act. The Assessing Officer is of the view that providing transponder's capacity for a consideration falls under the definition of 'royalty' within the meaning of Explanation 2 to clause (iii) to Section 9(1)(vi) of the Act. The Assessing Officer is also of the view that the amount received by the assessee is taxable within the meaning of Article 12.3 of relevant DTAA as the payment received by the assessee is a payment for use of 'secret process' for which the Assessing Officer has relied upon the decision of the Tribunal in the case of Asia Satellite Telecommunication Company Ltd. Vs. DCIT 85 ITD 875 (Asia Sat). Apart from assessing the consideration received in respect of

programme telecasted in India by various T.V. channels of India, Ld. Assessing Officer has also assessed the consideration received from non-resident T.V. channels. The Ld. CIT (A) has upheld the order of the Assessing Officer for the receipts received by the assessee from Indian T.V. channels and so far as it relates to receipts from non-resident T.V. channels, he has deleted the addition. The assessee is aggrieved, hence, in appeal.

ASIA SATELLITE TELECOMMUNICATION COMPANY LTD. (INTERVENERS).

8. It is a company incorporated in Hong Kong. It also operates satellites through which transponder's capacity is provided to the telecasting companies. Consideration received in lieu of providing such transponder's capacity has been taxed as income from royalty as in assessee's own case for earlier years similar consideration has been held taxable. This company has joined as intervener to argue that such consideration could not be taxed as 'royalty' under the provisions of Income-tax Act, 1961.

9. All the parties have submitted before us their arguments in detail. They have also submitted synopsis of arguments advanced by them during the course of hearing. -

ARGUMENTS OF SHRI M.S. SYALI, SENIOR ADVOCATE REPRESENTING NEW SKIES SATELLITES N.V.

10. Referring to the three questions proposed to be answered by this Bench, it was submitted by the ld. Counsel that the question No.1 presupposes that "services" have been rendered and similarly it was pointed out that question No.3 pre-supposes that use of satellites were provided. It was submitted that both these issues are under dispute either by the Department or by the assessee, hence, in fairness the suppositions are required to be discarded.

11. Reference has been made to the DTAA and particularly to Article 12.4 of Indo-Netherlands DTAA which defines royalties and the relevant extract is as under:-

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

12. It was submitted that the receipt of the assessee is not royalty for the following broad propositions:-

i) because it is a payment for "services" and being services, as such, the character of royalty is ruled out.

ii) In the alternative, these receipts do not constitute consideration for "use or right to use the process" as under law it is not any and every process which leads to royalty. It was submitted that the process which could be understood to be falling under the relevant provisions should be *ejusdem generis* with the Intellectual Property Rights (IPR's) in the company of which it occurs can lead to "royalty".

iii) In the alternative, these receipts do not constitute consideration for "secret process."

iv) It is not an equipment royalty

13. So as it relates to proposition listed at (i), it was submitted that the transponders installed at the satellite operated by the assessee have specified bandwidth and there is no secret frequency. The frequency, plan and transponder lay out is transparent and is provided in technical user's guide for each of the satellite. Each transponder id represents different uplinking pair of transmitting and downlinking receiving frequencies. In other words, a transponder id will have different uplinking frequencies. The different frequencies are there to avoid the interference with other transponders as well as uplink and downlink footprints. The process involved in uplinking and downlinking is a service for data transmission provided by the assessee to its customers. The assessee does not and cannot tinker with the signal to be downlinked. What is emanating from the

customer and is received by the consumer remains the same. Such activity of the assessee is only an activity of providing service. The assessee is only a link in the chain.

14. It was submitted that transaction flow will reveal that the activity of the assessee is only an activity of providing service. The viewers pay to the cable operator who provide them with the programmes. Telecasting companies receive revenue from the cable operators in the shape of subscription charges. They also receive payments from the advertisers and these telecasting companies pay to foreign satellite operators outside India. Describing this chain it was submitted that the role of the assessee is limited to receive the signals and to relay those signals in the footprint area. In the entire transmission chain, the telecasting companies who are the customers of the assessee are interested in merely transmitting their signals in a wider geographical area. The customers are neither interested in knowing the technology used by the assessee nor do they intent to do the processes, if any, involved in relaying such signals. To enable the customer to use the standard service, there is an agreed "transmission plan" (TP). TP is a set of data that provides sufficient information to activate service and include information about satellite and transponder capacity used for service, transponder setting, antenna location and parameters, carrier setting, carrier power level, service performance, central carrier frequency, etc. These details are provided only to enable the customers to receive the signals and to avail the service and there is no transfer of any technology, experience, skill, know how or processes, etc.

15. Further, ld. Sr. Counsel referred to the role performed by various components utilized in the process as under:-

EARTH STATION

16. The earth station is a primary component in satellite transmission comprises the ground equipments necessary to transmit or receive the signals from the satellite and it can be located almost anywhere where there is enough power and a clear, unobstructed view in the direction in which the satellite is located. It does not require a large facility, but it needs to contain a satellite antenna and the equipment necessary to amplify, convert and send or receive signals to and from the satellite. It can be located almost anywhere in

the footprint area of satellite. From the earth station signals are transmitted to the assessees' satellites. The process of transmission of signals is the process using specific radio frequency carrier transmitted from the earth station to the satellite.

SATELLITE TRANSPONDER

17. The transponder receive the signal from the uplinking earth station on the uplinking frequency, amplifies the signal, and retransmits it to downlinked earth station on the downlinked frequency. It boosts the power of the uplinked signal (which becomes weak due to distance between earth and the satellite) to a high-powered level before the signal is relayed down in the footprint area.

THE DOWNLINK

18. From the satellite, information is transmitted over the footprints. The area of coverage for a particular satellite is known as "footprint." The earth stations within footprint area and equipped with the necessary equipment catch/downlinks the signal. A global beam pattern covers more than 1/3 of the earth's surface. However, global beam transponders being having a low earth's surface power requires larger ground receive antennas.

19. Elaborating that how the transmission of a live event, say a cricket match takes place through a satellite, it was explained by Ld. Sr Counsel as under:-

- **Step 1** — The telecasting company with authorization for the subject event (cricket match in the instant case) has small VSAT/ SNG station (VSAT= Very Small Aperture Terminal; SNG = Satellite New Gathering).

The telecasting company will usually have several TV cameras deployed on stadium which would be connected to the small transportable studio where TV signal is selected and transmitted by SNG station via satellite to the TV Broadcaster HUB station or large studio. According to satellite configuration and transmit beam coverage more than one broadcaster can receive this signal. Thus firstly, in a live event, the use of satellite first could

be to pick the live feed and to send the same to the HUB station or studio through
the satellite.

• **Step2** — In the studio signal could be modified (if necessary or required) i.e. transformed to other video format - Standard, High Definition Television; accompanied by more sound channels with several language comments, Encrypted etc.

• **Step 3** — Then modified TV signals are broadcasted via standard distribution channels/network i.e. either through satellite, fiber optic cable other TV broadcasters, cable operators etc.

20. Referring to the above process it was submitted by the Ld. Sr. Counsel that role of the assessee in the entire transmission chain is limited to receive the signal and then transmit the same over the foot print area.

21. Reference was made to the agreement of the assessee with the telecasting companies which is named as "Service Ordering Agreement." Copy of such agreement is enclosed at pages 97 to 108 of the paper book-I. Referring to the said agreement, it was pleaded that the payments received by assessee from its customers should properly be characterized as payments for performance of services and is in the nature of business profits which are not chargeable to tax in India. It was submitted that it is an admitted position that none of the business operations of the assessee are carried out in India and, thus, no part of these receipts/income can be taxed in India. The assessee is a service provider. Several telecasting companies/telecom operators enter into contract with the assessee for the purposes of signal transmissions such as data, voice programme, etc. To render these services, the assessee uses its satellites and other infrastructure (all located outside India). These satellites and infrastructure and their control and monitoring are owned, maintained and controlled by the assessee through its employees who are based outside India.

22. Referring to the title of the agreement which is "**Service Ordering Agreement**", it was pleaded by the Ld. Sr. Counsel that the title deed shows that the intention of the parties who are entering into agreement with the assessee for certain services. Reference was made to various clauses of the agreement to contend that the agreement was only an agreement for rendering services

| Clauses | Particulars |
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| **Clauses showing that contractually the Appellant is rendering the services** | |
| Preamble (Pg 97) | Satellite Service(s) (the "Service") |
| Provision of Capacity (Pg 97, cl.1) | Subject to the availability of **satellite capacity** at the time of fully executed "Service Order" **NSS will provide Customer with Service** on the Satellite (s) in accordance with the terms and conditions of this agreement (emphasis supplied). |
| Service Orders (Pg 97, cl 2) | ……Each such executed Service Order, shall constitute an individual lease agreement for NSS to provide and, customer to purchase, service for the term set forth in the individual service order, and in accordance with the terms and conditions set forth herein and therein (each such lease agreement is hereinafter referred to as a "Lease"). Each service order shall also include a description of the technical characteristics of the Service, which shall be set forth in an attachment to the Service Order, to be provided by NSS.<br><br>Appellant's Submissions — The term lease has been used merely to show that certain transponder capacity has been contracted for with the customer. The Agreement is its entirety shows that it is for rendition of services. |
| Third Party Providers (Pg 97, Cl.3) | Customer acknowledges that NSS may contract with one or more third parties for the provision of certain services to be provided as part of the Service under individual lease pursuant to this |

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| Appendix B: APPELLANT Standard Terms and Conditions for Satellite Services | |
| Service Order (Pg 100, cl.1) | By executing an NSS service order, NSS agrees to provide, and Customer agrees to accept, Service in accordance with the terms and conditions set forth below... |
| Use Restrictions (Pg 100, cI 2) | . ..The ***service*** may be used by Customer solely for transmission of its own multi-carrier digital telecommunication services, including<br>the ……(emphasis supplied) |
| Service Fee (Pg 100, cI 3) | Customer shall make each and every Service Fee payment in advance, on or before the first business day of each month (emphasis supplied) |
| Termination (Pg 100, cI 5) | (a) This Agreement may be terminated by either Party on notice to the other; if (1) the Service suffers a Confirmed Outage and NSS does not restore Service within thirty (30) days, or (2) the Satellite is removed from commercial operation at its Authorized Orbital Location and NSS does not provide a Replacement Satellite within thirty (30) days. |
| Replacement Satellite (Pg 100, cI 5) | NSS may determine in unusual or abnormal technical situations or other unforeseen conditions, to replace the Satellite utilized to provide the Service, with a Replacement Satellite, provided that the service specifications of the Replacement Satellite are substantially comparable to (or better than) the Service Specifications. |
| No Resale (Pg 101, cl 11) | The service is provided for Customer's own use and in no event shall Customer be permitted to resell the Services, in whole or in part, to any other person or entity, except as expressly provided` |
| No Property Interest Subordination | This Agreement is ***a service contract*** and does not grant, and Customer shall not |

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| | assert, ***any right, interest or lien in any property or assets*** of NSS including any satellite(s) or related equipment that it may own.<br><br>Appellant's Submissions — The customer of the Appellant is merely interested in the service. There is no use or right to use is granted to the customers in any property or assets which include the satellites, transponders, processes etc. The Appellant uses them to provide service to the customer. |
| Appendix C: Operational Requirements | |
| Pre-emptive Rights in Abnormal Circumstances (Pg 104, cl 10) | Customer recognizes that it may be necessary, in unusual or abnormal technical situations or other unforeseen conditions, for NSS deliberately to cease or interrupt Customer's use of the Service, solely in order to protect the overall health and performance of the Satellite and/or to assign certain amplifiers among transponders on the Satellite to make use of a spare redundant equipment unit.<br><br>Appellant's Submissions — Complete control over the Satellites and its related equipment! processes remain with the Appellant at all times. |
| Testing in the event of Transponder Failure (Pg 104, cl.11 | If a transponder that is used to provide the Service is not meeting Service Specifications, but Customer elects to continue to use (and pay for it) such Services, as degraded, NSS may interrupt Customer's use as necessary to perform testing or take any other action that may be appropriate to attempt to restore the affected Transponder to the Service Specification.<br><br>Appellant's Submissions — Complete control over the Satellites and its related |

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| | equipment! processes remain with the Appellant at all times. Any testing etc is performed by the Appellant. Transponder is used by appellant to provide services to its customers. |
| Appendix E : Definitions | |
| Replacement Satellite (Pg 107) | Shall mean any satellite, other than a follow on satellite, which NSS places in the same orbital location (or to the extent NSS receives authorization to do so, any orbital location within 5 degree of such orbital location) as the satellite used to provide such Service. |
| Service Transponder (pg 107) | Shall mean the specific transponder ***utilized to provide the Service***, as such transponder may be changed from time to time by NSS in its sole discretion. |
| Suspend Service (Pg 107) | Shall mean to deny Customer access to the Service |
| Suspension (Pg 107) | Shall refer to a denial of access to the Service |
| Transponder (Pg 107) | Shall mean any of the Transponders on the Satellite (or, if applicable, the Replacement Satellite), including the transponder utilized to provide the Service.<br><br>Appellant's Submissions — It is submitted that transponder is mean to itself in provision of the services and not an end itself. |

23. Referring to the above terms, it was pleaded that the following conclusions can be drawn:-

1) The agreement is a service contract and that the payment received by the customers is correctly referred to as 'service fee';

2) The customers do not have any lien on the equipment/satellite;

3) Appellant has the control of the satellite and the processes inside it and can replace the transponder under given circumstances;

4) Transponder is only a means to uplink and downlink and not an end in itself;

5) There is no use or right to use granted to the customers in the Satellite or the transponders or the processes in the satellite;

6) The services were not incidental or subsidiary to the enjoyment of any right rather the sole intention is provision of services;

7) The appellant provides the service of delivering the signal over the footprint.

24. It was pleaded that there are certain embedded processes which are carried out within the satellite through the transponder. However, the said processes are used by the assessee for the purpose of rendering service and the customer is merely getting a service and is not using such processes on its own.

25. It was submitted that once it is found that services were rendered by the assessee, then, the same cannot be termed as "royalty." It was pleaded that the basic factor to determine that whether a transaction results into an acquisition of property is based on the fact that whether the consideration paid is for acquisition of the property or for the services. Reference in this regard was made to OECD TAG report, the abstract of which is filed at pages 294 to 295 of the paper book III in paras 32 to 35. Reference was also made to OECD commentary (2005) on Article 12 (copy of which is enclosed at pages 547 to 557 of paper book III at pages 535 to 536 in paras 11 to 11.3) wherein a distinction has been drawn between a contract for know-how and a contract for services. In a

contract for know-how one of the parties agrees to impart to the other, so that he can use them for his own account, is special knowledge and experience which remain revealed to the public. It is recognized that the granter is not required to play any part himself in the application of the formulae granted to the licensee and that he does not guarantee the result thereof. However, in case of contract for services one of the parties undertakes to use the customary skills of his calling to execute work himself for the other party.

26. It was submitted that as per Article 12.4 the dominant intention has to be seen. If the dominant intention is to receive services, then consideration paid is not for "use" or "right to use" a property to receive services. Reliance was placed on the following decisions:-

i) Bharat Sanchar Nigam Ltd. 282 ITR 273 (SC) (page 297, para 45 and page 309 top para of ITR Citation)
ii) Dell International 305 ITR 37 (AAR), observations at pages 56-57.
iii) OECD Tag Report paras 32 to 35.

27. It was submitted that *causa causans* of the consideration is the use or right to use which will make it fall within the purview of 'Royalty.'

28. Reference was made to the decision in the case of Skycell Communications Ltd. Vs. DCIT 251 ITR 53 (Mad) to contend that the services provided by the assessee are in no way different from the services provided by the assessee in that case. It was submitted that the Tribunal in Pan Amsat's case has followed the said decision and distinguished the Asia Sat's case. In this regard, reference was made to the following paras from both the decisions of Asia Sat's and Pan Amsat's cases:-

i) Asia Sat's case para 64, ITD citation.
ii) Pan Amsat's case, para 23 of SOT Citation.

29. It was submitted that ITAT in the case of Asia Sat failed to appreciate that there is no difference if the ultimate consumer received the signal directly from the telecasting company or from the cable operator. Even the cable operator passes on the same signal

to the public which he received from the telecasting companies through the appellant and thus, the ratio laid down in Skycell's case is equally applicable to the case of the assessee.

30. It was submitted that the ratio laid down by Hon'ble Madras High Court in the case of Skycell (supra) has been recently followed by Hon'ble Delhi High Court in the case of CIT vs. Bharti Cellular Ltd 175 Taxman 573. It was submitted that the same argument was submitted before the Hon'ble High Court as was submitted by the Department in Asia Sat's case and Hon'ble High Court after affirming the Skycell's case rejected such argument of the revenue dehors Skycell's case.

31. It was submitted that if the activity of the assessee is considered to be services in the shape of royalty u/s 9(1)(vi) Explanation 2 (vi) based on the finding that services were in connection and incidental with activities in Clause (iii) of Explanation 2 even than such clause does not occur in an adumdum matter for royalty under the DTAA provisions [refer Article 12(5)(a)]. Referring to the decision of the Tribunal in Asia Sat and Pan Amsat it was submitted that in both the cases there is no dispute as both the decisions regard the characteristics of transactions as "services." To substantiate reference was made to the decision of Asia Sat in para 6.27 and 6.25 and Pan Amsat's case in paras 22 and 23. To support the contention that what is provided by the assessee is a service, reference was made to Section 80-IA (4)(ii) which recognize the factum of satellite services.

32. To support the broad proposition that the receipts of the assessee does not constitute consideration for use or right to use the process, it was submitted that the assessee is a tax resident of Netherlands, therefore, entitled to invoke the provisions of DTAA to the extent they are beneficial to the assessee. Referring to Article 12.4 of Indo-Netherlands DTAA which defines "royalty", it was submitted that the consideration should be towards use of or right to use of any of the rights mentioned therein. It was submitted that the definition requires IPR's to be in the nature of exclusive rights vested in the granter and be privy to the person who owns it and not general or publicly available. Referring to the decision of Asia Sat in para 6.17, it was submitted that it was held that the plain construction of the word "use" refers to deriving advantage out of it by

employing for said purpose. There should be a physical contact of the signals of the TV channels with the process in the transponder provided by the assessee. It is only when those signals come in contact with the process in the transponder that the desired results are produced. It is not necessary that process must be used by the customers and the only requirement is that process must be used. It was submitted that these findings in the case of Asia Sat are erroneous for the reasons discussed hereinafter.

33. It was submitted that payments made for the "use" or "right to use" presupposes that customers should themselves be in the control or possession of the said right, while they utilize the asset for the purpose of their business. Reference was made to the report of the Technical Advisory Group (TAG) of OECD in which the scope of payments made for the use of equipment in the context of electronic commerce related issues has been considered, as a number of tax treaties across the world still cover such payments within the scope of royalty. In the said report while commenting upon that under what circumstances computer hardware, namely, equipment should be said to have been made available for use to a customer, TAG has brought the following tests the fulfillment of all or some of which would render the transaction to be used for equipment.

*a) The customer is in physical possession of the property.*

*b) The customer controls the property.*

*c) The customer has a significant economic or possessory interest in the property.*

*d) The provider does not bear any risk of substantially diminished receipts or substantially increased expenditures if there is non-performance under the contract.*

*e) The provider does not use the property concurrently to provide significant services to entities unrelated to the service recipient.*

*f) The total payment does not substantially exceed the rental value of the equipment for the contract period.*

34. Referring to those tests, it was submitted by the Ld. Sr. Counsel that in order to constitute use of equipment, the customer should actually have domain or control over the equipment. According to him, the equipment should be at the disposal of the party. The customer should be in a position to use the equipment in its business activity.

Reference is made to the decision of Hon'ble Supreme Court in the case of Bharat Sanchar Nigam Ltd. 282 ITR 273 at page 311. Referring to the observations of their Lordships it was pointed out that there will be no “right to use” involved while providing a tele-communication service. It was submitted that a telecommunication service provider does not give any right to use to the subscriber of the said service. It was submitted that the Hon'ble Supreme Court has made it clear that it is important to see whether there was any intention to transfer the right to use or not. It was submitted that in the case of the assessee the customer do not have any control or physical possession over the equipment and the satellite/network facilities are owned, maintained and controlled by the assessee. The customers of the assessee merely avails a service and are neither interested in the fact that how the services are rendered nor intent to use the assessee’s infrastructure or the processes involved therein. Reference was made to the decision of Advance Ruling Authority (AAR) in the case of Dell International 305 ITR 37 (AAR). It was submitted that the issue before AAR was whether the amounts payable by Dell International to B.T. America under the terms of ‘B.T private line connect service schedule’ is in the nature of royalty or fee for technical services (FTS) within the provisions of the Act and DTAA. Under the agreement, B.T. America was responsible for providing connectivity services to Dell International i.e., two way transmission of voice and data through telecom bandwidth. The matter was concluded in favour of the assessee by the AAR and it was held that connectivity payments are neither in the nature of royalty nor FTS. It was submitted that the above decision of AAR is applicable to the case of the assessee as in the case of assessee the customer merely makes use of the facility and does not itself use the equipment.

35. It was further submitted that the Dell’s decision was later on followed in the case of ISRO Satellite Centre 307 ITR 59 (AAR) which also supports the case of the assessee. This decision was cited to highlight that recipient of the service in the case of satellite services cannot be said to have a control or possession of the transponder or any equipment in satellite which is a pre-requisite for concluding that the receipts are in the nature of royalty.

36. Further reference was made to the commentary on Double Taxation Conventions of Professor Klaus Vogel the relevant extract of which is enclosed at pages 283 to 287 of the paper book III, the referred portion of which is as under:-

> *"aa) Whenever the term royalties relates to payments in respect of proprietary rights, processes, or equipment, application of Article 12 requires the payment to be made for the* ***'use'*** *or the right to use, the assets in question.*
>
> ***A distinction*** *must be made between letting the licensed asset for use on the one hand and transferring its substance by* ***alienation*** *(regarding the deviation of US MC, see infra m. no. 63). The decisive difference in this connection is the degree of change in the attribution of the asset from licensor to licensor to licensee. On the other hand, another distinction to be made is letting the proprietary right, experience, etc., on the one hand and* ***use of it by the licensor himself.*** *e.g. within the framework of an advisory activity. Within the range from 'services via 'letting' to 'alienation', out right alienation is the one clear cut extreme, viz, outright transfer of the asset involved (right, etc.) to the payer of the royalty. The other, just as clear cut extreme is the exercise by the payee of activities in the service of the payer, activities for which the payee uses his own proprietary rights, know-how, etc., while not letting or transferring them to the payer (for more details regarding the distinction between licensing and the provision of services, see infra m.nos. 54ff, in connection with the various subjects of licences). Neither extreme comes under Art. 12, all that does is the central category, viz. 'letting'*
>
> ……..
>
> ***Industrial, commercial, or scientific equipment****:*
>
> *The use of a satellite is a service, not a rental (thus corerctly, Rabe, A., 38 RIW 135 (1992), on Germany's DTC with Luxembourg); this would not be the case only in the event that the entire direction and control over the satellite, such as its piloting or steering, etc., were transferred to the user."*

37. Referring to the above commentary it was submitted that if the activity of the assessee is seen in the light of the agreement entered into by it with the telecommunication companies, then the consideration received by it cannot be termed to be as royalty. It was submitted that the assessee did not provide any right to use to its

customer, therefore, the receipts cannot be termed of being in the nature of royalty under the provisions of DTAA.

38. Reference was made to the decision in the case of Diamond Services International Pvt. Ltd. Vs. UOI and others (2008) 304 ITR 201 (Bom). It was submitted that Gemological Institute of America (GIA) was grading the diamonds and was issuing certificates stating the properties such as color, carat, etc. of the diamonds worldwide. The certificate issued by GIA is regarded as evidence of the quality of diamonds. The Indian customers were required to make payments for grading and certification reports based on invoice raised by the assessee. It was the case of revenue that payments made by the Indian customers to GIA were covered by definition of royalty within the meaning of Explanation 2 (iv) to Section 9(1)(vi) and Article 12 of DTAA between India and the Singapore and it was held that the payments received were not the one for the use or right to use experience, but was instead one for the application of experience to a certain factual situation. What was received by Indian customers was report where the GIA used its commercial or technical knowledge to give a report under Article 12.4 of DTAA. It was submitted that in the case of the assessee it merely provides services to the customers and for provision of such services it does not impart with any 'process' involved in working of the satellite. The assessee merely used the process itself while rendering services to its customers.

39. Referring to the provisions of Article 12.4 it was submitted that the word "process" is surrounded by words such as patent, invention, model, design, trade mark, etc. which denotes IPRs. It was submitted that the words "similar property" used in Explanation to Clause (iii) to Section 9(1)(vi) also support such interpretation. It was submitted that for a payment to be termed as royalty, it must be paid to a granter/licensor as consideration for parting with his exclusive right for allowing some one to make use of that right. It was submitted that from the agreement and the factual position, there is no parting of any right, let alone the exclusive right, by the assessee in favour of the customer. The activity of the assessee is only provision of service where customer only avails the service and pays for it. Reference was made to the following decisions:-

i) CIT vs. Neyveli Lignite Corporation Ltd., 243 ITR 459 (Mad)

ii) CIT vs. Ahmedabad Manufacturing and Calico Printing Co., 139 ITR 806 (Guj)

40. It was submitted that the word "process" cannot be defined in a generic sense. Rather, it should be something whereby a result or effect is produced. The assessee is receiving signals from the customer and downlinks the same without any change in the form and content of the signal. It was submitted that there is no process involved in the use of satellite or transponder as is required in Article 12.4 of DTAA.

41. Reference was made to the rule of construction known as *noscitur a sociis* to contend that associated words take their colour from one another and they should be construed in the like manner. It was submitted that the philosophy of such doctrine is that the meaning of a doubtful word may be ascertained by reference to the meaning of words associated with it; such a broader doctrine is broader than the maxim *Ejusdem Generis*. Reference was made to the following decisions where such doctrine has been elaborated:-

i) State of Bombay v. Hospital Mazdoor Sabha AIR 1960 SC 610 (copy enclosed pgs 568-576 PB-IV)

ii) Oswal Agro Mills vs. Collector of Central Excise 1993 Suppl (3) SCC 716 (copy enclosed 577-588 PB-IV)

iii) Collector of Central Excise vs. Ramdev Tobacco Company (1991) 2 SCC 119 {copy enclosed 589-597 IV)

iv) KK Kochuni v. State of Madras & Kerala AIR 1960 SC 1080 {pg 598 PB-lV)

v) Amar Chandra Chakraborty vs. Collector of Excise AIR 1972 SC 1863 {pg 599 PB-IV}

vi) Siddeshwari Cotton Mills AIR 1989 SC 1019 (pg 600 PB-lV}

42. It was submitted that in some of the DTAA's satellite services have specifically been stated to be royalty and reference was made to the following DTAA's:-

i) Indo Hungary DTAA .... Pgs 273-275 @ pg 274 PB-III

ii) DTAA between Australia and Czech Republic .... Pgs 276-278 @ 277 pg PB-Ill

iii) DTAA between Australia and New Zealand .... Pgs 279-281 @ pg 280 PB-Ill

43. It was further submitted that, in any case, the consideration received by the assessee is not a consideration for "secret process". It was submitted that process used by the assessee is not at all secret and data on working of satellites is available publicly in the books, websites, etc. and, thus, there is no secret about the process. It was submitted that this fact has been acknowledged by ITAT in the case of Pan Amsat. Ld. Sr. Counsel has submitted that there is a difference of definition of "royalty" under domestic law as compared to law enumerated in DTAA and the said difference has been tabulated as under:-

| **Section 9(1)(vi) Expl.2** | **Article 12(3) of Indo Netherlands DTAA** |
|---|---|
| Explanation 2: For the purposes of this clause "royalty" means consideration for (…….)<br>(i)…….<br>(ii)…….<br>(iii) the use of any patent, invention, model, design, secret formula or process or trademark or similar property<br><br>(iv)..... | Article 12(4). The term "royalties" as used in this Article means payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work including cinematograph films, any patent, trade mark, design or model plan, secret formula or process, or for in formation concerning industrial, commercial or scientific experience. |

44. Referring to the said difference it was submitted that punctuation "comma" is deployed in the DTAA after word "process" which is missing under the domestic law. It was submitted that the use of comma after the word process under the treaty signifies that it is qualified by the word "secret". It was submitted that on interpretation of the treaty there is no dispute between Asia Sat's case and PanAm Sat's case. To further elaborate this proposition it was submitted as under:-

(i) The reasoning given in AsiaSat's case that since trademark can never be secret, therefore, secret before formula only qualifies formulae gets satisfied under the treaty in as much as trademark is used before "secret formula or process" under Article 12(4).

(ii) Definition of royalty under Indo US DTAA in PanAmSat's case is identical to the definition in Indo Netherlands treaty.

(iii) This interpretation stands accepted in DELL's case (supra) pg 62-63, para 56 of ITR citation (pg 321-322 of PB-Ill)

(iv) Where a statute is carefully punctuated "comma" does play an important role in interpretation. References Sama Alana Abdulla vs. State of Gujarat AIR 1996 SC 569@ pg 571, para 7 and 8 {copy enclosed pgs 562-564 pf PB-I'?) and Mohd Shabbir vs. State of Maharashtra AIR 1979 sc 564 @ pg 565, para 4 {copy enclosed pgs 565 to 567 of PB-IV).

(v) Punctuations do carry weight provided they do not give an absurd result.

(vi) Reference may be made to Indo Sweden DTAA were in "secret formulae and process" are used interchangeably. Reference lndo Sweden DTAA dt 23-01-1 959 {copy enclosed pgs 266 PB-Ill) and Indo Sweden DTAA dt 17-12-1 997 (copy enclosed pgs 270-271 PB-Ill @ pg 271)

(vii) Indo Syria DTAA "comma" is used between words "secret formulae" and "process" {Copy enclosed pgs 264-265 PB-Ill @ pg 265)

45. Lastly, it was submitted by Ld. Sr. Counsel that the consideration received by the assessee also does not fall within the category of "equipment royalty." It was submitted that equipment royalty is not included in the definition of royalty applicable to the case of assessee for the Assessment Years involved in these appeals. It was submitted that prior

to substitution of Notification No. SO 693 (E) dated 30th August, 1999 with retrospective effect from 01.04.98 the term "royalty" as used in Article 12(4) means :

> (a) payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work including motion picture films and works on film or video-tape for use in connection with television, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience; and
>
> (b) payments of any kind received as consideration for the use of, or the right to use industrial, commercial or scientific equipment, other than payments derived by an enterprise described in paragraph 1 of Articles 8 and 8A (shipping and air transport) from activities described in paragraph 2 (a) of Article 8 or paragraph 4(b) of Article 8A.

46. It was submitted that after substitution of notification No. SO 693 (E) dated 30th August, 1999 with retrospective effect from 01.04.98 the term "royalty" is as under:-

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

47. Concluding his arguments, Ld. Sr. Counsel submitted that keeping in view the proposition laid down by him, tax should not be levied on the assessee on the amounts received by it from telecommunication companies for uplinking and downlinking services through satellites operated by it.

ARGUMENTS OF SHRI F.V. IRANI ARGUING THE CASE FOR SHIN SATELLITE

48. It was submitted by Ld. Counsel that the amount received by the assessee for providing telecasting facilities is not taxable under the Income-tax Act, 1961 (Act) as no income could be regarded as either accruing or arising to it or deemed to accrue or arise to it under the Income-Tax Act, 1961. He submitted that it is nobody's case that any

payment was received by the assessee in India. In the alternative, it was submitted that in any event, the amount received by the assessee was saved from Indian tax by virtue of the agreement for the avoidance of Double Taxation Agreement between India and Thailand (DTAA).

49. It was submitted that according to the Assessing Officer, the amount received by the assessee is for providing telecasting facilities is an income deemed to accrue or arise in India as the same fell within the scope of Section 9(1)(vi) of the Act. For holding so, definition of royalty provided in clause (iii) of Explanation 2 to Section 9(1)(vi) of Income-tax Act has been referred. It was submitted that the Assessing Officer also took the view that amount received by the assessee fell within the Article 12.3 of the DTAA as the payment received by the assessee was a payment for the use of a "secret process" and for holding so reliance has been placed by the Assessing Officer on the decision of Asia Sat case (supra). Ld. CIT (A) has agreed with the reasoning of the Assessing Officer so as it relates to receipts from residents are concerned. However, Ld. CIT (A) reversed the order of Assessing Officer in so far as it relates to assessee's receipt from non-resident T.V. channels. Ld. AR has referred to Article 12.3 of DTAA and Section 9 (1)(vi) of Income-Tax Act, 1961. To contend that there is no liability of the assessee to be assessed under Indian Income-Tax Act, 1961, it was pleaded that the word "for" as existing in the definition of royalty is very important. It was submitted that the amount received by the assessee do not constitute consideration received "for" the use of any patent, invention, model, design, secret formula or process or trade mark or similar property. It was submitted that in any event without prejudice to the argument that the amount is not received for any of the above items, the requirement of clause (iii) of Explanation 2 to Section 9(1)(vi) is that payment should be for use of, and exploitation of an intellectual property right (IPR) and not simplicitor for the use of process without such right of exploitation of IPR. He submitted that Clause (iii) of Explanation 2 to Section 9(1)(vi) is attracted only in a case when the person making the payment is given the right to exploit the patent, invention, model, design, secret formula or process or trade mark or similar property. He submitted that very use of a patented article or a secret process would not bring the payment within Clause (iii) of Explanation 2 to Section 9(1)(vi). Without

prejudice, it was submitted that even if it is held that the amount received by the assessee is in the nature of "royalty", then also the same could not be taxed for the reason that telecasting facilities/services are provided/rendered by the assessee outside India and not within India.

50. Elaborating his arguments, it was submitted that in order to determine that whether the amount received by the assessee fall within clause (iii) of Explanation 2 to Section 9(1)(vi), it will be necessary to first determine that what the assessee is being paid "for". It was submitted that the intention of the parties and the purpose of payment is for the provision of telecasting facilities and not for the use of any process. Therefore, amount received by the assessee cannot be regarded as falling within the clause (iii) of Explanation 2 to Section 9(1)(vi). Insisting on the word "for" it was submitted that the dictionary meaning of word "for" as described in Mitra's Legal & Commercial Dictionary, 2nd Edition is as under:-

> *"FOR : The word is used as a function word to indicate, purpose or an intended destination or the object toward which one's desire or activity is directed."*

51. Referring to Oxford Dictionary, Thesaurus and Wordpower Guide, the definition of word "for" is as under:-

> "FOR: having as a purpose or function; having as a reason or cause."

52. Ld. AR referred to the decision of Hon'ble Supreme Court in the case of Bharat Sanchar Nigam Ltd., vs. Anr. Vs. Union of India & Ors (2006) 282 ITR 273 (SC). It was submitted that while considering the question that whether SIM cards provided by cellular service providers through subscribers would attract sales-tax, it was observed by their Lordships that the question depends entirely upon the intention of the parties and if the SIM card was intended by the parties to be a separate object of sale, then, sales-tax would be leviable thereon. It was found that such SIM card was merely a part of services

rendered by the cellular service providers and the same was held not to be charged separately for sales-tax.

53. Further reference was made to Special Bench decision in the case of Motorola Inc. vs. DCIT 95 ITD 269 (SB). It was submitted that the assessee in that case was supplying telecommunication equipment to Indian companies who were setting up cellular telephone networks in India. The equipment so supplied consisted of two components, viz., hardware and software. Sale of equipment was completed abroad. It was the case of the Department that payments for the software component of the equipment was an income deemed to accrue or arise in India u/s 9(1)(vi) of the Act as the same constituted royalty and such contention of the Department was rejected by the Special Bench for the reason that one had to analyse that 'for' what the payment was made by the Indian cellular operators to the assessee. It was found that the supply of the software was merely an integral part of the entire system supplied by the assessee. It was held that the payment made by the Indian cellular operators to the assessee could not be regarded as having been paid 'for' the software and, therefore, such payment could not fall under the definition of royalty as provided in Section 9(1)(vi) of the Act.

54. Further, Ld. AR referred to the decision of Hon'ble Madras High Court in the case of Skycell Communications Ltd. vs. DCIT 251 ITR 53 (Mad). It was submitted that Hon'ble Madras High Court in that case has held that though sophisticated equipment was used by a cellular mobile service provider in the course of providing cellular mobile telephone facilities to its customers, the payment received by it could not be regarded as "fees for technical services." It was submitted that the judgment of Madras High Court has been followed by Delhi High Court in the case of CIT vs. Bharti Cellular Ltd. 175 Taxman 573.

55. Reference is made by Ld. AR to the decision of Delhi Benches in the case of DCIT vs. PanAm Sat International Systems (supra). It was submitted that similar question was considered by the Tribunal and while construing the provisions of DTAA it was held that the payment received by the assessee was not for the use of secret process,

but the intention of the parties was simple that the broadcasters used the services of the assessee for the purposes of transmitting their programmes.

56. Further, the reference was made to the decision of Delhi ITAT in the case of Expeditors International (India) (P) Ltd. vs. Addl. Commissioner of Income Tax (2008) 118 TTJ (Del) 652. It was pointed out that the issue before the Tribunal in that case was that whether VSAT uplinking charges were in the nature of fees for technical services so as to attract section 194J of the Act or whether they were merely amounts paid for availing of communication facility, so that section 194J of the Act was not attracted and it was held by the Tribunal that payment was merely "for" availing of communication facility for transmitting data and was not "for" rendering technical services and, hence, not covered by Section 194J of the Act.

57. Further reference was made to Delhi ITAT decision in the case of DCIT vs. Escotel Mobile Communications Ltd. order dated 31st August, 2007 in ITA No. 2154 to 2156/Del/2005, copy of which is filed at Item (k), in the Paper Book filed by him. Referring to the decision it was pointed out that the issue considered by the Tribunal was whether interconnection and port/access charges paid by the assessee (here a cellular service provider) to BSNL by providing interconnection and access facilities constitute fee for technical services so as to attract section 194J of the Act and following the decision of Hon'ble Madras High Court in the case of Skycell (supra) it was held that payment was not for technical services.

58. Reference was also made to decision of Delhi Tribunal in the case of DCIT vs. Estel Communications Pvt. Ltd. 2008-TOIL-174-ITAT-DEL, copy of which is filed at item (j) of the paper book filed for case laws. In that case, the assessee was providing data routing interconnection services which was considered to be fees for technical services to attract section 195 of the Act and the Tribunal, following the decision in the case of Skycell (supra) has held that Section 194J was not applicable. For raising similar proposition, reference was also made to decision of Chandigarh Bench in the case of HFCL Infotel Ltd. vs. Income Tax Officer (2006) 99 TTJ (Chd) 440.

59. Referring to the above discussion, it was submitted that in determining the nature of payment, the determining factor is the intention of the parties and the dominant purpose and intent for payment of consideration and the mere fact that certain technology or processes may be used in the course of providing a facility or performing a task for which alone the payment is made would not transform the payment into a payment for the use of a process so as to constitute royalty. Referring to the assessment order it was submitted that the Assessing Officer himself has observed that the essence of the agreement entered into by the assessee with telecasting company is relaying of the programme of ETC to the cable operators located in India. The responsibility of the assessee was to make available the programme in India. Similarly, reference was made to the observations of the Ld. CIT (A) wherein it has been mentioned that the real intent of the contract by the TV Channel with the assessee was to make available their programmes in India and, thus, the essence of activities was the making available the programme of TV channels in India. Referring to these observations of Assessing Officer and Ld. CIT (A) it was submitted that the payments received by the assessee cannot be regarded as payments ”for” the use of a process so as to fall within the definition of “royalty” under Explanation 2 (iii) to section 9(1)(vi) of the Act.

60. It was submitted that the decision in the case of Asia Sat (supra) is contrary to the principles of law enunciated in the abovementioned decisions. It was submitted that while deciding the issue in the case of Asia Sat, the example given for ‘glass of juice’ has been misinterpreted as the payment made by the customer is for a glass of juice and not for use of the process in the juicer. The intention of the parties was to provide the purchaser with a glass of juice and not to give him the use of the process in the mixer.

61. It was submitted that the payment must be made by the payer for using of right, property or information or process and since there is no use of process by the payer, the payment cannot be considered or said to be made for “royalty.”

62. In the alternative and without prejudice to above submissions, it was submitted that if the payment is held to be made for use of a process, then also, such payment cannot fall within the definition of royalty as such payment should be for exploitation of an Intellectual Property Right (IPR). It was submitted that the word "process" in clause (iii) of Explanation 2 to Section 9(1)(vi) of the Act must necessarily refer to a proprietary process on the principle of *ejusdem generis* and *noscitur a sosis* because the word "process" appears along with the words "patent, invention, model, design, secret formula and trade mark" all of which are indisputably IPRs. Further, laying stress on the words "similar property", it was submitted that it clearly indicate that all the items referred in the said clause must be IPRs. It was submitted that transmission process in the satellite is not an IPR at all and, hence, does not fall within the ambit of said clause.

63. Without prejudice to above arguments, it was submitted that the words "use" or "right to use" in the said clause require that the payer must acquire the right to commercially exploit the patent, invention, model, design, secret formula or process or trade mark or similar property. It was submitted that a person buying a patented product or goods bearing a certain trade mark cannot be said to be making any payment for the use of the patent or for the use of trade mark because he is making the payment only for the use of the patented or trade marked article and not for the use of patent or trade mark.

64. It was submitted that even if it is assumed that the telecasters can be regarded as making payment to assessee for the use of a process, then also the consideration received by the assessee cannot be taxed as "royalty" because the payment is not made for the right to commercially exploit a proprietary process as the telecasters do not acquire any rights of commercial exploitation in respect of proprietary process. For contending so, reliance was placed by Ld. AR on the decision of Lucent Technologies Hindustan Ltd. vs. ITO 270 ITR (AT) 62. In that case the assessee was an Indian company engaged in the manufacture and sale of electronic switching systems required for the telecommunication industry. The assessee obtained an order from the Department of Telecommunication (DOT) for the supply of digital local telephone exchange equipment. The cost of switching equipment to be supplied consisted of hardware and software

component. According to the Department, the assessee was required to deduct tax on software component and it was held by the Tribunal that assessee had merely purchased software without having any right to commercially exploit/duplicate it and, therefore, it was not a payment for "royalty."

65. It was submitted that some tax treaties have made a specific provision to treat such consideration received by the satellite companies to be paid as "royalty" and absence of such specific provision in the tax treaty of India with Netherlands, the consideration received by the assessee cannot be considered to be as "royalty." To substantiate, reference was made to the treaties between New Zealand and Australia and Australia and Czech Republic. It was submitted that in both these treaties there is a separate provision with regard to payments made for transmission of images or sounds by satellite or for the transmission of TV broadcast by satellite. It was submitted that if such payments are to be considered as royalty within the simple meaning of the existing clause, then, there was no need to bring a specific provision in the above mentioned treaties to bring such payments to fall within the ambit of definition of "royalty."

66. Without prejudice, it was submitted, to treat such consideration as royalty, it is necessary that services should be rendered in India. To substantiate, reference was made to the decision of Hon'ble Supreme Court in the case of Ishikawajima-Harima Heavy Industries Ltd. vs. Director of Income-tax , Mumbai (2007) 288 ITR 408 (SC). In that case the assessee entered into a composite, indivisible turnkey project for setting up of a gas terminal in Gujarat. The contract consisted of both offshore and onshore services. It was not disputed that the assessee had a business connection in India under the Act and that it had a permanent establishment in India under the provisions of the relevant treaty and there was also no dispute regarding the taxability of the onshore supplies and the onshore services. The dispute relates only with regard to taxability of the offshore supply and offshore services component. According to the Department, offshore components were taxable in India under section 9(1)(vi) (c) of the Act as they were payments made by a non-resident in respect of services utilized by a business or profession carried on by such non-resident in India or for the purposes of making or earning any income from any

source in India. It was held by Hon'ble Supreme Court that in order to attract section 9(1)(vi)(c) it was not only sufficient that the services were utilized in India, but it was also necessary that they were rendered in India. Reference was made to the observations of their Lordships at pages 444 and 447 of the report. Therefore, it was argued that the receipts of the assessee cannot be taxed in India even if it is assumed that they fall within the definition of "royalty" as the service rendered by the assessee and the process employed by the assessee were all outside India viz., in outer space and, in any event, not even above territory of India as the satellites are not positioned over Indian territory.

67. It was submitted that even after insertion of Explanation to Section 9 by the Finance Act, 2007, said receipt could be taxed as the explanation merely provides that where income is deemed to accrue or arise in India under Clause (v), (vi) and (vii) of Sub-section (1) of Section 9, such income shall be included in the total income of the non-resident, whether or not the non-resident has a residence or place of business or business connection in India. It was submitted that this Explanation in no way provides that even if services are rendered outside India, royalties and fees for technical services can be taxed in India. Thus, it was pleaded that decision of Hon'ble Supreme Court in the case of Ishikawajima-Harima Heavy Industries Ltd. (supra) will have full application to the case of the assessee.

68. It was submitted that the scope of Explanation to Section 9 was considered in the case of Clifford Chance vs. DCIT 221 CTR 1 (Bom) wherein Hon'ble Bombay High Court following the decision of Hon'ble Supreme Court in the case of Ishikawajima-Harima Heavy Industries Ltd. vs. Director of Income-tax, Mumbai (supra) has held that to apply Section 9(1)(vi)(c) to tax any income in India, following two conditions have to be fulfilled;

(i) Services from which income is earned must be utilized in India; and
(ii) These services should be rendered in India.

69. It was submitted that specific reference to Explanation to Section 9 was made and despite that it was held that for taxing the income earned from services, the service must be utilized in India and they should be rendered in India. Thus, it was pleaded that even on application of Explanation to Section 9, such income should not be taxed in the hands of the assessee.

70. It was further submitted that having shown that income of the assessee could not be taxed under domestic law, it is also pleaded that consideration received by the assessee cannot also be taxed under the provisions of DTAA. Reference was made to Article 12 and it was submitted that the use of word "for" in Article 12.3, represents the "use" or "right to use" any secret process because the dominant purpose of the payment and intention of the parties in making payment is the performance by the assessee of the task of/provision of a facility by way of telecasting the customer's programmes. He submitted that in other words, the payments received by the assessee are not for the use of any process as such. It was submitted that the word "secret" attached to formula goes with the word process also and for this purpose Ld. Counsel placed reliance on the decision of the Tribunal in the case of DCIT vs. Panam Sat (supra). It was submitted, under the Treaty even the process should be a secret process, so that the payment, therefore, if any may be assessed in India as a royalty. Thus, it was submitted that the receipts of the assessee could not be assessed as royalty even under the provisions of DTAA.

71. Concluding his arguments Ld. Counsel submitted that the overwhelming weight of judicial authorities is in favour of the assessee. The decision of ITAT in the case of Asia Sat is completely distinguishable from the case of the assessee as that case was a non-treaty case. It was submitted that the decisions relied upon by him including the decision of jurisdictional High Court in the case of Bharti Cellular, are in favour of the assessee and considering that weight of judicial opinion, the issue should be decided in favour of the assessee. Lastly, it was submitted that if it is found that two views are possible regarding the taxability of amounts received by the assessee from TV channels, the view favourable to assessee should be preferred and for that purpose reference was made to the decision of ITAT Special Bench of Five Members in the case of Narang

Overseas Pvt. Ltd. vs. Asstt. Commissioner of Income-tax (2008) 114 TTJ 433. Thus, it was submitted that the issue should be decided in favour of the assessee.

ARGUMENTS OF SR. COUNSEL, SHRI GANESH

72. Explaining the functioning of the assessee with regard to transmission through its satellite, it was submitted by the ld. Sr. Counsel that the satellite owned by the assessee is a "bent pipe satellite" which is a simple repeater i.e., that it receives a signal from the ground, changes its frequency to one suitable by the downlinking path, amplifies it to provide it with required power, and re-transmits it to the ground. The information/programmes contained in the signals are not processed by the satellite. The signals are received by the satellite in outer space above the Indian ocean at the earth's equator (which is not above India). It was submitted that the assessee does not provide any ground based uplink, downlink or terrestrial transmission services to its customers and its only responsibility is to re-transmit the signals which are received from earth to send them back to the earth. The customers of the assessee own, operate and manage the uplinked and downlinked earth's stations and other equipments necessary to transmit the signals to and receive signals from satellites. The customers may either contract with system integrator to build its own uplinked/downlinked facility or it may contract with suitable teleport to uplink/downlink the signals and his client does not play any role in uplinking/downlinking activity. The customer provides transmission plan in writing to Asia Sat which ensures that one customer's use of services does not interfere with other customers use of the similar services and as a part of agreement the customers are provided with the parameters which would be required to be complied with for availing the data transmission services. The assessee operates and maintains the satellite through the tracking, telemetry and control subsystem which is located in Hong Kong. No portion of the control of the satellite, control center or any other infrastructural facility used by the assessee for providing the service lies with the customer. It was submitted that if there is an unauthorized signal which the satellite receives, the assessee will be able to jam the same, so that satellite does not beam the signal back to the footprint. The

agreement entered into by the assessee is titled as "Transponder Utilization Agreement." Referring to the terms of model agreement entered into by the assessee with Satellite Television Asian Region Ltd. (STAR), Hong Kong, it was submitted that plain reading of the agreement will make it clear that the agreement is for providing the services. It was submitted that the assessee has been referred to as "service provider." He has drawn a table referring to various clauses and descriptions in the agreement which for the sake of convenience is reproduced below:-

| **Article** | **Terms of the Agreement** | **Description** |
|---|---|---|
| | CUSTOMER INFORMATION SUMMARY | AsiaSat is a provider of transponder capacity in Asia. The customer wishes to utilize the services provided by AsiaSat. |
| | INTERRUPTION | "Interruption" means a complete shutdown of service on the Transponder. |
| | UTILISATION FEE | "Utilisation Fee" means the fee payable by the Customer, in quarterly installments, for the use of the Transponder Capacity and other services provided by Asia Sat pursuant to this Agreement and includes any other payments described as utilization fees herein. |
| 4. | DEPOSIT AND UTILISATION FEE | 4.2 In consideration for the use of the Transponder Capacity and the other services provided by Asia Sat pursuant to this agreement the Customer agrees to pay the Utilisation Fee at the rates specified in box 7 of the Summary payable in accordance with clause 4.3 |
| 6. | INTRRUPTION OF SERVICE | 6.1. interruptions which are not attributable to the negligence or default of the Customer or to the matters described in Clauses 6.3 or 6.4 will |

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| | | result in a refund of the Utilisation Fee……. |
| 11. | TERMINATION AND THE EFFECTS OF TERMINATION | 11.3 In the event that the customer –<br>© fails to maintain its ground facilities in accordance with the clause 5 such that in the reasonable opinion of AsiaSat such failure may interfere with or cause damage to the services provided by AsiaSat to other customers of, or users of any of, AsiaSat satellites, including the satellite, or the transponders on any of AsiaSat's satellites (including the satellite) or other services provided by Asia Sat through any of its satellites (including the satellite) or may interfere with or cause damage to Asia Sat's other satellites or the satellite and in any event shall fail to rectify such defaults within twenty-eight (28) days of the receipt by it of notice from AsiaSat requiring rectification of the same.<br>11.6 In the event of any termination of this agreement pursuant to clause 11.3 and provided that the Customer has paid to Asia Sat the Default Payment due, AsiaSat shall use all commercially reasonable efforts to market the Transponder Capacity and in the event AsiaSat subsequently reaches an Agreement to provide service to a third party via the Transponder Capacity during the period the Transponder Capacity otherwise would have been provided to the Customer, AsiaSat shall remit to the Customer as a refund of the Default Payment any utilization fees (other |

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| | | than refundable amounts, including but not limited to deposits) it receives and is entitled to retain such third party with respect to such Transponder Capacity, applicable to such period, less all reasonable expenses and costs incurred by Asia Sat in obtaining Agreement with such third party, upto the amount of the Default Payment paid by the Customer for such Transponder. |
| 12. | LIMITATION OF ASIASAT'S LIABILITY | 12.1 The customer acknowledges the inherent risks in launching, operating and providing satellite services and agrees that the customer's sole relief or remedy, hereunder, whether in the event of the inability of AsiaSat to provide the Transponder or Transponder Capacity or the failure of the Transponder or Transponder Capacity to operate as Successfully Operating Transponder or otherwise howsoever unless arising out of AsiaSat's fraud or other willful terms hereof and the customer's obligation to pay the Utilisation Fee as provided herein and as appropriate, the right to a refund of any advance payments where expressly provided for in this Agreement…….. |
| Annexure A3S/2 | Page No.81 of the Agreement | 6.0INTERFERENCE CHARACTERISTICS FOR LINK DESIGN<br>6.1 General<br>…….<br>Interference from external sources are beyond the direct control of any operator and the effect on services depends on a variety of factors, |

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| | | initial assignments will be made…….. |
| Annexure A3S/2 | Page 84 of the Agreement | "7.0 TRANSPONDER CHANNEL CHARACTERISTICS<br>7.1 Usable Transponder Bandwidth<br>The transponders have a nominal 3 dB bandwidth of 36 MHz. For most purposes, this can be considered as "usable" bandwidth. For some services, however, the effects of transponder channel – edge, gain slope and ground delay, adjacent channel interference, adjacent satellite interference and cross-polarization interference and multi-customer guard band may restrict the usable bandwidth to a smaller proportion to the channel bandwidth." |
| Annexure 4 | Page 96 of the Agreement | "1.0 Introduction<br>The design and operation of the Customer's satellite network direct responsibility of the Customer. However, in order to use the AsiaSat space segment services, the Customer must demonstrate that the design and operation of the transmit earth stations of the network are in compliance to the Transmit Earth Station Mandatory Requirements provided in Annex1. The process of demonstrating compliance begins with the submissions of a Network Design/Transmission Plan to AsiaSat and ends with service activation. The AsiaSat system provides customers with the highest quality of service and the earth station qualification process is one means of insuring that the |

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| | | customer's desired performance is achieved without creating or receiving harmful interference with other services.<br>…….<br>Note that there are other actions that the Customer must complete for the service to be activated. These actions are not AsiaSat's direct responsibility." |
| Annexure 4 | Page 97 of the Agreement | 2.0 NETWORK DESIGN / TRANSMISSION PLAN SUBMISSION<br>……<br>after service has been established customers may wish to add new earth stations, expand their service change capacity or otherwise modify their service. In any of these event, an updated transmission plan to reflect the existing and new service requirements should be submitted for reiew and approval." |
| Annexure 4 | Page 98 of the Agreement | TRANSMIT EARTH STATION OF QUALIFICATION<br><br>Approval of the transmission plan does not authorize a customer to begin transmission. Upon test plan approval the customer will be requested to perform earth station antenna and/or electronics qualifications tests for earth stations which are not type-approved. AsiaSat will coordinate the schedule for conducting qualification tests on participating earth stations. To provide the highest quality of service, AsiaSat coordinates and controls the |

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| | | transmission of all carriers. It is the policy of AsiaSat to fully assist customers in the performance of earth stations tests designed to demonstrate compliance to the AsiaSat requirements." |

73. It was submitted that perusal of the above quoted provisions of the Agreement would clearly point out to the fact that AsiaSat is engaged in providing services to its customers. Similarly, the following clauses of the Agreement would show that the satellite used by AsiaSat is always under the direction and control of the Company. As submitted above, AsiaSat provides transmission services using its satellites.

| **Article** | **Terms of the Agreement** | **Description** |
|---|---|---|
| 2 | UTILISATION | 2.1 AsiaSat hereby agrees to make available the Transponder Capacity to the Customer during the Utilisation Term and the Customer hereby agrees to use the Transponder Capacity in accordance with the terms of this Agreement. The Customer acknowledges that AsiaSat may preempt or interrupt the Customer's use of the Transponder Capacity to protect the overall health and performance of the Satellite in unusual, abnormal or other emergency situations. AsiaSat shall use reasonable effort to notify the Customer of such preemption or interruption and will use all reasonable efforts to schedule and conduct its activities so as to minimize the disruption of the Permitted Service. |
| 5 | GROUND FACILITIES | 5.1(b) AsiaSat shall, however, maintain telemetry, tracking and control in relation |

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| | | to the Satellite in order to enable it to comply with its obligations under this Agreement. |
| 9. | COMPLIANCE WITHAPPLICABLE LAWS | 9.2 The customer shall upon written request from AsiaSat promptly cease and desist from any use of the Transponder Capacity or Transponder which in the reasonable and bonafide opinion of AsiaSat is unlawful under applicable laws, including, but no limited to, any use of the Transponder Capacity or Transponder which anyways breaches applicable laws, including limitation laws relating to defamatory, obscene or pornographic material, or third party rights or any other matter which may result in or put AsiaSat at risk of the termination, revocation, suspension or curtailment of AsiaSat's rights to operate the satellite or which may result in AsiaSat or any of its assets, officers or employees becoming subject to criminal, civil or similar proceedings. |
| 11 | TERMINATION AND THE EFFECTS OF TERMINATION | 11.1 (b) The retirement by AsiaSat of the satellite from operation in order to comply with any applicable laws provided that AsiaSat shall use all reasonable assets to give the customer at least ninety (90) days notice of such retirement. |
| 12. | LIMITATION OF ASIASAT'S LIABILITY | 12.1 The customer acknowledges the inherent risks in launching, operating and providing satellite services and agrees that |

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| | | the customer's sole relief or remedy, hereunder, whether n the event of the inability of AsiaSat to provide the Transponder or Transponder Capacity or the failure of the Transponder or Transponder Capacity to operate as a Successfully Operating Transponder or otherwise howsoever unless arising out of AsiaSat's fraud or other willful terms hereof and the customer's obligation to pay the Utilisation Fee as provided herein ad as appropriate, the right to a refund o any advance payments where expressly provided for in this Agreement…… |
| 15. | REPRESENTATIONS AND WARRANTIES AND COVENANTS | 15.3 AsiaSat hereby further represents to an warrants with the customer that :<br>(a) It is the operator of the satellite and has the right to make available the Transponder Capacity to the customer as provided in this Agreement. |

74. It was submitted that perusal of the above terms and conditions of the agreement will reveal that the essence of agreement is to provide telecommunication/transmission services. It was submitted that the assessee uses its satellite to provide facilities to its customers to retransmit the signals for the viewers and its activity is just like a manufacturer of goods who would use his manufacturing plant and processes, etc. to manufacture and sell goods to the customer. He submitted that agreement is not for, nor can it be interpreted conferring any right to use a process or equipment or any other asset whether tangible or intangible to the customer. All assets including the satellite and the transponders, processes therein in the satellite/transponder and other equipment belong to assessee and are being used exclusively by it for providing necessary transmission

services to its customers. He submitted that the essence of agreement can be summarized as follows:-

(i) The customer wishes to utilize the services provided by AsiaSat for the purpose of transmission of its programmes, thereby clearly outlining that the essence of the agreement is the provision of services by the company. The customer is neither interested in, nor uses, any process or equipment or any other asset belonging to AsiaSat. The customer is interested in availing the transmission services of requisite quality from AsiaSat.

(ii) For availing the necessary services from AsiaSat, the customer is required to ensure that its ground-based facilities (also called "earth stations") confirm to the parameters laid down by AsiaSat. Setting up of the ground facilities is only a condition which is required to be fulfilled by the customer prior to availing the company's services.

(iii) The annexures to the agreement provide for technical specifications which are required to be fulfilled by the customer to ensure that AsiaSat is able to provide its transmission services. Merely because the customer is required to install earth stations or configure its facilities does not in any way change the character of the agreement from a service contract to a use/joint use of the satellite/transponder by the customer. In fact, setting up the earth station is an essential requirement for the customer to enjoy the services of the company. The company starts providing the transmission services after the earth station/ground facilities of the customer has been set up.

(iv) AsiaSat provides the services by using its satellites and other assets, etc. The possession and control of the satellites (including the transponders in the satellites) are at all times with AsiaSat only. The possession/control never pass to the customer. It is clearly provided in the agreement that –

(a) the telemetry, tracking and control in relation to the satellite remains with AsiaSat (page 16 of the agreement).

(b) AsiaSat has the power to pre-empt the customer from using its satellite so as to protect the functioning and overall health of the satellite (page 10 of the agreement).

(c) AsiaSat has the right at any time, to move the customer to a new transponder or to different frequency ranges within the transponder or on another transponder on the Satellite (page 11 of the agreement). This implies that AsiaSat has

complete control of the operation and use of the satellite including the transponders.

(d) The agreement can be terminated in case the satellite is retired from its operations (page 28). This aspect also clearly suggests that the satellite is always under the Company's control. It is for AsiaSat to decide about the useful life of the satellite.

(e) In the event the customer does not comply with the norms laid down under the agreement, AsiaSat is empowered to suspend the customer's use of the service (page 27)."

75. It was submitted that the transponder utilization agreement is for providing transmission services to its customers. It is not for renting or leasing out or allowing any one the right to use any asset or process, etc., of the company. To provide the services, the assessee uses its satellite and other assets which are always under the direct control of the assessee.

76. It was submitted that the term "utilization fees" mentioned in clauses 2.4 and 4.2 of the agreement is not indicative of the fact of user by the customer or right to use by the customer of the process as according to other terms of the agreement it has been specifically mentioned that the assessee is providing service to its customer. As entire control and operation of the satellite (including transponder) is with the assessee, no part of the control or operation of the satellite was given to the customer. It was submitted that wherever the agreement refers to the company agreeing to make available the transponder capacity to its customer, it effectively means that the assessee would use a defined capacity of its transponder (as agreed with the customer) to provide the transmission service to the customers. Thus, it was submitted that the department's contention that the agreement represents the consideration received by the assessee for use and for right to use the process is not correct.

77. It was submitted that clause 8.1 of the agreement should not be understood in the manner suggested by the revenue. Ld. Counsel submitted that as per arguments of revenue this clause assign rights/obligation, therefore, the agreement cannot be said to be an agreement for providing services. It was submitted that in the said clause assessee has

agreed to provide transmission services to the customers for using pre-agreed transponder capacity. In the course of availing the services, it is possible that the customer may not be able to utilize the services in full, as a result of which some portion of the transponder capacity may remain unutilized and in such a situation, the customer has been provided a right to assign/enter into special utilization agreement with other parties (as mentioned in clause 8 of the agreement), so that the entire transponder capacity can be utilized by AsiaSat to provide the complete range of services to the customer or his sub-user/assignee. It was submitted that such right of the customer cannot change the basic purpose of the agreement which is to provide the transmission services to the customer or his assignee.

78. It was submitted that it has been the case of the Department that secret information relating to setting up of earth station is being provided by the assessee to its customer and, thus, the contract entered into by the assessee with its customer is one for the right to use the process. In this regard it may be submitted that the assessee provides transmission services using its own satellite and in order to avail such services it is necessary that the customer must have adequate grounds based facilities/earth stations which are owned by the customers. To ascertain that standard services are availed and provided, it has to be ensured that ground based facilities must be of specific standard/type. It was submitted that merely because assessee provides the necessary configuration and related information to enable its customer to set up his ground facility, the contract does not cease to be a service contract between parties. It was submitted that providing the necessary configuration details is only incidental to the sole purpose of the agreement which is to provide the services. To further strengthen such argument example was given where the customer is availing network services which the customer is required to install and maintain a PC, modem and other devices and also a telephone connection before customer can start availing network services from an internet service provider. Example was also given of an industrial concern which needs electricity for which it requires to install a sub-station of requisite configuration at the premises and such sub-station is connected with the electricity poles belonging to electricity service provider and in that case it will be nobody's case that merely by installing the sub-station

as per required configuration; the contract ceased to be for the provision of electricity services provided by electricity service provider.

79. It was submitted that according to well settled law what is required to be seen is the essence of an agreement or the reality of the transaction as a whole and not merely the form of agreement and for this purpose reliance has been placed on the following decisions:-

- CIT vs. M/s Panipat Woollen & General Mills Co. Ltd. (Chd) [AIR 1976 SC 640]
- State of Gujarat vs. Variety Body Builders AIR [1976 SC 2108]
- State of Orissa vs. Titaghur Paper Mills Co. Ltd. [AIR 1985 (SC) 1293]
- Nanak Builders & Investors Pvt. Ltd. vs. Vinod Kumar Alag [AIR 1991 (Del) 315]
- Delta International Ltd. vs. Shyam Sunder Ganeriqalia [1999 4 (SCC) 545].

80. It was submitted that essence of agreement is for providing telecommunication service to customer. The assessee is engaged in the business of transmitting voice, data and programme belonging to its customer to the footprint area of the earth. For rendering such services the assessee is using his own satellite and other facilities. The agreement is not for conferring to the customer any right to use any process or equipment or any other asset. All assets including the satellite and transponders therein, process in the satellite/transponder and other equipments belonging to the assessee are used exclusively by the assessee company to provide services to its customers.

81. Coming to the legal submissions it was submitted that the payments received by the assessee should properly be characterized as payments for performance of services and constitute business profits which are not chargeable in India. It was submitted that it is an admitted position that none of the business operations of the assessee are carried out in India and, therefore, no part of its receipts/income can be taxed in India. It was

submitted that to accomplish the task of providing telecommunication services, the infrastructure including satellites are under the control of the assessee through its employees who are not based in India. The assessee maintains staff of technically qualified employees to monitor its satellites and other operations outside India and work with its customers to assure that its contractual obligations can be performed. The services of the assessee can be availed by any one who will have to pay the requisite fee. No knowledge or technology or training is transferred or imparted by the assessee in the course of providing the transmission services. The satellite is a mere conduit through which programme is transmitted to one location to other. Reference was made to the decision of Hon'ble Supreme Court in the case of Bharat Sanchar Nigam Ltd. vs. Union of India 201 CTR 346 (SC). It was submitted that income should be treated as one earned from rendition of services and not for providing any asset/equipment/intangible on a lease or right to use basis to the customer/payer of the services. It was submitted that under domestic law i.e., under the provisions of Section 9(1) (vi) of IT Act, 1961 the consideration received by the assessee cannot be treated as royalty. It was submitted that clause (iii) and (iva) of Explanation 2 to Section 9(1) (vi) cannot be applied to assessee's case as "royalties" are payments made for the "use", or "right to use", the processes or equipment. It was submitted that India does not have a tax treaty with Hong Kong and Asia Sat is a resident of Hong Kong. But India has entered into tax treaties with many other countries. According to these agreements entered into by India with other countries the definition of "royalties" usually includes payment of the nature envisaged in clause (iii) and (iva) of Explanation 2 to Section 9(1)(vi) of the Act and, therefore, reference to international commentaries on tax treaties will provide a useful code for interpreting the provisions of Section 9(1) (vi) of the Act. It was submitted that there are two models of tax treaties prevalent in the world; one is model adopted by Organization for Economic Cooperation and Development (OECD) which is world's apex body in the matter of fiscal and taxation laws and such model is popularly known as OECD model. The other is the model adopted by the United Nations (UN) and such model is popularly known as UN model. Referring to the commentary provided under OECD model, it was submitted that to constitute "royalty" within the meaning of Article 12, the consideration should be for the "use" or the "right to use". Similarly, it was pointed out that according to UN

model the consideration should be for the "use" or "right to use." It was submitted that although payment made for the use of equipment are currently included in the scope of "royalties" under the UN model tax treaties, the same is currently not included in the scope of royalties under the OECD model. Earlier the OECD model tax treaties contained such a provision, however, by virtue of the amendments made to such model in 1992, payments made for the use of equipment, were excluded from the scope of "royalties.". Reference was made to the TAG report dated 1st February, 2001 to contend that the said report considered the scope of payment made for use of equipment in the context of electronic commerce related issues and following tests were laid down to make a transaction to be treated as royalty for use of equipment:-

(a) The customer is in physical possession of the property.

(b) The customer controls the property.

(c) The customer has a significant economic or possessory interest in the property.

(d) The provider does not bear any risk of substantially diminished receipts or substantially increased expenditures if there is non-performance under the contract.

(e) The provider does not use the property concurrently to provide significant services to entities unrelated to the service recipient.

(f) The total payment does not substantially exceed the rental value of the equipment for the contract period.

82. It was submitted that in order to constitute use of equipment, the customer should have actual domain or control over the equipment, in other words, equipments should be at the disposal of the customer. It was contended that in the case of assessee no such control has been provided to the customer as the control disposition and possession of the satellite/infrastructure used by the assessee to provide services were not at all controlled or possessed by the transmission companies. Therefore, it was contended that the providing of facility for user of transponder capacity is a provision of service by the assessee to the transmission companies. It was submitted that in the leasing of equipment also right to use has been defined in various reports on interpretation of tax treaties.

Reference was made to Klaus Vogel which has been discussed in earlier part of this order and it was contended that unless some control is given to the receiver of the service, the user or right to use cannot be construed in that transaction. It was submitted that according to Black's Law Dictionary the "process" has been defined as under:-

> "a series of actions, motions, or occurrences; progressive act or transaction; continuous operation, method, mode or operation, whereby a result or effect is produced".

83. Referring to this definition, it was submitted that although the act of transmission of voice, data and programme belonging to the customers over Asia Sat's footprint area may be described as a "process", but the point to consider is that the Asia Sat is the one which is in fact utilizing such process which is inbuilt in the satellite whilst providing such services. That does not mean that the process is given to the customer for his use. It was submitted that going by the principles of use of a data, as elucidated by the Technical Advisory Group, the provision of services to transmit voice and other traffic for the customers cannot be said to be transactions for "use" or "right to use" either any "process" or equipment by the customers so as to render the amounts payable by the customers to AsiaSat as "Royalties" under the Act. The transactions are merely in the nature of provision of services.

84. It was submitted that as per principles of interpretations, reference can be made to other statutes dealing with the same subject and forming part of the same system on the basis of doctrine of "*pari materia*" as per decision of Hon'ble Supreme Court in the case of Ahmedabad Pvt. Primary Teachers' Assn. Vs. Administrative Officer and Others (2004) 1 SCC 755. For raising similar contention reliance was also placed on the following decisions:-

(1) Kalyan Municipal Council and Others vs. Usha Ranjan Bhadra (184 ITR 80).
(2) CWT vs. Imperial Tobacco Company of India Ltd. 61 ITR 461

85. Referring to these decisions it was submitted that since the I.T. Act and OECD model tax treaties deals with the same subject, viz., the levy of income-tax, the report of

TAG of the OECD on interpretation of OECD model tax treaties and commentaries of international authors should be relied upon to interpret similar provisions contained in the Act and the treaties on the basis of doctrine of *pari materia*.

86. To contend that there was no "use" or "right to use" involved in the provision of telecommunication services, ld. Counsel relied the decision in the case of Bharat Sanchar Nigam Ltd. vs. Union of India (supra).

87. It was submitted that the customers of assessee who are availing transmission services have neither intended to nor has obtained any rights to use the underlying infrastructure (including the satellite) maintained and used by AsiaSat for providing the requisite services. The customers do not intend to nor use any portion of wiring, cable, the satellite or technology, etc. maintained/owned by AsiaSat. All these are used by AsiaSat to provide the necessary telecommunication services to its customers and to raise such contentions reliance was placed on the following decisions:-

1) Aggarwal Brothers vs. State of Haryana and Anr. (1999) 9 SCC 182 -In that case the appellant had provided shuttering to the builders and contractors and it was held that requirement of deemed sale were completed as there was a transfer of a right to use the goods for consideration.

2) State of Andhra Pradesh and Anr. vs. Rastriya Ispat Nigam Ltd. (2003) 3 SCC 314 wherein after examination the clause contained in the agreement, it was observed by the Hon'ble Supreme Court that the transactions between the respondents and the contractors did not involve transfer of right to use the machinery in favour of the contractors and in the absence of satisfying essential requirement i.e., transfer of right to use the machinery, the hire charges collected by respondents from contractors were not exigible to sales-tax. Referring to this decision it was contended that it is important to see that whether there was any intention to transfer the right to use or not and in the present case it was contended that there was no transfer of the "right to use."

3) Lakshmi Audio Visual Inc. vs. Asstt. Commissioner of CT (Kar) 124 STC 426 - In the said case the petitioner was engaged in the business of hiring different audio visual multi media equipments at the site desired by the customers, the equipments were handled, arranged, installed and operated by the petitioners, technicians/operators to meet the requirement of the programme/event. At no time the equipments were given to the possession and control of the customers, nor were they operated by the customers. On these facts, it was to be examined by Hon'ble High Court that whether the transactions involved transfer of "right to use goods" which is chargeable to tax and it was held that the transfer of the right to use the goods, which may be by way of leasing, letting or hiring involves the transferor permitting the transferee to use his goods. To constitute such transfer, there should be delivery of possession of the goods by the transferor to the transferee, that is transfer of the effective and general control of goods with the right to use the goods, as distinct from a mere custody of goods, from the transferor to the transferee. Reliance was also placed for raising similar contention on the decision in the case of Alpha Clays vs. State of Kerala 135 STC 107. Referring to these decisions, it was submitted that there is no use or right to use involved and, thus, the transaction cannot be called to be in the nature of royalty.

88. Reference was made to the decision in the case of S.P. Gupta vs. President of India AIR 1982 SC 149 to contend that what is binding is the ratio of the decision and the principle underlying the same and not the conclusion. Reference is also made to raise similar contention to the decision of Hon'ble Supreme Court in the case of Dalbir Singh vs. State of Punjab AIR 1979 SC 1384.

89. Relying on the decision in the case of Skycell Communications Ltd. and Another vs. DCIT (supra), it was contended that there is a distinction between payment made for use of a thing and utilization of a process or equipment to render services. It was

submitted that though the said decision is rendered in the context of fee for technical services u/s 9(1)(vii), but the ratio therein is applicable to the facts of the case.

90. Support was drawn from the decision of the Tribunal in the case of DCIT vs. PanAm Sat International System Inc. (supra) to contend that receipt of the assessee from its customer do not involve a "right to use" the process, etc., being granted in favour of service recipient and, thus, such receipts could not be taxed as royalty. It was submitted that the said decision of the Tribunal vindicates the Asia Sat's stand.

91. Reference also was made to the decision of Authority of Advance Rulings (AAR) in the case of ISRO Satellite Centre 307 ITR 59 and also in the case of Dell International Services India Pvt. Ltd. 305 ITR 37 and it was contended that on similar set of facts it was held that payments made by Indian residents to a foreign company for "utilization of leased capacity on navigational transponder" is not in the nature of royalty under the Act.

92. It was submitted that there is no difference between the operation performed by the transponder used by IGL (i.e., in the case of ISRO) and that used by AsiaSat and forming part of their respective satellites. It was submitted that transponders used by AsiaSat are of same configuration as were used by IGL. It was submitted that the transponders of AsiaSat are also passive transponders and do not undertake any onboard data processing/storage. Following table was given to describe that there is no difference in the transponders installed in the case of ISRO and installed in the case of the assessee.

| | Inmarsat-4 F1 | AsiaSat-3S |
|---|---|---|
| Frequency Translation | Yes | Yes |
| Uplink Freq (MHz) | C1 : 6532.42 – 6536.42<br>C5:6538.45 – 6558.45 | H-Pol: 5865 – 6425<br>V-Pol:5845-6405 |
| Downlink Freq. (MHz) | L1: 1573.42 – 1577.42<br>L5 : 1166.45 – 1186 | V-Pol: 3640-4200<br>H-Pol: 3620 – 4180 |
| Signal Amplification | Yes | Yes |

| | | |
|---|---|---|
| | (uplink path loss – 162 dB & downlink free space loss – 185 dB) | (uplink path loss – 162 dB & downlink fre space loss - 196 dB) |
| On-Board Data Storage | No | No |

93. Thus, it was submitted that the ratio of decision of AAR in the case of ISRO is duly applicable to the present case.

94. Referring to the decision in the case of Dell International Services India Pvt. Ltd. (supra), it was submitted that in the said case the company was mainly engaged in the business of providing call-center, data processing and information technology support services to its group companies. Dell India entered into an agreement with Connect Service Schedule (CSS) with BTA. CSS was relating to underwater sea cable facility from Ireland to India provided by BTA. Dell India used the facility and, hence, has nexus with the activities of the applicant in India and the question for consideration before AAR was that whether the amounts payable by the Dell India under CSS would be in the nature of royalty or fee for included services as per Article 12 of the Treaty or Section 9(1)(vi)/(vii) of the Act. It was held by AAR that the emphasis in the agreement was laid on "Services" and not in respect of use of equipment. A distinction was drawn between rendering of service of a person using his own equipment vis-à-vis the grant of right to use the equipment to the recipient of service. It was observed by AAR that word "use" in relation to equipment under Explanation 2 (iva) to Section 9(1)(vi) of the Act cannot be equated with the availing the benefit of an equipment. It was held that provision of "telecom band width facility" by means of dedicated circuits and other network installed and maintained by BTA does not amount to a lease of an equipment under clause (iva) of Section 9(1) of the Act and Article 12 of the Treaty.

95. Reference was made to two examples contained in the protocol signed between Government of India and Government of USA which forms part of DTAA between India and USA which explains the meaning of the term "fee for included services" contained in Article 12 of DTAA to contend that even intangible assets like process can be imparted

by the owner to the payee/lessee and that it is in only those cases that consideration earned from imparting the process can be taxed as royalty.

Example 1 – as given the facts like that a USA manufacturer grants right to an Indian company to use manufacturing process in which transferor has exclusive right by virtue of process, patent or the protection otherwise extended by law to the owner of a process. As a part of contractual arrangement, the US manufacturer agrees to provide certain consultancy service to the Indian company nor made the effectiveness of latter's use of the processes. Such service include the provision of information and advice on sources of supply for materials needed in the manufacturing process, and on the development of sales and services, literature for the manufactured product. The payment equitable to such services do not form a substantial part of total consideration payable under the contractual arrangement. It has been analysed that the payments are fee for included services as the services are ancillary and subsidiary to the use of manufacturing process protected by law as described in para 3 (a) of Article 12 because the services are related to the obligation or enjoyment of the intangible and the granting of right to use the intangible has the clearly predominant purpose of arrangement.

In example 2, the manufacturing company is Indian company who produces a product that must be manufactured under sterile conditions using machinery that must be kept completely from all bacterial or other harmful deposits. The US company has developed a cleaning process for removing such deposits from the type of machinery. The US company enters into an agreement with Indian company under which the former will clean the latter's machinery on regular basis. As part of arrangement the US company leased to the Indian company a piece of equipment which allows the Indian company to measure the level of bacterial deposits on its machinery in order for it to know when cleaning is required and it was analysed that the services were ancillary and subsidiary. Rental of monitoring equipment, therefore, were not fee for included services.

96. Referring to these examples it was pleaded that intangible asset (like process) can be granted on a "right to use basis" to another party which is like tangible asset.

97. To contend that the consideration received by the assessee cannot be taxed as "royalty" even under clause (vi) of Explanation 2 to Section 9(1)(vi), it was submitted that unless the consideration received by the assessee fell within the meaning of sub-clauses i.e., clause (i) to (iv), (iva) and (v), the consideration cannot be treated as royalty under sub-clause (vi). Sub-clause (vi) read as under:-

> "vi) the rendering of any services in connection with the activities referred to in sub-clauses (i) to (iv), (iva) and (v)."

98. It was submitted that the phrase used in sub-clause (vi) "in connection with" has been considered by Hon'ble Karnataka High court in the case of Stumpp, Schuele and Somappa Ltd. vs. Commissioner of Income-tax 190 ITR 152 (Kar). Similar words are used in Section 37 (iii) of the Act and it was observed as under:-

> "Section 37(3) of the Income Tax Act, 1961, lays down that expenditure incurred in connection with traveling by an employee or any other person shall be allowed only to the extent and subject to any conditions as may be prescribed. The expression "in connection with" in section 37(3) includes matters occurring prior to as well as subsequent to or consequent upon, so long as they are related to the principal thing. In other words, whatever has nexus to the travel undertaken in connection with the work outside the headquarters resulting in the stay, such stay, whether actual work in connection with company affairs was carried out or not, would be relatable to the travel undertaken which was indisputably in connection with the work of the company and, therefore, the only logical inference to the drawn is that the stay also was in connection with the work as it is intimately connected with the travel undertaken. The entire expenses of such travel would be covered by section 37(3)."

99. Referring to these observations it was submitted that a payment will qualify as "royalty" under clause (vi) of Explanation 2 only if the conditions of clause (iii) and (iva) are first satisfied and not otherwise, because clause (vi) is intimately connected with the definition of royalty as outlined in clause (iii) and (iva). It was submitted that if a view that services covered by clause (vi) are independent of clause (i) to (iv) of Explanation

and, hence, covered by types of services is correct, then, the same would render all other provisions of the Act including section 9(1)(vi) obsolete.

100. It was submitted that clause (i), (ii), (iv) and (v) of Explanation 2 to Section 9 (1) (vi) are also not applicable. It was submitted that it is also not the case of the revenue that any of these clauses are applicable. Above arguments have been summarized in the following conclusion:-

(a) AsiaSat is engaged in the business of providing telecommunication services. These services are provided outside of India.

(b) AsiaSat is not engaged in letting out or leasing or imparting its telecommunication network or facility (including the satellites) to its customers. The payments received by the Company are for performance of services only.

(c) In the course of rendering the services, AsiaSat does not allow any use of, nor does it give any right to use, its assets (whether tangible or intangible including process) to its customers. The Company uses its own assets and satellite network including the processes to provide services to the customers. It could not be considered to have received any amounts for allowing the use of, or the right to use, any process or other tangible or intangible asset or equipment by any person.

101. In the alternative, it was submitted that even if it is assumed that the assessee has granted a right to use the process to its customer, such right to use must be in relation to a secret process to qualify the same as royalty. Emphasizing on the words "similar property" appearing in sub-clause (iii) of Explanation 2 to Section 9(1)(vi) of the Act, it was submitted that the use must be for IPR. It was submitted that as per decision of Hon'ble High Court in the case of CIT vs. Neyveli Lignite Corporation Ltd. 243 ITR 459 the royalty to be in the nature of payment to a person for allowing others to use that thing by virtue of him having an exclusive right over that thing. It was submitted that the word "process" has to be interpreted not according to any dictionary, but according to the context and on the basis of rule of *ejusdem generis* and *noscitur a sosils* and the process must be secret so that the consideration, if any, paid can be assessed as "royalty." It was submitted that satellite technology is available as public literature and no secrecy is involved.

102. Reference was made to the decision of Hon'ble Gujarat High Court in the case of CIT vs. Ahmedabad Manufacturing and Calico Printing Company Ltd. 139 ITR 806 wherein their Lordships have considered the meaning of the term "royalty" as defined in the dictionaries.

103. In that case, in the absence of definition of word "royalty" under Income-tax Laws, on the basis of various definitions given in dictionaries and commentaries, etc., it was held that where the payment is made for utilization of secret process, the same will be considered to be a royalty.

104. Reference was made to the decision of Hon'ble Calcutta High Court in the case of N.V. Philips v. Commissioner of Income-tax 172 ITR 521. In that case Hon'ble Calcutta High Court considering the meaning of the term "royalty" (prior to enactment of Section 9(1)(vi) of the Act) observed that payment may be regarded as royalty where the parting of one's intellectual right is similar to parting of a monopoly right. This case was cited for the contention that the process for which the payment is made, must be protected either by steps taken by the owner to preserve the secrecy of the process or by exercise of the legal protection afforded by patents and similar protection. It was submitted that AsiaSat does not hold any patent in connection with satellite and the process used in AsiaSat in the delivery of services is not secret, thus, payments received by it could not fall within the definition of royalty.

105. To contend that consideration can be treated as "royalty" only if the same is paid for secret process, reliance is placed on Article 12 (3) (a) of the Treaty between India and Sweden. It was submitted that several Indian Treaties including Treaty with Greece used the phrase "secret process or formula" (64 ITR 86). It was submitted that India's Treaty with Austria, Belgium and France, originally used the phrase "secret process or formula, but were specifically amended to use the phrase "secret formula or process" and the said change was only brought to bring the statutory language in conformity to the language used in UN Model Convention. It was submitted that two phrases viz., "secret process or formula" and "secret formula and process" mean one and the same.

106. Reference was also made to the decision of Hon'ble M.P. High Court in the case of CIT vs. HEG Ltd. 263 ITR 230 wherein it has been held that information which is in public domain would not fall within the ambit of royalty under the Act/Treaty. To have the status of royalty, the information must have special features where some sort of expertise or skill is required and it was submitted that the decision in the case of Dun & Bradstreet Espana SA 272 ITR 98 and decision of ITAT in the case of Wipro Ltd. vs. ITO 80 TTJ 91 are of the same effect. It was submitted that the word "process" in the definition of royalty should be interpreted in restricted sense rather than a wider or general sense. Reference was made to the rule of interpretation *ejusdem generis* and *noscitur a sociis.* For this purpose reliance was placed on the following decision:-

i) RBI Vs. Peerless General Finance & Investment Co. Ltd. (1987) 1 SCC 424 (refer pages 211-226 of paper book-II)
ii) S. Mohanlal Vs. Kondiah AIR 1979 Supreme Court 1132 (refer pages 227-230 of paper book-II).
iii) IPCA Laboratory Ltd. Vs. DCIT 266 ITR 531 (Supreme Court) (refer pages 231-243 of paper book-II).
iv) Jamshedpur Motor Accessories Stores Vs. UOI: 189 ITR 70 (Pat) (refer pages 244-255 of paper book-II) – affirmed by Supreme Court in Allied Motors Vs. CIT: 224 ITR 677 (refer pages 256-266 of paper book-II).

107. It was submitted that in the recent decision Hon'ble jurisdictional High Court in the case of CIT vs. Bharti Cellular Ltd. 175 Taxman 573 has invoked rule of *noscitur a sociis* to interpret the meaning of the word "technical" used in the definition of "fee for technical services" u/s 9(1)(vii) of the Act and it was pleaded that the term "process" when used in the context of royalty should be used for a technique, formula, information all of which constitute know how and are not in a public domain.

108. It was submitted that the Hon'ble Supreme Court in the case of CIT vs N.C. Budharaja 204 ITR 412 has observed that statute cannot always be construed with the dictionary in the one hand and the statute in the other hand and due regard must be had to

the scheme, context and the legislative history of the provision. It was submitted that Asia Sat has used its own assets and processes to provide necessary services to its customers. No process in any form is ever intended to be imparted by the assessee company to its customers. It was submitted that process by which communication satellite transmits signal has been widely understood and is in the public domain for many decades. It is not protected from disclosure and, in fact, is described in a large number of publications on the subject and there is nothing secret about the satellite transponders or any other related item. The information can be gathered from various books and websites. To conclude, it was submitted that even if it is assumed that in the course of rendition of services AsiaSat granted a right to use the "process" to its customers such right to use must be in relation to "secret process" for it to be qualified of being "royalty."

109. Reference was made to the decision of Privy Council in the case of Lewis Pugh Evans Pugh vs. Ashutosh Sen AIR 1929 Privy Council 69 (copy given at pages 166 to 169 of paper book I). It was submitted that the Privy Council while interpreting the provisions of Article 48 and 49 of the Indian Limitation Act, 1908 observed that :

> "The truth is that, if the article is read without the commas inserted in the print, as a court of law is bound to do, the meaning is reasonably clear…"

110. Reference was made to the decision of Hon'ble Supreme Court in the case of Ashwini Kumar Ghose v. Arbinda Bose AIR 1952 SC 369 (Copy placed at page 170 to 202) of the Paper Book I) to contend that punctuation is only a minor element in the interpretation of the statute and it cannot control the meaning of the text. To raise similar contention, reliance was placed on the decision in the case of Pope Alliance Corporation v. Spanish River Pulp and Paper Mills Ltd. AIR 1929 Privy Council 38.

111. Referring to these decisions it was pleaded that the 'comma' or similar punctuation mark has only minor role to play in the interpretation of the statutes and the same cannot be regarded as having a controlling impact on the words used in the statute. The true intent of the statute should be derived at from the meaning of the words forming

part of the statute and not based on the punctuation marks. It was submitted that while defining the term "royalty" the same may be construe to be in respect of Intellectual Property Right and, therefore, the non-use of comma after the words "secret formula or process" in clause (iii) of Explanation 2 to Section 9(1)(vi) should not be regarded as controlling element for determining whether the payment made for the use of process is regarded as royalty or not.

112. It was submitted that language used in clause (iii) of Explanation 2 is in *pari materia* to the definition of royalty under both OECD and UN Model Conventions and it was submitted that the only difference between the definition in these models and definition under the Act is that comma has been used after the word 'process' in the model conventions, but coma is not used in the definition given in clause (iii) of Explanation 2 to 9(1)(vi). It was submitted that as per accepted principles the commentaries and technical reports issued by OECD and UN in relation to international tax treaties should be adopted while interpreting the tax treaties and as is submitted earlier that comma does not make any difference, the interpretation given under commentaries and technical reports while interpreting the provisions of the treaties should adopted.

113. It was submitted that AsiaSat does not provide any equipment to its customers in the course of rendition of the services. Therefore, no right to use has been given by it to its customers. It was argued that as no right to use has been given, clause (iva) of Explanation 2 to Section 9(1)(vi) also cannot be invoked. In this regard, it was submitted that in the decision rendered by Division Bench in assessee's own case, the meaning of word "equipment" as appearing in sub-clause (iva) to Explanation 2 to Section 9(1)(vi) was discussed and it was observed that the same has been defined in Chambers 21st Century Dictionary to mean; "the clothes, machines, tools instruments, etc. necessary for a particular kind of work or activity" and it was held that a bare perusal of the meaning of the term "equipment" would reveal that equipment is an instrument or tool which is capable of doing some job independently or with the help of other tools. It was submitted that the Tribunal has held that transponder which is used by AsiaSat for receiving and

then retransmitting the signals belonging to the customer cannot qualify as "equipment" in itself. A transponder is not capable of performing any activity if it is divorced from the satellite. The transponder in itself without other parts of the satellite is not capable of performing any function since satellite is not plotted at a fixed place and, thus, the Tribunal concluded that payment for leasing out the transponder to the customers cannot be equated with the leasing out of the equipment so as to qualify as giving rise to a royalty payment.

114. It was submitted that the order of the Tribunal in assessee's own case (85 ITD 478) does not lay down the correct law wherein the revenue earned by assessee is held to be taxable under the definition of "royalty" contained in Section 9(1)(vi) of the Act. To contend so, the reference was made to arguments which have been recorded above. It was submitted that ITAT failed to appreciate that no "use" or "right to use" with respect to any asset (tangible or intangible) was granted by the assessee to its customers in the course of providing transmission services. It was submitted that reliance by the Division Bench in the case of P.No.30 of 1999 228 ITR 296 was wrongly placed as the said case was distinguishable on facts. It was submitted that in that case charges were for the use of Central Processing Unit (CPU) and Consolidated Data Network (CDN). The Indian company was interested in the software. The CPU and CDN merely enable the Indian company to gain access to that software and, thus, it was held that the payment was made for the use of software, and, it was a payment for "royalty." It was submitted that in the present case it has been demonstrated beyond doubt that customers have made payments for availing transmission services and not for use of any asset. It was submitted that the Tribunal in the case of Kotak Mahindra Primus Ltd. vs. DDIT 11 SOT 578 has held that the decision in P.No.30 of 99 does not lay correct law. It was submitted that ITAT has invoked clause (vi) of Explanation 2 to Section 9(1)(vi) to hold that revenue derived by AsiaSat would also fall in clause (vi) of the said Explanation 2. It was submitted that ITAT failed to appreciate that for invoking the clause (vi) of Explanation 2, the predominant purpose of the arrangement must be covered in clauses (i) to (v) of Explanation 2 to Section 9(1)(vi) of the Act and that the services being provided must be "in connection with" i.e., incidental to transmission falling under clause (i) to (v) of

Explanation 2. It was submitted that the examples given by ITAT in para 6.17 of fruit juicer and Atta Chakki to hold that it is not necessary that process must be used by the customer is erroneous. It was submitted that while arguing the present appeal a clear distinction has been drawn between allowing someone else to use the asset/process and the asset/process being used by the owner himself to provide a service to his customer. It was submitted that it is only in the former situation the case would come under the definition of "royalty" and in latter situation it is a mere case of provision of services by the owner who is using its own asset/process for providing the services. It was submitted that decision of Division Bench of ITAT in assessee's case is also not correct as while construing the word 'process' on the ground that there is no 'comma' after the word 'process' in clause (iii) and detailed arguments have already been submitted in this regard to show that to constitute royalty the word 'process' must be understood to be a secret process and for that purpose reliance has been placed on various decisions. Concluding the argument, it was submitted that the decision of Division Bench given in the case of the assessee is bad in law and should be overruled by the Special Bench.

ARGUMENTS BY SHRI Y.K. KAPOOR, LD. SPECIAL COUNSEL APPEARING FOR THE REVENUE.

115. It was submitted by ld. Counsel that the controversy under adjudication by the Special Bench is mainly concerned with the interpretation of legal definition of 'royalty" provided in Explanation 2 to Section 9(1)(vi) of the Income-Tax Act, 1961 (the Act) as well as in Article 12 or 13 of the applicable Treaties. It was submitted that it has been the case of the revenue that payments made by the telecasting companies/broadcasters (customers) to the satellite companies for use of transponder to uplink, amplify, process and downlink content rich programmes developed by them are chargeable to tax as royalty, both as per provisions of the Act and tax treaty. It was submitted that from a plain reading of definition of royalty defined under section 9(1)(vi), it can safely be inferred that for the payments to be characterized as "royalty", such payments have to be necessarily for the use of any property mentioned in clause (iii) of Explanation2 to Section 9(1)(vi) of the Act and the "process" being one of the constituent items occurring

in the said definition, it can further be safely assumed that "consideration for use of a process would result in the payment being made to be referred as "royalty."

116. It was submitted that so far as it relates to findings given by the Tribunal in AsiaSat decision, there is no dispute that they have attained finality. It was submitted that while reading PanAm Sat decision, it will be clear that there is no dispute whatsoever while considering the taxability of these transactions under the definition of royalty, so far as it relates to domestic provisions. It was submitted that the dispute, if any, is with regard to the taxability of these transactions while construing the provisions of various tax treaties. It was submitted that the only difference which persuaded the subsequent Bench of the Tribunal in PanAm Sat to hold that the payment to be characterized as royalty must be made for the use of "secret process" and these findings are reiterated on the sole premises that in the treaty there is an appearance of punctuation mark "comma" after the words "secret formula or process" which is absent under domestic law. It was submitted that the subsequent Bench in PanAm Sat has completely misdirected itself in reading the same to be a binding precedent to the followed in the same term. It was submitted that since, on the same facts there were two views, the Special Bench has been constituted mainly to adjudicate whether the appearance of the punctuation mark "coma" in DTAA makes any difference and on that basis whether a different view could be taken in PanAm Sat decision which differed with the view earlier taken in Asia Sat's case.

117. It was submitted that the arguments submitted by the Ld. Counsel of New Skies Satellite N.V. can be summarized as below:-

a) Comma or no comma does not make a difference and therefore no arguments were addressed on the presence of a comma in the Treaty.
b) The other argument referred to by the learned counsel appearing for the assessee in this case was that the payment so made by the broadcaster to the satellite company are for the use of services and thus being its business income and the satellite company having no permanent establishment in India, its receipts are not taxable in India.

c) It was also contended by the learned counsel for the assessee that the payments are not for the use or the right to use the process.

d) It was the case of the assessee that for the payment to be qualified as royalty, it has to be payment for the use of intellectual property right which according to the assessee, is not the case here.

e) It was faintly contended that the payment if any does not even constitute consideration for the use of secret process.

f) That at the outset it is most respectfully submitted by the revenue that an argument has been made by the appellant that this is not a payment within the meaning of Clause (iva) of Explanation 2 of section 9(i)(vi) of the Income Tax Act. On this issue a detailed submission has been made in the later part of this submission.

g) The counsel for the other assessee namely Shin Satellite while adopting the arguments advanced on behalf of New Skies submitted that the consideration to qualify as royalty payment must be received 'for the use of the products mentioned in Section 9(i)(vi) and which products in all cases without exception should be some kind of intellectual property.

h) Apart from the above, the learned counsel for the Shin Satellite also contended that since the payments do not accrue or arise in India, and the services are not rendered in India, the payment so received are not exigible to tax in India.

118. It was further submitted that almost similar arguments were submitted on behalf of the Ld. Counsel appearing for Shin Satellite and also the ld. Counsel appearing for intervener, namely, AsiaSat.

119. Ld. Special Counsel referred to the definition of "royalty" as appearing in Explanation 2 of Section 9(1)(vi). Highlighting the word "process" used in the definition, it was submitted that the process takes place in the satellite/transponder. Ld. Special Counsel has submitted before us a diagram of basic satellite system. According to the said diagram, the satellite contains a solar panel, satellite repeater, receiving antenna and transmitting antenna. First, information is put into encoder which travel to modulator and up-converter where it is amplified and uplinked to the satellite through

receiving antenna of satellite and, then, the same is downlinked by transmitting antenna where receiving earth station receives it with low noise, down converter, de-modulator and decoder and the information is output.

120. It was submitted that the hardware components of satellite are summarized as under:-

> ”All of them have a metal or composite frame and body, usually known as the bus. The bus holds everything together in space and provides enough strength to survive the launch.
>
> All of them have a source of power (usually solar cells) and batteries for storage.
>
> All of them have an onboard computer to control and monitor the different systems.
>
> All of them have a radio system and antenna. At the very least, most satellites have a radio transmitter/receiver so that the ground-control crew can request status information from the satellite and monitor its health.
>
> Many satellites can be controlled in various ways from the ground to do anything from change the orbit to reprogram the computer system.
>
> All of them have a transponder.
>
> All of them have an altitude control system. The ACS keeps the satellite pointed in the right direction.

121. Describing the details about transponder it was submitted that it is an electronic device used to wirelessly receive and transmit electrical signals. Describing the definition of transponder from various technical websites it was submitted as under:-

a) A satellite transponder receives signals from the earth and transmits signals back to the earth. A transponder usually receives on one frequency and transmits on another.

b) Equipment in the satellite that receives a signal unlinked from a teleport on the ground, amplifies it, converts it to a different frequency and re-transmits it to the ground so that every household with a dish within the footprint of the satellite can receive the signal. www.satellite.se/ordlistaen.html

c) The device in a communications satellite that receives signals from an uplink on earth and transmits it back to earth (downlink). It is used by cable programmers to deliver signals to local cable systems. www.factmonster.com/ipka/A0776021.html.

d) Satellite equipment that receives signals on the uplink, translates them to the downlink frequency, and amplifies them for retransmission to earth. www.telesat.ca/support/terminology-e.asp

e) A device that relays electrical signals not necessarily in the same form or on the same frequency as received.
Frozone.itsc.uah.edu:8080/LEAD Glossary/Complete/tcomplete.jsp

f) the electronic equipment on a satellite that receives signals from an uplink, converts signals to a new frequency, amplifies the signal, and sends … www.tamu.edu/ode/glossary.html

g) Transponder according to Webster Dictionary

A radio or radar set that upon receiving a designated signal emits a radio signal of its own and that is used especially for the detection, identification, and location of objects.

h) Transponder – Word Net (r) 2.1 (2005):

Transponder

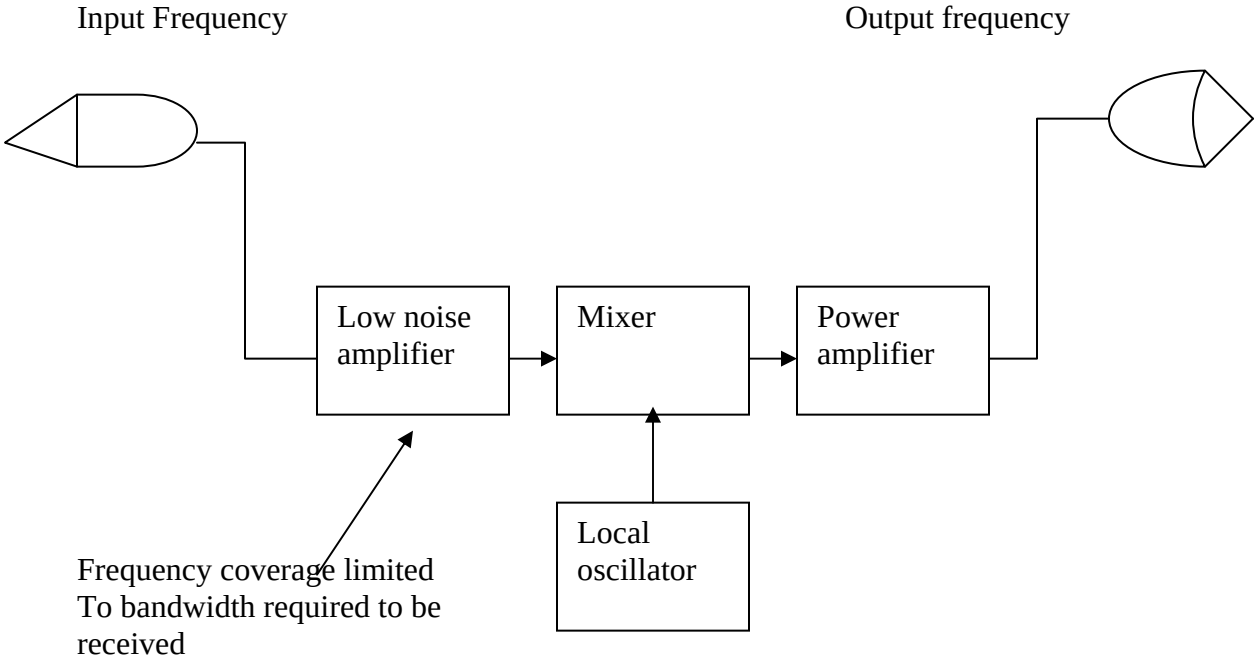
Nl: electrical device designed to receive a specific signal and automatically transmit a specific reply.

i) Transponder

The electronic equipment on a satellite that receives signals from an uplink, converts signals to a new frequency, amplifies the signal, and sends it back to earth. Satellites are usually equipped with 12 to 14 transponders.

Technology Glossary Terms taken from www.timbercon.com.

122. Referring to above definitions, it was submitted that various components of a satellite transponder can be listed as under:-



123. Describing the details of processing in the satellite transponder it was submitted that a transponder is a broadband RF channel used to amplify one or more carriers on the downlink side of a geostationary satellite. It is part of the microwave repeater and antenna system i.e., used onboard the operating satellite. The satellites and most of their cohorts in the geostationary orbit have bent-pipe repeaters using C and Ku bands; a bent pipe repeater is simply one that receives all signals in the uplinked beam, block translates them to the downlink band and separates them into individual transponders of a fixed band width. Each transponder is amplified by either a traveling waive tube amplifier (TWTA) or a solid State Power Amplifier (SSPA). Satellites of this type are very popular for transmitting TV channels to broadcast stations, cable TV systems and directly to the home. Other applications include very small aperture terminal (VSAT) data communication networks, international high bit rate pipes, and rural telephony. Integration of these information types is becoming popular as satellite transponders can deliver data rates in the range of 50 to 150 Mbps. Achieving these high data rates requires careful consideration of the design and performance of the repeater. It is submitted that most cycle impairments to digital transmission come about in the filtering, which constraints bandwidth and introduces whole distortion, and the power amplification, which produces an AM/AM and AM/PM conversion. For maximum power output with the highest efficiency (e.g., to minimize solar panel DC supply), this amplifier should be operated at its saturation point. However, many services are sensitive and susceptible to AM/AM and AM/PM conversion, for which back off is necessary. With such an operating point, inter modulation distortion can be held to an acceptable level; however, back off also reduces downlink power.

124. The transponder takes signals from the uplink earth station on a frequency f1, amplifies it and sends it back on a second frequency f2. The guard band assures that the transponders do not interact with each other, therefore, transponder itself, which are leased are separate equipments.

125. It was submitted by Ld. Special Counsel that the issue whether any process was used by the persons who have obtained transponders capacity from satellite companies or

it was a mere facility, was considered in the case of AsiaSat (supra). In this regard, reference was made to the paras 6.19 to 6.23. It was submitted that while holding in para 6.23 that what the TV channels in the entire cycle of relaying their programmes in India are doing is that they are using "process provided by the assessee" have referred to the book written by Stephen C Pascal and David J Withers. From page 176 of the book, it was noted that while describing the functions of satellite in the transmission chain, there is a "process" involved.

126. Ld. Special Counsel also referred to the paras 6.24 to 6.25 of the said decision to contend that the Tribunal while holding that the payments received by satellite companies was in the nature of royalty, the decision of Hon'ble Madras High Court in the case of Skycell was also considered. It was submitted that even in the case of PanAm Sat in para 19 it has been held that the process was involved in the activity carried on by the assessee. Thus, it was submitted that if a conjoint reading is given to the decisions of the Tribunal in the case of AsiaSat and PanAm Sat, then, there is no room to doubt that the process takes place in the transponder/satellite and payments made by the telecasters are for the use of process and, thus, so as it relates to domestic law, the findings by both the decisions have been returned in favour of the revenue.

127. It was submitted that the contention of the assessee is that payment is not for the use of the process and it is the assessee alone who is using the process and not the telecaster/customer. He contended that as far as the satellite is concerned, it is not disputed that satellite is used for beaming the signals for the purposes of telecasting programmes from place A to place B. As customer will use the process in the transponder for which the payments are made, for beaming its programme in a particular area which falls under the footprint of the satellite. It was submitted that essence of the agreement of the TV channels with the assessee is that they want to use assessee's transponders to relay their programmes in India.

128. Referring to the agreements, it was submitted that the choice of programme, the place where it has to be telecasted and the time of telecast is of the customer and the

parties have agreed for uninterrupted use of the satellite against payment on 24 x 7 basis for the period mentioned in the agreement and such result of beaming the programme can be achieved only when the customer has an exclusive right to use the satellite or the process which is embedded therein. It was submitted that we are familiar with the concept of breaking news displayed on the TV screen while watching a programme. It was submitted that unless and until customer has an access to the process, the news cannot be telecasted in the manner and at a particular time for which customer wants and, therefore, keeping the exigencies of the business, the broadcaster and the satellite company have entered into an agreement whereunder the "use" and "right to use" the process is given to the customer and the background in which the use or right to use is given to the customer is only to safeguard the interest of the customer, so that tomorrow it may not come and say that programme was delayed or not telecasted.

129. Ld. Special Counsel referred to the new Telecom Policy 1999 (India) which inter alia refers to telecasters as "use" and provides for "avail of" and "use" of the transponder capacity. Attention was drawn on the following extract taken from that policy :-

> "3.9 SATCOM Policy
>
> The SATCOM Policy shall provide for users to avail of transponder capacity from both domestic/foreign satellites. However, the same has to be in consultation with the Department of Space."
>
> Under the existing ISP policy, international long distance communication for data has been opened up. The gateways for this purpose shall be allowed to use SATCOM.
>
> It has also been decided that Ku frequency band shall be allowed to be used for communication purposes.

130. Further reference was made to para 6.17 of AsiaSat decision to contend that the word "use" should not be restricted only to physical use. It should be construed in the

context in what it is used. While considering the definition of the word “use” in ordinary sense, it was held that it would really be unfair to restrict the meaning of the word “use” only to physical use. The plain construction of the word ‘use” refers to the deriving advantage out of it by employing for a set purpose. It was held therein that there was a physical contract of the signals of the TV channels with the process in the transponder provided by the assessee and it was only when those signals come in contact with the process in the transponder that the desired results were produced. Thus, it was submitted that the word “use” cannot be restricted to the physical user only.

131. Referring to the above discussion, it was submitted by Ld. Special Counsel that neither the DTAA nor the definition of royalty provided under the Act requires physical possession or control by the user. It only requires the “use” or “the right to use.” It was submitted that satellite is neither in physical possession of the assessee nor with the customers. The payment is made for the use of, or the right to use of specific capacity of the transponder and the process therein. It was submitted that even otherwise the signals uplinked by the customer not only comes in the physical contact with the transponders, but also enter the transponders and get processed therein before they are downlinked. Uplink and downlink are the established links between the satellites and the telecasters earth station. Broad frequency and transponder is fixed in the agreement itself for use to the customer. Every transponder is identified with a separate name and the transponder once allotted to one customer in the agreement cannot be changed by the assessee later on; until and unless it has the permission from the customer. Even if telecaster customer require more capacity, the personnel at their station do not technically add band width to a customer and do not provide the services, but rather allow additional channel(s) on an existing space approved to be accessed by the customer. Channels are nothing, but the transponders which along with the process are allowed to be used for a periodic payment which is “rent”, can be given nomenclature by the assessee. Not only this the location of the satellite, which is fixed vis-à-vis one point on earth , if changes, the customer can terminate the agreement.

132. Also, the customer can re-sell the use of a transponder or the entire capacity of the transponder just like a right or product in possession. Thus, it was submitted that what has been held in the case of PanAm Sat is without assigning any reason.

133. It was submitted that the Tribunal in the case of PanAm Sat has wrongly understood the meaning of word "services" and by taking the clue from the preamble of the agreement it has been held that services were provided by the satellite companies. It was submitted that services referred to in preamble do not mean the services as generally understood. It was submitted that the Mumbai Bench of the Tribunal in the case of Asstt. Commissioner of Income-tax Vs. Sanskar Info T.V.P Ltd. (2008) 24 SOT 87 (Mum) while considering the digital broadcast service agreement of that assessee with M/s Shin Satellite Public Co. Ltd. (one of the assessee in the present proceedings) and has held that the transponder fee paid by the payer to Shin Satellite was covered by the definition of royalty and was chargeable to tax under provisions of Section 9(1)(vi) of the Act and the payer should have deducted the tax. It was submitted that the said decision is dated 10th June, 2008 which is a date after the decision in the case of PanAm Sat. It was submitted that the Bench had also considered the taxability of the transaction even under the provisions of DTAA between Government of India and Government of the Kingdom of Thailand and, thus, it was submitted that as it relates to the case of Shin Satellite, the taxability of consideration has already been upheld by the Tribunal Mumbai Bench and the said decision requires the approval of the Special Bench. It was submitted that even in the case of New Skies which is resident of Netherlands, the definition of royalty is identical. Therefore, the payments in both the cases are in the nature of royalty.

134. Dealing with the contention submitted by the Ld. Counsels appearing for the respective assesses that no right to use the process was given to the customers, it was submitted that such argument is contrary to the agreements placed on record and is hit by the provisions of Section 91 and 92 of the Evidence Act. It was submitted that three agreements are placed on record.

135. Referring to the agreement in the case of interveners, namely, AsiaSat, it was submitted that the agreement has been styled as "transponder utilization agreement" meaning thereby that the use of transponder capacity and the process involved therein is granted and is left to the wisdom of the customer. It was submitted that at page 2 of the agreement in item No.2 consideration has been termed as utilization fees. Page 3 of the agreement talks of transponder utilization agreement – general terms and conditions. Ld. Special Counsel contended that before discussing the other terms and conditions of the agreement it will be relevant to understand the meaning of the word 'utilize/utilization." It was submitted that these words have been liberally used in the agreement whereby customer is placed in a position under the agreement to utilize the process of the satellite. He contended that as per Webster's Third New International Dictionary at pages 2525, the word 'utilize' has been defined as "to make useful, turn to profitable account or use, make use of or convert to use." The word "utilization" has also been defined therein as "the action of utilizing or state of being utilized." In Oxford dictionary the word "utilize" has been defined "verb; make practical and effective use of." He contended that having examined literal meaning of the words , the terms of agreement should be examined to gather the dominant intention of the parties as to whether the customer was given any "use" or "right to use" the process of the satellite by the assessee and the first thing which comes across in the definition section of this agreement at page 9, (at hand written page 9) customer is supposed to pay utilization fees for the use of transponder capacity and the said clause reads "utilization fees means fee payable by the customer, in quarterly installment, for the use of transponder capacity." Thus, it was contended that the definition has sanction of the agreement itself describes that consideration termed as "utilization fee" is for using the transponder capacity and other services provided by AsiaSat and this very definition demolishes the case of the assessee that no right to use the transponder was given. Making reference to clause 2(1) of the agreement which is under the head "utilization" it was submitted that the said clause read as "AsiaSat hereby agrees to make available the transponder capacity to the customer during the utilization term and the customer hereby agrees to use the transponder capacity, in accordance with the terms of the agreement. The customer acknowledges that Asia Sat may preempt or interrupt the customers use of the transponder capacity to protect the overall health and

performance of the satellite in unusual, abnormal or other emergency situation." It was contended that this clause clearly depicts that the agreement is for use of the transponder's capacity by the customer. Then, reference was made to clause 2.4 which read as under:-

"the customer is hereby granted the right to use the transponder capacity."

136. Referring to this clause, it was submitted that this clause is indicative of the fact that it is the customer and not the assessee who is using the transponder and the said use has consciously placed within the domain of the customer with the correct understanding and knowledge and belies the case of the assessee that it is he who using the process or the process is privy to him alone at the exclusion of the customer or the telecaster. It was contended that the situation becomes further clear by reading the clause 2.5 wherein obligation has been cast upon the customer before making use of the transponders in terms "the customer shall prior to taking up use of transponder capacity provide Asia Sat with the customer's written transmission plan in sufficient details to enable AsiaSat to ensure that the customer's use of transponder capacity does not or will not cause interference to other customers of satellite or other satellites and does not or will not adversely affect AsiaSat's ability to coordinate the satellite with other satellite operators. It was submitted that such provision in the agreement belies the claim of the assessee that customer has no role and he is using only a standard facility. It was contended that if it is a standard facility, then no prior permission or plan is required and the customer would have remained a passive recipient of the service provided by the satellite provider which is clearly not the case here. Then, Ld. Counsel has referred to clause 4 of the agreement under the head "deposit and utilization fees." Reference was made to clause 4.2 of the agreement wherein consideration has been mentioned to be for the use of transponder capacity and other services provided by Asia Sat which according to Ld. Special Counsel is not for any standard facility as is contended by the other side. It was contended that reliance is being placed by the revenue on the word "for" used in the said clause and it is submitted that this clause makes it clear that the consideration is for the use of transponder capacity which use has been granted to customer under the said

agreement and it is not for any special facility. It was contended that clause 4 of the agreement has clearly demonstrated the dominant intent of the parties whereby the use of transponder has been granted to the customer or telecaster and in consideration of the same the customer or the telecaster is obliged to make payments to the assessee which, by their very characterization, as utilization fees bear out the claim of the revenue on all grounds.

137. It was submitted that clause 5 of the agreement under the head "ground facilities" further belies the claim of the assessee of the alleged service being a standardized facility by a fair appreciation of the sub-clauses contained in that clause. It was contended that clause 5.1 of the agreement provided that "the provision of transponder capacity under this agreement does not include any ground based uplink, downlink or terrestrial transmission facilities. It was submitted that in the same clause it is further categorically stated that Asia Sat shall have no obligation whatsoever with regard to obtaining of any authorities , licenses or permits (governmental or otherwise) required in relation to or to provide any uplink services, down link services or terrestrial transmission services. It was contended that the said clause establishes the claim of the revenue that the ground based facilities required to establish connection and use the satellite are exclusively in the hands of the customer or the telecaster and Asia Sat by its own admission so demonstrated during the course of hearing through grounds of appeal filed before the Commissioner of Income Tax (Appeals), has no role to play in instigating or invoking the process of satellite as the very act of uplinking and downlinking remains in the exclusive control of the customer. It was submitted that when the said clause is read in conjunction with the preceding clauses discussed earlier, which give the use and right to use of the transponder to the customer, it will be revealed that the said grant of the right to use the transponder was not a matter of pure agreement or contract between the parties, but was compelled by the manner of functioning of the satellite system. It was further submitted that unless customer or telecaster at his own end does not uplink and send content rich signals to the satellite and until or unless the signals reaches and enters transponders, the transponder mounted on the satellite does not even get activated and remains handicapped being unable to process anything. Even after such processing is

done after uplink by the customer, until or unless downlinked, the processed signals just get scattered and does not yield anything. It was contended that to illustrate the functioning further following illustration can be cited:-

> "In the case of some breaking news of an event which is exclusively pertaining to Indian affairs, the Indian telecaster or broadcaster are the only entities which by virtue of their infrastructure and expertise have the capability to capture and relay the said event onward for satellite transmission. The bare exigency of such business would in the least require that a customer or telecaster is granted and assured an interrupted usage of the satellite transponder so as to enable him to telecast spontaneous news, occurrences and events which require an immediate broadcast. If the case of the assessee is to be believed that would mean that the customer or the telecaster is in some way dependent upon or handicapped by the right to use the process as alleged to be vesting in the satellite owner which argument is clearly not the spirit of the agreements or the dominant purpose for which the same have been entered into."

138. Referring to clause 5(b), it was submitted that the said clause clearly demonstrate that a substantial share of the control over the process of satellite has been vested in the domain of customer or the telecaster and the satellite company has only consigned itself with a limited role of maintenance in the operation of the said system. He submitted that since the factum of control of the process in the satellite cannot be said to be privy to the said provider, the payment for the same under the agreement have to be necessarily considered only as royalty and even terms of authoritative exposition rendered by Klaus Vogel who regards and holds similar payments to be only royalty and nothing else. Referring to clause 5.2 to sub clause A, it was submitted that customer was put under an obligation to ensure that the design and operation of the customer's satellite ground stations and customers utilization of transponder capacity conformed to the agreement and technical specifications for such designs and operations have been provided by AsiaSat to the customer under the same agreement. Thus, it was submitted that the

customer or telecaster, if alone is responsible under the said agreement to ensure the proper working and functioning of the equipment necessary for the business of the parties to the agreement itself clearly establishes that it is the customer or the telecaster who is not only using the process, but also controls the initiation by uplinking, processing in transponder and the end result of the process and the processes are fully dependent upon him. It was pointed out that under Sub-para B of sub clause it is clearly provided that such ground station facilities of the customer or the telecaster have to be qualified by Asia Sat for access to and use of the satellite and/or transponder capacity. It was submitted that dominant intention of the parties to grant access and use of satellite in the hands of the customer or the telecaster has been unequivocally expressed and reconfirmed and, therefore, the assessee cannot plead and argue contrary to the terms of the said binding agreement. Sub-clause-C of the same clause provides that the assessee can send its engineer for an on site inspection to assist the customer for qualifying a ground station. If it is so, Ld. Special Counsel pleaded that one fails to understand the need to have the processes in the hands of the customer/telecaster inspected and the urgency to ensure their correct and proper functioning if, as claimed by the assessee that no processes have been granted or shared by the satellite provider to the customer or the telecaster. Thus, it was contended that the entire process is not privy to the satellite companies.

139. Referring to clause 6.1 of the agreement, it was pleaded that if the customer is not using the process , then, there was no need for the clause to be written in the agreement which states “interruptions which are not attributable to negligence or default of the customer” which entitles the customer for refund of utilization fees. It is submitted that if customer is not using the process, then, there was no occasion for any apprehension that the process that has come in the hands for usage or operation would be not properly used or operated. In clause 6.4, it has been made clear that “no refund in utilization fees will be made if the interruption is the result of or attributable in whole or in part, the failure or non-performance of the customers station or the customers other satellite facilities regardless of who is operating or controlling the facilities.” It was submitted that last part of this clause is indicative of the fact that the assessee by no means can

claim to be using the process as the assessee is by means of this clause guarding its own interest in the event of misuse of the process, should the same occur or be occasioned.

140. It was contended that clause 7 of the agreement speaks of protection to the transponder or its degradation. It was submitted that if customers is not involved in the process and no interest has been provided to him in the process or no part of its usages falls in customer's hand, then one fails to understand the incorporation of such clause in the agreement especially in the light of the fact that the case of the assessee is that it is a standard facility provided to every one or any one who is willing to pay and process is privy to the assessee. It was submitted that in the commercial world everything and anything is available for a price and any one willing to pay can use or buy that thing but that does not mean that everything in the world is a standard facility. To raise similar contention, reference was made to clause 7.4 and 7.6. It was contended that clause 8 speaks of volumes of right to the customer in the process which the assessee wrongly claims to be privy to him. It was submitted that the word "assign/assignment" is always indicative of a right which is being transferred or assigned. Referring to clause 9.1 which provides that if customer is not otherwise in default under any provisions of this agreement, and save as otherwise expressly provided in the agreement, AsiaSat shall not interfere with the customer's use of transponder capacity in accordance with this agreement. It was submitted that this clause itself is not only indicative of the fact but it proves beyond doubt that it is the customer and the customer alone who is using the process or has been given the right to use the process. It was submitted that clause 9.2 also clearly indicates that if Asia Sat requests in writing to the customer, customer shall promptly cease and desist from any use of transponder capacity or transponder which in the reasonable and bona fide opinion of the assessee is unlawful under applicable laws and similarly was the effect of clause 9.3 (a) and (b) wherein as per clause 9.3(a) the customer was under an obligation to provide reasonable details to the assessee regarding the nature of the material that the customer is intending to broadcast and/or the services to be provided by the customer through the use of the transponder capacity. In sub-clause (b) it has been provided that the customer has undertaken to the assessee that he will use all commercial reasonable efforts to ensure that the material which is intended to be

broadcast is to provide design and will not cause assessee to violate any applicable law and/or third party rights. In sub-clause (c) Asia Sat has been provided with a right, in addition to desist the customer from broadcasting the material, to suspend customers use of transponder capacity.

141. Ld. Special Counsel referred to clause 11.3 (a) of the agreement which talks of "utilization fee" by the customer and it was submitted that it is a pointer to the fact that it is the customer who is utilizing the process for telecasting. It was submitted that though clause 11 of the agreement talks of termination and effects of termination, clause 11.3(c) also demonstrates that the process is initiated by the customer and used by the customer and ends with the customer, otherwise there was no necessity of the same. Reference was made to clause 11.6 and clause 12 to contend that it is in fact the customer who uses the process of the satellite contrary to what has been contended by the assessee.

142. Further reference was made to clauses 16 which deals with confidentiality. It was contended that if it is only a standard facility available to any one, then there was no need for the clause of confidentiality. It was submitted that Annexure I to the agreement provides the details regarding transmit earth station mandatory requirements. The said document primarily outline the technical specifications which are secret, confidential and necessary in order to make the system of satellite communication through the use of processes used therein workable and functional. It was submitted that the process of transponders has been vested in the control of customer which has been provided with complete technical specifications (which are secret and confidential in nature) to enable him to interact, access, use and control the process of the satellite. It was submitted that such technical resource or specifications under the contract are not options available to customer, but are conditions precedent to claim the rights of the contract.

143. Referring to Annexure 4 which deals with the earth station, qualifications and activation and clause 1 of the said Annexure (page 94 of the paper book), a term has been laid that the design and operation of the customer satellite network is the direct responsibility of the customer whereas in order to use Asia Sat space segment services

the customer must demonstrate that design and operation of the transmit earth station of the network are in compliance to the transmit earth station mandatory requirement. Referring to the clause 2 and 3 of the Annexure, it was submitted that these clauses amply demonstrate that it is not only the customer using the process or has been given right to use the process, but customer activates the process in the transponder, uses the said process for which it is paying the consideration and is also the beneficiary of the process. It was submitted that without the customer upliking and downlinking the signals, setting up the earth station, in conformity with the requirement of the satellite, uplinks and downlinks the beams without which the satellite or transponder would be nothing, but dead piece of matter suspended in the high skies.

144. Similarly, with respect to agreement in the case of Shine Satellite Company, Ld. Special Counsel referred to the clauses 7, 9 and 10 of the agreement and clauses B.3, B.4(i), B.4 (ii), B.6, B-7, B-8, B-9.4, B.10, B.11.2 of the Appendix-B to raise the similar contentions and it was submitted that the dominant intention of the parties when they signed the agreement was the use and right to use the process of the satellite or transponder vested in the customer and, therefore, the consideration will fall within the domain of "royalty" liable to be taxed in India. Further reference was made to the advertisement given by New Skies on their website in which it was mentioned that "in order to preserve the high level of service quality and integrity of the SES NEW SKIES space segment we have developed a process by which earth stations are granted access to the satellite." It was submitted that advertisement itself indicated that the customer entered into contract has got access to the transponder and process therein and uses the same for the benefit of achieving satellite communication or messages, information or images that is uplinked. It was pointed out that the word "access" has been defined in the Webster's New Third Dictionary at page 11 to mean "freedom or ability to obtain or make use of" and also "ability of means to participate in work in or gain insight." It was submitted that definition of word "access", thus, clearly indicates that customer or telecaster has been granted all rights which enables it to an unbridled freedom to obtain or to make use of transponder in the satellite. It was submitted that all the above-referred clauses of the agreement and the advertisement read together will leave no room to doubt

that it is the customer who is using the process and not the assessee and the contention of the assessee that it is using its own process is misconceived and is liable to be rejected.

145. Thereafter, Ld. Special Counsel referred to the decision of the Tribunal in the case of PanAm Sat to contend that Tribunal was wrong to hold that the consideration received by the assessee does not represent consideration for use of any process. It was submitted that while holding so, the decision of Hon'ble Madras High Court in the case of Skycell Communication has been wrongly understood by the Division Bench whereas the same was correctly appreciated in the case of AsiaSat. It was submitted that ITAT in the case of PanAm Sat has differed with the decision in the case of Asia Sat without assigning any reason.

146. It was submitted that the contention of the assessee that the word "process" should be understood in the nature of IPR is not acceptable because the term IPR can be used only in respect of properties like trade mark, patent, copy right, etc. which are protected by the specified Acts of the Parliament and in a case where the same are not protected by specified Act, they cannot be considered to be IPRs. It was submitted that definition of "royalty" is inclusive definition having wider meaning and covers properties both tangible and intangible in nature and also covers both protected and unprotected intangible properties. Reference was made by Ld. Special Counsel to the decision of Hon'ble Supreme Court in. AIR 1960 SC 610, pg.618 (page 89 to 97 of the paper book of the revenue. wherein their Lordships of Hon'ble Supreme Court referring to the rule of interpretation *noscitur a sociis* observed that such rule is merely a rule of construction and the same cannot prevail in cases where it is clear that the wider words have been deliberately used in order to make the scope of the defined words corresponding the wider. It is only where the intention of the legislature in associating wider words and words of narrower significance is doubtful or otherwise is not clear that the rule of *noscitur a sociis* would be applied usefully. It could be applied where meaning of words of wider import are doubtful, but where the object of the legislature in using wider words is clear and free from ambiguity, the said rule cannot be pressed into service. Reference was also made to the decision of Hon'ble Supreme Court in the case of

Godfrey Philips India Ltd. vs. State of U.P. AIR 2005 SC 1103 and reference was made to the following observations:-

> "We are aware that the maxim of noscitur a sociis may be a treacherous one unless the societas to which the socii belong, are known. The risk may be present when there is no other factor except contiguity to suggest societas."

147. For this purpose, reliance was also placed on the decision of Hon'ble Supreme Court reported in 1990 (3) SCC 447 to contend that maxims or precedents are not to be mechanically applied. It was submitted that undoubtedly, the legislature in its wisdom and so too the treaty makers have used wider words after the narrower words to intentionally give wider meaning with the sole idea of expanding the tax net. The intention of the legislature for using the wider word is writ large with a definite purpose. Therefore, the rule of *nosciis socii* under the facts and circumstances of the present case cannot be pressed into service and has no application to the facts of these cases. It was submitted that rule of *noscitur a sosiis or ejusdem generis* cannot be applied to each and every case, but their application is determined by the nature of words in the context which is under consideration and where wider words have been used deliberately in order to make the scope of the corresponding word 'wider', the rule of *noscitur a sociis* shall not be applicable.

148. Referring to the arguments of the other side that the assessee itself is using the process for rendering the service and the customer does not have any access to that process, it was submitted that this contention of the assessee should not be accepted as in the present case there is complete participation by the customer in the process through which the telecasting takes place so much so that without such participation the end result cannot be obtained or made possible and that is why the various clauses of the agreement supports the case of the revenue that the customer is completely involved in the process. Not only the customer is utilizing the process, but the "use" or "right to use" is also vested in the customer and these rights are specified under agreement intentionally and

deliberately because the customer has the viewership and at his command the earth station while the satellite companies have other necessary apparatus. The business is dependent on each other and that is why the parties agreed to enter into the kind of agreement giving right to the customer to use the process through the right to use the process. In this manner, the assessee as well as the customer are achieving their goals and that is why the assessee in his wisdom has granted the customer the "use" and "right to use" the process. It was submitted that the contention of the assessee that it is the person who is using the process for providing facility will be correct only in a situation where the customer who has the telecasting rights of say, a cricket match being held at Gurgaon and wants the same to be screened at Bangalore and for that contact the assessee and issues a limited instructions to this effect and the customer has no earth station, then, in that situation, the process can be said to have been used by the assessee only and it can be said that the assessee is providing only the facility.

149. It was submitted that the revenue is placing reliance on the decision of the Authority for Advancing Ruling (AAR) P.No.30 of 1999 In re: 238 ITR 296 where, according to the Ld. Special Counsel, on almost identical facts, it was held that the payments made for such an arrangement will be a royalty. It was submitted that this decision has not been distinguished by any of the counsels appearing on behalf of the assessees. Therefore, it means that they have accepted the reasoning of the AAR.

150. Addressing his arguments on the issue that whether the word "secret" can be extended to the "process" also, it was submitted that the view point adopted by the decision of Division Bench in the case of PanAm Sat is erroneous and arbitrary and suffers from serious infirmities because of the following reasons:-

> a. That the Ld. Tribunal in PanAmSat held, in Para 19 that "it must be remembered that India had no DTAA with Hong Kong and hence the view taken by the Tribunal (supra,) with regard to the clause (iii)) of Explanation 2 below Section. 9(i)(vi), would apply if we were to also interpret the same provision" and further held that "we do agree with the arguments 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 statutory provisions and in fact the id. counsel for the assessee did not seriously dispute the proposition". It is

stated that after holding', so, the Hon'le Tribunal has gravely erred & fallen in error in paying undue tribute to the punctuation mark 'comma', surprisingly while even accepting that punctuation marks do not play a governing role in interpreting a statute.

b. That the Ld. Tribunal has in its decision no where spelt out the compelling difference in the form, content & layout of the definitions of royalty in the domestic statue as opposed to the same in the treaty, which would have warranted such a drastic departure.

c. That the Ld. Tribunal has gravely erred & fallen in the highest error in misconstruing an 'Obiter' or passing reference illustratively cited by the Ld. Member in Asia Sat, to the effect that had the intention of the legislature been to append the word 'Secret' to the word process also, there would have been a comma after the word process, least realizing that the said remark of the Ld. Member in the decision of Asia Sat had no precedential value as the issue before this Tribunal in the case of Asia Sat was the interpretation of the definition of the Royalty as occurring in section 9(i)(vi) of the Income Tax Act, which admittedly did not have any such comma and therefore did not present itself as an issue for authoritative adjudication before the said bench hearing the case of Asia Sat. That it is further submitted that the punctuation mark 'comma' was conspicuously absent in the, domestic definition, and the same in the circumstances never crystallized for debate in the said proceedings, no arguments on the said issue were addressed and the said remark remained an illustrative venture not to be accorded the status of a precedent, more so when the Ld. Tribunal's Obiter have no sanctity in law & such remarks do not form part of the doctrine of Stare decises.

d. That it is further submitted that while the Ld: Bench in the decision of Pan Am Sat has mandated departing form the interpretation of the Ld. Bench in Asia Sat citing the' onus of the same to lie upon the 'surrounding words' as appearing in the definition of Royalty under the treaty, but the said decision (Pan Am Sat) does not offer any elaboration upon the said assertion other that simply mentioning that the 'surrounding words' as occurring in the definition of Royalty under the treaty necessitate departing from the conclusion of Asia Sat. That it is respectfully submitted that since the Ld. tribunal in the said decision has riot done anything more than just simply mentioning the mystery of surrounding words and has not thought it fit to discuss or dispel the 'mystery of such surrounding words' , the conclusion thus arrived at is wholly. non speaking & devoid of any reason and entirely Un-authoritative.

e. That the Ld. Tribunal in the case of Pan Am Sat has ignored the

contention of the Revenue to the effect that since in the commercial domain/world, no process can ever be in stricto sensu secret, the word secret therefore cannot be said to be affixed to process as the same in light of the realities of commerce & business is practically impossible, since in the world of commerce and business it is but only necessary that the processes to which one claims proprietary are disclosed to the other party in order to lure users or buyers, which transaction when extrapolated statistically to the laws of supply and demand, do in-turn yield the fixing of the price/consideration of the said transaction. It is further submitted that the same would not be possible if the 'process' which is the subject matter of transaction remains a dark unknown or a deep secret.

f. That it was also alternatively argued before the Ld. Tribunal in Pan Am Sat, that even if Secret is assumed to be affixed before the word process as occurring in the definition of royalty under the treaty, the same would still not exonerate the assessee from its liability to pay tax as 'secret process' in that context would have to be read to mean, the means and mechanisms (encryption/secure access —through passwords, digital codes/signatures etc.) which secure or protect an unchecked access & thus use of the 'Process' under discussion. That in such vein it was further contented that since processes in a commercial world are not possible to be kept stricto sensu secret, the only meaning of the word 'secret process' should one still venture to tag secret with process, would mean the access to the process is checked/ restricted or made secure and thus 'the process is kept secret' and not that the process is an unknown mysterious entity not within the purview of knowledge of the known and knowledgeable world. It is the matter of record that telecasting process is a secure process, which cannot be accessed by an unauthorized person.

g. That the said arguments of the revenue however have not been appreciated and rather do not even find a mention in the order of the Tribunal in Pan Am Sat.

h. That the Ld. Tribunal in the case of Pan Am Sat has fallen in grave error in holding that the word 'secret process' is also a specie of intellectual property, which observation of the Ld. Tribunal are in direct contrast to the decision of the Apex court reported in **AIR 1960 SC 610 & AIR 2005 SC 1103** to which decisions the attention of this hon'ble Bench was also drawn during the hearing and thus the subsequent Division Bench has fallen in grave error in not appreciating that in the definition of Royalty as occurring in the treaty, all classes of intellectual property being copy right, trademark & patent have been indicated and the treaty framers in their wisdom have further travelled great distances to include other properties/categories, such as mode, design, similar property or imparting of any information concerning technical, industrial, commercial or scientific knowledge, experience or skill or use or right to use any

industrial, commercial, or scientific equipment or rendering of services in relation to the above, which within themselves are not intellectual properties, because had the same been intellectual properties then there was no need for their separate mention as the same section or article as they already stood covered in one of the three broad classifications of intellectual properties namely, trademark, copyright & patent.

The very fact that the legislature and the treaty maker have brought those properties within the purview of royalty which are within themselves do not qualify to be intellectual property indicates the intention of the legislature that it wanted to broaden the tax base and wanted to bring all those things which are capable of exploitation to bring within the definition of royalty and for this and this reason alone the legislature has jointly brought the intellectual properties and other products which it realized was capable of exploitation which exploitation could generate revenue to the owner and intentionally to bring that generated revenue to tax net these products were brought together with the intellectual property.

This very submission was not only made before the earlier bench but were also made before this Hon'ble Bench at the time of oral hearing, but for the reasons best known to them, have not rebutted the same.

i. That the revenue had in support of contentions raised had cited several judgements on the issue, which while stated by the Ld. Tribunal in its decision to be having an undisputed application have however not been given effect to and resultantly has caused the said decision to be infested with errors of the highest magnitude. Like in Panam Sat where the counsel appearing for the assessee has conceded that punctuation mark has no controlling effect when interpreting statute, before this Bench also there was uniformity in the submissions made by the counsel appearing for the parties that punctuation mark does not control a statute. In view of the uniformity on this legal issue, the observation of Asia Sat apply with full force and therefore the process in the circumstances by no means can be said to be a secret process only on the account of role played by comma and even otherwise in view of the submissions made at the bar on the punctuation mark comma, which has no controlling effect, the process by no means can he said to be secret before the payment for the same can be qualified to be payments for royalty.

151. The Ld. Special Counsel referred to para 20 and 21 of the decision of the Tribunal in the case of PanAm Sat and it was submitted that the findings in both the paras are self-

contradictory and, thus, also the decision in the case of PanAm Sat case cannot be accepted or applied.

152. It was submitted that the agreement between the assessee and the customer are commercial agreements. The terms, conditions, clauses, schedules and annexures to these agreements are pointer to the use of the process in the transponder by the customer. The customer is assigned a particular band width frequency on which it can uplink and such uplink is only possible after the customer uses the assigned codes and keys to have an access to the protected process contained in the assigned transponder. It was submitted that it is not as if any one and every one at his own can access any transponder. There has to be synchronization and matching of the frequencies and codes of the uplinked signal with the recipient transponder.

153. Thus, it was submitted that the consideration received by the assessee in respect of transponder's capacity is taxable under Clause (iii) of Explanation 2 to Section 9(1)(vi) and without prejudice to the same it was submitted that it can also be taxed under Clause (iva) on the ground that the consideration paid by the customer is for the use or right to use the transponder which is an equipment.

154. It was submitted that part of the band width of each signal satellite transponder can be used independently for signal transmission under the agreement in normal situation, the designated part of the band width of the satellite transponder shall be used to transmit the parties' signals only. The particular frequency and transponder is given for use to the customers. The transponder cannot be changed by the assessee on its own. Thus, the customer is making payment as consideration for the use, or the right to use the designated band width on the transponder. A big customer can hire the entire transponder capacity on a satellite or even the full capacity on the satellite can be hired. Since the bandwidth is provided by the satellite systems, the third party's right to use the bandwidth shall be viewed as the right to use the satellite system. Thus, it was submitted that the payments so received by the assessee is a consideration for the use of or the right

to use industrial, commercial or scientific equipments within the meaning of royalty as provided in clause (iva) of Explanation 2 to Section 9(1)(vi).

155. Ld. Special Counsel of the revenue submitted that in the case of PanAm Sat International Systems Inc. (7 Intl. Tax Law Report 419) while examining the taxability of such consideration in the country of China it was held that the payments are taxable as royalty. He referred to the facts and ratio of the decision in the said case which is as follows:-

> *"PanAmSat International Systems, Inc. (Plaintiff moved court against foreign tax administration branch Beijing, who had issue notice to China Central Television (CCTB) to withhold income tax on payments made under the Digital Compression Television Fulltime Satellite Transponder Services Agreement between China Central Television and PanAmSat Corporation.*
>
> *The plaintiff's allegations were as follows:*
>
> *(I) Firstly the nature of the agreement should be determined in accordance with the law of contract. The predominant feature of a lease agreement is the delivery of leased property, i.e., transfer of possession and the right to use of the physical property. Under the Agreement, the plaintiff was responsible for operating and making available its Satellites located in outer space and its ground facilities located in the US to provide transmission services to the third party. There was no transfer of possession and right to use of any of the above facilities and therefore, no lease agreement existed. Consequently, the plaintiff's income was not rental income.*
>
> *(ii) Secondly, the expression 'the use of, or the right to use industrial equipment' within Article 11 of the China-US Tax Treaty should be understood to mean the equipment is actively and effectively used by the user. However, during the whole process of signal transmission, all facilities were wholly operated and used by the plaintiff exclusively. The third party was not authorized to and did not, in any way, effectively use any facilities of the plaintiff. The plaintiff's income was not a royalty.*
>
> *(iii) Thirdly, the plaintiffs income was active income which had been acquired through constant work and belonged to the category of business profits. Since the plaintiff did riot have a permanent establishment in China, its income should be exempt from China taxes.*

*The defendant contended that:*

a) *Firstly, the term 'use' in the China-US Tax Treaty refers to use of both tangible property and intangible property. Use is not necessarily limited to effective operation of the object, which is merely one form of use. The term 'use' should be correctly understood to mean availing of the functions of a certain object to achieve one's expectations.*

b) *Secondly, under the agreement, the third party availed itself of the plaintiff's satellite equipment to transmit its television signals. This demonstrated of the plaintiff. Hence, the so called season-based service fees and equipment fees that the third party paid to the plaintiff should be classified as a royalty under the China-US Tax Treaty.*

c) *Thirdly, the whole or part of the specific transponder of the plaintiff's satellites had been exclusively used by the third party, which conformed to the relevant provisions of Chinese tax law on easing property to a lessee located in China and met the requirements of a lease agreement that called for the transfer of the right to use the property. Therefore, the plaintiff's income was rental income.*

*Court held that: -*

*Article 19(1) of the Income Tax Law of the People's Republic of China for Enterprises with Foreign Investment and Foreign Enterprises provides that or foreign enterprises having no establishments or places in China but receiving from China the income of profits, interest, rental, royalties and other income, or foreign enterprise having establishment or places in China but having the above said income not effectively connected with the establishment or places, the said income shall be taxed at 20% Article 11(3) of the China-US Tax Treaty defines royalties as 'payments of any kind received s -a consideration for the use of, or the right to use, any copyright or literary, artistic or scientific work, including cinematographic films or films or tapes used for radio or television broadcasting, any patent, technical know-how, trademark, design or model, plan, secret formula or process, or for the use of, or the right to use, industrial commercial or scientific equipment, or for information concerning industrial, commercial or scientific experience.' The satellite transponder has a function of transmitting signals, or which the third party has to avail itself in order to expand its television reach to regions such as the Pacific region, America can etc. Part of the bandwidth of each single satellite, transponder can be used independently for signal transmission. Under the Agreement, in normal situations, the designated part. of the bandwidth of the satellite transponder shall be used to transmit the third party's television signal only, which means the third party solely owns the right to use the designated part of the bandwidth.* ***Since the bandwidth is provided by the satellite system, the third party's right to use the bandwidth shall be***

***viewed as the right to use the satellite system. Therefore, payments that the third party made to the plaintiff in consideration for this shall be classified as payment received as a consideration for the right to use industrial commercial or scientific equipment within the meaning of royalties as provided in Article 11 of the China-US Tax Treaty. Paragraph 2 and para 5(a) of the same article also provides that royalties will be deemed to arise in a contracting state when the payer is a resident of that contracting state. Such royalties may also be taxed in the contracting state in which they arise and according to the laws of that contracting state, but if the recipient*** *is* ***the beneficial owner of the royalties, the tax so charged shall nor exceed 10% of the gross amount of the royalties.*** *Since the plaintiff's royalty income was sourced in China, the defendant was lawful in rendering fell within the scope of Article 11 of the China-US Tax Treaty and Article 19 of the Income Tax. .Law of the Peoples Republic of China for enterprises with Foreign Investment and Foreign Enterprises and should be taxed 7% of on the gross amount of the royalty.*

156. Referring to the above decision it was submitted that facts of the Chinese case are almost similar to the facts of the cases of the assessee and the reasoning of Chinese court squarely applies to the present case and on that analogy the payments cannot escape the exigibility of tax as royalty.

157. Coming to the arguments of the other side that even if it is held that payment is made for use of a process, the same cannot be taxed as the said use has not been rendered in India and the payment source is also not situated in India, it was submitted by Ld. Special Counsel that the provisions of Section 9(1)(vi) of the Act does not require that the services should be rendered in India. It was submitted that source rule is based on the status of the payer referred in clauses (a), (b), (c) of Section 9(1)(vi) of the Act. Had the services, as claimed, were rendered in India, the same are taxable as per the provisions of section 5(2) of the Act, on the basis of accrual of or arising in India and there was no need to refer to section 9, which deals with income deemed to accrue or arise in India. It was submitted that due to specific insertion of Explanation below Section 9 of the Act by the Finance Act, 2007 with retrospective effect from 01.06.1976, the doubt, if any, regarding applicability of the provision was set at rest. Thus, it was submitted that in view of Explanation so inserted with retrospective effect from 01.06.1976, such contention of the assessee is to be rejected. Ld. Special Counsel placed reliance on the decision in the case of Sanskar Info T.V.P. Ltd. (supra) to contend that such consideration

received by the assessee falls within the scope of royalty defined in Section 9(1)(vi) and it was held that even para 2 of Article 12 of respective Treaties provided for taxation of royalties in the country in which they arise according to the laws of that State. It was submitted that in Income-tax Act, 1961, the source rule is based on the payer of payment which covers the case of resident as well as non-resident. Thus, it was submitted that even if payments are made by the non-residents, the same are sourced in India because such payments are made for the purpose of business or profession carried on in India and for the purpose of making or earning income from source in India i.e., business of TV channels in India. It was submitted that source of income lies in the subscription income as well as advertisement income which accrues or arise in India. Reference was also made to the decision in the case of Star Television Asia Region Ltd. 99 ITD 91 (Mum) to raise similar contention.

158. It was submitted that to consider the source rule relating to royalty or fee for technical services, neither the location of the property used nor the place for performing the services is relevant. It was submitted that neither the Act nor the Tax Treaty contains such requirement. The source rules are based on payers. It was submitted that observations of the Bench in the case of PanAm Sat that the performance of the services is not in India and is several thousand kilometers above the earth is not relevant when the source rule is applied. It was submitted that para 6.27 and para 6.28 of the decision in the case of Asia Sat it has categorically been held that the source lies in India.

159. It was further submitted that the decisions relied upon by the other side are distinguishable. It was submitted that the decision of Hon'ble Madras High Court in the case of Skycell (supra) cannot be relied upon to decide the present issue. It was submitted that the said case related to the issue regarding deduction of tax under section 194 J with regard to the telephone facility provided by the company to the customers and it was held by Hon'ble High Court that the payment so made could not be considered as fee for technical services within the meaning of Explanation 2 to Section 9(1)(vi). It was submitted that the said judgement is to be understood in the context in which it was delivered and the issue involved in that decision was the issue that whether a subscriber

of a telephone facility is using the technical services or not. It was submitted that a bare comparison of two definitions (one under Income-Tax Act and other under DTAA) reveals that both these definitions caters to different situation while one brings to tax net rendering of any managerial, technical or consultancy services while other brings to the tax net payments for exploitation of IPRs as well as other products which are clubbed with IPRs and the payments for exploitation of which the Department treats as royalty. It was submitted that the area of the two situation being different, the definition being different, the judgement in the case of Skycell (supra) will have no application on the facts of the present case.

160. It was submitted that Skycell's decision is distinguishable on facts also. In the case of Skycell the customer was only to make a request to the service provider for providing the service and beyond that nothing was to be done by the subscriber except that on allocation of connection, the subscriber was entitled to use the service. As against that in the present case, the customer was to have his own earth station, the customer was to pick up the signals and the customer was to uplink the signals, the customer was to catch the signals at the earth stations or to downlink the signals, and, therefore, the customer is a part of process whereas in the case of Skycell the customer is not a part of process. It was submitted that Hon'ble Madras High Court did not touch the issue in hand which pertains to "royalty" and royalty alone. Reference was made to para 6.24 of the decision in the case of Asia Sat (supra) and it was submitted that the decision of Hon'ble Madras High Court in the case of Skycell could not be applied to the cases of satellite companies. Reference was also made to para 6.25 of the Asia Sat decision to contend that the process was used by the customer and the services were provided in connection with the process and the same falls within the definition of royalty.

161. Referring to the decision of Hon'ble Delhi High Court in the case of Bharti Cellular Ltd. (supra), it was submitted that the said case also relates to applicability or otherwise of Section 194-J of Income-Tax Act, 1961 and it was held that the services so provided do not fall within the meaning of the expression "technical services". It was submitted that while repelling to contention of the revenue , one of the tests laid down by

the Hon'ble High Court was that there should be an element of human interface before a service can be held to be technical service. In the absence of such element of human interface, the contention of the revenue was negatived with the following observations:-

> *It is independently provided by the use of technology and that too, sophisticated technology, but that does not mean that MTNL/ other companies which provide such facilities are rendering any technical services as contemplated in Explanation 2 to Section 9(1) (viii,) of the said Act. This is so because the expression 'technical services' takes colour from the expressions ' managerial services and consultancy services' which necessarily involve a human element or. what is nowadays fashionably called, human interface, in the facts of the present appeals, the services rendered qua interconnection/ port access do not involve any human interface and, therefore, the same cannot be regarded as technical services as contemplated under Section 194J of the said Act."*

162. Thus, it was submitted that the issue before the Hon'ble Madras High Court in the case of Skycell and before the Hon'ble Delhi High Court in the case of Bharti Cellular pertained to a different regimes of tax and the issue whether those payments qualify for being taxed as "royalty" was never examined and, therefore, these decisions could not be relied upon to draw any support by the assessee in the present case.

163. With regard to the Special Bench decision in the case of Motorola (supra), it was submitted that reference was made by the other side on para 173 of the report which relates to the question that whether the payment was "for the software as such."

164. It was submitted that payment in that case was made for hardware and software was a lump sum payment and there was no separate consideration mentioned for the hardware and the software. It was observed that only income-tax Department had split the consolidated payments into two payments and it was observed that when the parties to the contracts were not agreed upon a separate price of hardware and software, it was not open to the income-tax authorities to split the same and consider that part of the payment being payment for software and, thus, it was held that consideration could not be considered as royalty. It was submitted that the reliance on Motorola's case cannot advance the case of the assessee. Referring to the observations in para 227 of Motorola

decision, it was submitted that in that case the payment was not considered as royalty because it was not made for a copy right, but for a copy righted article.

165. It was submitted that so far as the applicability of decision of Hon'ble Supreme Court in the case of Ishikawajama-Harima Heavy Industries Ltd. vs. Director of Income-tax 288 ITR 408 (supra) as relied upon by the other side to contend that the income received by the assessee is not sourced in India and has no business connection in India because of the fact that the signals are received outside India and released out of India and, thus, the receipts, if any, cannot be said to be sourced in India. Reference in this regard was made to the insertion of Explanation in Section 9 by the Finance Act, 2007 with retrospective effect from 1st June, 1976 which is clarificatory in nature and it was pleaded that in view of that Explanation the reliance on the said decision cannot be placed now by the assessee.

166. Further reference was made to the decision of Hon'ble Bombay High court in the case Clifford Chance vs. DCIT 221 CTR 1 (supra). It was submitted that this judgement also has no application for two reasons:

1) issue of royalty was not involved.
2) In view of the amendment carried out in section 9(1)(vii).

167. It was submitted that insertion of Explanation below Section 9 (2) w.e.f. 01.06.76 has made it clear that for the purpose of Section 9, where income is deemed to accrue or arise in India under clauses (v), (vi) and (vii) of sub-section (1), such income shall be included in the total income of non-resident, whether or not non-resident has a residence or place of business or business connection in India. Referring to the transactions showing fund flow, it was submitted that the chart shows dotted line and continuous line. Dotted line gives the monthly charges for viewing and how the payment is made. Before explaining the diagram since programme is India-specific and the assessee has footprint in India, the programme is meant for consumption of Indian viewers and diagram indicates that Indian viewers are paying monthly charges to cable operators. In turn, the cable operators pay charges to telecasting company and similarly, advertisers also pay

charges to telecasting company for telecasting India-specific advertisement of products which aspire to market in India. It was submitted that diagram further indicates that the telecasting company makes payment to the satellite operator. Thus, the source of consideration received by the assessee is two-fold. One is the viewers who pay through the cable operators and second channel is advertiser who pay for the air time of their advertisement to the telecaster. Both these payments in turn are made by the telecaster and cable operators which finally reaches the assesses in the present case. Thus, it was submitted that that the position itself demolishes the case of the assessee that the income is not sourced in India.

168. Referring to the decision in the case of Raj Television Network (supra), it was submitted that the said decision also does not support the case of the assessee. It was submitted that the said case pertains to Section 194-J and reference to Section 9(1)(vi) is found only in para 7.3 wherein it was contended by the assessee that he is not using standard facility and the observation of the Tribunal on this issue are to the effect that "on merits factually no process has been made available to the assessee, hence, applicability of Section 9(1)(vi) does not arise. It was submitted that those observations of the Tribunal are without reasons and, therefore, do not have any persuasive value. Reference in this regard was made to the decision of Hon'ble Supreme Court in the case of Chairman & Managing Director, United Commercial Bank vs. P.C. Kakkar 2003 (4) SCC 364 to contend that right to reason is an indispensable part of the sound judicial system and in the absence of reasons, the courts cannot perform their appellate function or exercise the power of judicial review in adjudging the validity of the decision. With regard to other decisions relied upon by Ld. AR appearing on behalf of Shin Satellite, it was submitted that those decisions are in respect of 9(1)(vii) and they are distinguishable as per the submissions already made and, thus, they do not have any application on the facts of the present case.

169. Distinguishing the decision of Hon'ble Supreme Court in the case of Bharat Sanchar Nigam Ltd. 282 ITR 273 (supra) it was submitted that the issue before Hon'ble Supreme Court was service tax as well as sales-tax. Referring to the decision of Apex

Court AIR (2000) SC 3195, it was submitted that "words and expressions judicially defined in one statute as judicially interpreted do not afford a guide to construction of the same words or expression in other statute unless both the statutes are pari-materia legislations or it is specifically so provided in one statute to give the same meaning to words as defined in other statute. It was submitted that since two statutes i.e., sales tax and income-tax are absolutely different, the decision of Hon'ble Supreme Court in the case of BSNL (supra) has no application. For this purpose, reliance was also placed on the decision of Hon'ble Supreme Court in the case of Jagat Ram Ahuja vs. Commissioner of Gift Tax AIR 2000 SC 3195 (page 134 to 141 of the Paper Book of the revenue) and on the decisions in the case of S. Mohan Lal vs. R. Kondiah (pages 227 to 230 of the PB of Asia Sat).

170. Referring to the Dell decision of AAR (supra), it was submitted that the facts revolves around the question framed at para 6, page 44 of the report which pertained to technical services and, thus, adjudication on that issue has no relevance to the present proceedings. So as it relates to applicability of Article 12.3 of Indo-US Treaty and AAR , it was submitted that AAR fell in the same error as is committed by PanAm Sat decision and the said issue is being decided by Special Bench. It was submitted that in view of the re-adjudication of the issue in PanAm Sat the observations pertaining to royalty made in the case of Dell has lost its persuasive value.

171. Referring to the decision in the case of ISRO (supra) rendered by AAR, it was submitted that the question considered was that whether the payment for leasing the transponder is royalty or not which is not an issue in the present case. With regard to issue No.2 considered therein, it was submitted that the issue was that whether business to lease out navigational transponder is not liable to tax in India in respect of leased amount and, hence, not liable to TDS under section 195. It was submitted that the tenor of question in the said judgement are indicative of the fact that neither the facts were same nor the issue which was to be adjudicated was same. Therefore, it was pleaded that the said decision has no applicability.

172. Referring to the decision in the case of Diamond Service International Pvt. Ltd. vs. UOI (supra), it was submitted that payments were in respect of grading certificate issued by the foreign company to the Indian client and the department wanted the TDS to be deducted on the ground that it was a case of transfer of technical knowledge or skill which fell under the domain of royalty and it was held by Hon'ble High Court that there was no imparting of experience by the Institute in favour of the client and thus no TDS was required to be deducted. It was submitted that the said decision also does not advance the case of the assessee rather it advance the case of the revenue as it has never been held by Bombay High Court that payment received for parting with technical knowledge are royalties which are not IPRs, do qualify for royalty, but in the peculiar facts of the case, since no technical knowledge was imparted, the payments were held to be royalty, but not otherwise.

173. Referring to the commentary written by Klaus Vogal relied upon by the other side, it was submitted that learned author referred to the secret formula or process and proceeded to observe that "this covers know how in a narrower sense of the term viz., of business secrets or commercial or industrial nature. In most countries they enjoy a relative protection or capable of being protected." It was further observed by learned author that as a rule, the right to use already comes into existence in these instances by authorized information. Thus, the observations of learned author supports the case of the revenue because at the time of setting up the earth station, the complete technology of the satellite for cohesive working with the earth station in the setting up of which full know how is imparted or shared is parted with the customer. Thus, it was submitted that in the words of Klaus Vogal the business secrets of commercial nature are exchanged. What is protected is the authorized information and that is why in the agreement 'confidentiality clause' is put. On parting of the information, the right to use comes into existence otherwise there is no need for parting with the information. It was submitted that there was a complete sharing of the process as well a share of information. The process is coded to avoid unauthorized or unlicensed use. It was submitted that during the course of hearing an example of Mother Diary and ATM were exchanged to bring home the point that unless the process is opened so the method known in the case of

Mother Dairy by insertion of its specific coin which is purchased from its sales counter and in the case of ATM by making use of the code provided, the process cannot be put to use, though the right to use is there on the payment. Thus, it was submitted by Special Counsel that these processes including that of satellite are relatively protected/coded and not secret. It was submitted that similar is the example of legal softwares which are licensed through a code assigned to the person who is licensed to use the software and it is again a case of protected process or the protected copy right , but by coding a process or by granting an authorized user through a licence it cannot be said that some one is using a secret process. It was submitted that there is nothing known in the commercial word secret. What is capable of being exploited, cannot be kept as secret.

174. It was submitted that the consideration received by the assessee is for the "use" or "right to use" the process and the process is not secret. The payment is sourced in India and, therefore, liable to be taxed in India.

175. So as it relates to the arguments of the other side that it is not an equipment royalty, it was submitted that no question has been framed on this issue and, therefore, no arguments are being submitted.

176. Finally, in the alternative, it was submitted that if it is held that assessee is rendering services, then, as held by Asia Sat's case in para 6.25, the services should be held in connection with the use of the process as contemplated by clause (vi) of Explanation 2 to Section 9(1)(vi) of the Act and, similarly, this would also constitute royalty within the meaning of tax treaty also.

177. Finally, it was submitted that the decisions relied upon by the ld. Counsels of the assessee adjudge the question which are materially different from ones involved in the controversy at hand and the same cannot be pressed into service to advance the case of assesses as the principles or propositions that they duly discussed and settled is far fetched from the questions or issues involved in the present case pending determination by the Special Bench. It was submitted that the essence of the judgement or the ratio

dicidendi is the binding principle which a ruling lays for all future references. In examining the applicability of the judgement to a particular set of facts, it is well settled that it is the ratio of a decision that determines the force of applicability of a judgment to a particular set of facts. For this purpose, reliance was placed on the decision of Hon'ble Supreme Court in the case of Jagdish Lal vs. State of Haryana 1997 (6) SCC 538 and CIT vs. Sun Engineering Works Pvt. Ltd. reported in AIR 1993 SC 43.

178. We have carefully considered the rival contentions in the light of the material placed before us. The assessee (satellite companies) operates geostationary satellites either owned by them or obtained on lease. Several transponders are installed on those satellites. These transponders are capable of receiving uplinked data/images, etc. and, to amplify the same before downlinking to the footprint area of the satellite. Frequencies are predetermined for uplinking and downlinking the data/images to be transmitted. The satellites are controlled by satellite companies from ground station maintained by them from where they maintain the health of satellite by keeping them on right track and position. The capacity of the transponder as a whole or part thereof is provided to the person/entities (popularly known as telecasting companies) to enable them to uplink and downlink desired data/images. Such provision of transponder's capacity is also known as 'segment capacity', which is provided for a consideration mutually agreed between parties.

179. To maintain the health of satellite, its position and its distance from the earth is a highly scientific job which can be performed by a very few institutions all over the world. The scientific technology of placing the satellite in the orbit at a desired distance and to take the required benefit therefrom even today is in the rare hands all over the world. The operation of geostationary satellite which is also commonly known as "communication satellite" is a high profile scientific activity. Whenever such satellite is launched in the orbit, its specifications are publicized to receive the offers from various quarters so as to commercially utilize the capacity of transponders (known as "communication transponders") installed on the satellite for communication purposes. Thus, operating communication satellites now-a-days is a commercial activity managed by few entities all over the world. The assessees in the present case are few of them. To provide the

efficient services of communication, not only the sophisticated instruments are required to be installed on geostationary satellites, but, similarly, sophisticated instruments are required to be installed on the earth stations for compatibility of uplinking and downlinking the signals by the telecasting companies. The specifications of uplinking and downlinking instruments are generally prescribed by the operating companies of satellite to the telecasting companies so as to obtain optimized results. The satellite companies offer their services to the telecasting companies to ensure that the instruments installed by telecasting companies at their earth station are compatible enough to uplink the data and to downlink the same in a way that best results are obtained. If the uplinked signals have poor quality, then probably the down linked signals will not have any quality better than the quality of signals which have been unlinked. In other words, the job of satellite companies is highly scientific job and it requires high scientific skill to produce the desired results. The activities of the satellite companies as well as telecasting companies are commercial activities so as to earn maximum profit out of it.

180. Proceeding further, for proper appreciation of the issue, it will be relevant to discus certain provisions of Income-Tax Act, 1961 relating to taxation of income of non-residents. Section 5(2) defines the scope of income relating to non-residents. Section 5(2) reads as under:-

> *(2) Subject to the provisions of this Act, the total income of any previous year of a person who is a non-resident includes all income from whatever source derived which –*
> *(a) is received or is deemed to be received in India in such year by or on behalf of such person; or*
> (b) *accrues or arises or is deemed to accrue or arise to him in India during such year.*

181. Therefore, scope of "total income" so as it relates to non-residents; is all income, from whatever source derived; which – (1) is received or is deemed to be received in India in such year by or on behalf of such person; (2) accrues or arises or is deemed to accrue or arise to him in India during such year.

182. Section 9 describes the income deemed to accrue or arise in India. Section 9(1)(i) inter alia provides that all income accruing or arising, whether directly or indirectly,

through or from any business connection in India, or through or from any property in India or through or from any asset or source of income in India or through the transfer of a capital asset situated in India. The other part of Section 9, which is relevant, is clause (vi) to Section 9(1). It describes that income received by way of royalty shall be the income deemed to accrue or arise in India if it is payable by: (a) the Government; (b) by a person who is resident with some exceptions provided therein; (c) by a person who is non-resident, where the royalty is payable in respect of any right, property or information used or services utilized for the purpose of a business carried on by such person in India or for the purposes of making or earning any income from any source in India. Explanation 2 defines the "royalty" which read 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 ;*

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

(iva) *the use or right to use any industrial, commercial or scientific equipment but not including the amounts referred to in section 44BB;*

(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, but not including consideration for the sale, distribution or exhibition of cinematographic films ; or*

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

183. So as it relates to question No.1, as proposed to be answered by the Special Bench, it may be mentioned that the "process" whether it is "secret" or otherwise is involved in the "transponders" installed on the satellite. Satellite is only a space vehicle,

which is a necessary equipment to enable satellite companies to place the transponders at a particular height necessary to receive and relay the signals in a particular "footprint area." The "process" to uplink and downlink the data/signal is involved only in transponders. However, "transponders" in themselves are not able to do the task of uplinking and downlinking the data transmitted to them by the telecasters unless they are equipped with the necessary power backup, which is provided to them by the battery and solar cells, which are installed on the satellite. So the satellite is a home for the transponders providing them the necessary infrastructures to deliver the desired results. In other words, the real role is thus played by the "transponders" in the transmission activity of uplinking and downlinking the programme to be telecasted. The word 'process' has not been defined either under the Income-tax Act or under the provisions of DTAA and if a word is not defined in the relevant statute, then, according to well established principles of interpretation, the natural or prevalent meaning of that word should be adopted while interpreting the said word. It may be pointed out that it was not even denied by any of the ld. Representatives of the respective assesees that no process is involved in the transponder. The word "process" as defined in Oxford Concise English Dictionary is a "series of actions or steps towards achieving a particular end. " In Black's Law Dictionary, it means "a series of actions, motions, or occurrences; progressive act or transaction; continuous operation; method, mode or operation, whereby a result or effect is produced." Thus, the act of transmission of voice, data and programmes belonging to the customers is a process used in the transponders. Thus, the activity of uplinking and downlinking done by the transponder is a process and none of the parties have objected to such fact.

184. When we go to the fund flow statement, it is seen that originally the fund which is received as income, flows from the viewers of the downlinked images and users of the downlinked data. The viewers of the images downlinked, pay to the cable operators and in turn cable operators pay to the telecasting companies. Telecasting companies also receive income from advertisers who want to put their advertisements during the programmes. Thus, telecasting companies source their income from two sources i.e., amount received from cable operators and amount received from advertisers. Similarly,

users of data, which is uplinked/downlinked, may have directly made payment to the satellite companies as per agreement entered into by them. However, in the present case, we are concerned with the satellite companies vis-à-vis telecasting companies. The telecasting companies are paying revenue to the satellite companies. Both of them are carrying on these activities in commercial manner. Under these facts, we have to consider that whether or not such revenue is taxable in the hands of satellite companies under domestic law as well as under the provisions of DTAA as applicable in respective cases.

185 While examining the taxability of such receipts in the hands of satellite companies, the Division Bench of this Tribunal in the case of Asia Satellite (supra) has held that such receipts are taxable as per Clause (iii) of Explanation 2 to Section 9(1)(vi). Thereafter, this issue was again examined by the Division Bench of this Tribunal in the case of PanAm Sat (supra) wherein the Division Bench agreed with the conclusion drawn in the case of Asia Sat, but on the basis of difference between definition of "royalty" given under domestic law as compared to definition provided in Double Taxation Avoidance Agreement (DTAA), it was held that there being comma after the word "secret formula or process", the definition of "royalty" as interpreted by the Tribunal in Asia Sat could not be applied in a case where provisions of DTAA are applicable. On the basis of comma after the words "secret formula or process" it was interpreted that for qualifying the receipts to be considered as royalty, the process in respect of which such consideration is received should also be a secret process. Thus, it was held in PanAm Sat's case that the consideration received by PanAm Sat (satellite company) was not 'royalty' within the meaning of Article 12 of DTAA as the consideration was not for use of 'secret process'. It is, therefore, the first two questions referred to this Special Bench have been framed. To appreciate the controversy, it will be relevant, if the provisions of domestic law as interpreted in the case of Asia Sat (supra) and provisions of DTAA as interpreted in the case of PanAm Sat are reproduced:-

Provisions of domestic law as interpreted in Asia Sat's case.

*"**Section 9(1)(vi)** - 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) ……*
*(ii) ……*
*.(iii) the use of any patent, invention, model, design, secret formula or process or trade mark or similar property;"*

Provisions as interpreted in the case of PanAm Sat

Article 12.3 (a) -

*"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 copy right 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 ratio 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 "*

186. Both the sides have submitted elaborate arguments on the issue that for consideration being taxable as royalty whether it is necessary that the consideration should be for using secret process. It was admitted by the learned representatives of the parties that while uplinking and downlinking the signals, there is a process involved. Their contention is that satellite companies themselves use the said process. According to their arguments, as per various views given in commentaries and decisions, the use of process should be by the person who is availing the benefit for the consideration. In other words, the main contention in this regard of satellite companies is that user of the process by satellite companies themselves does not fall within the ambit of word 'use', therefore, the consideration is not in the shape of 'royalty' which could be taxed either under domestic law or under the provisions of DTAA.

**WHETHER THE "USE" OR "RIGHT TO USE" THE PROCESS IS VESTED WITH SATELLITE COMPANY OR WITH TELECASTING COMPANY**

187. For contending that the consideration received by satellite companies from their customers in respect of transponders capacity cannot be regarded as royalty within the meaning of either Section 9(1)(vi) of IT Act, 1961 or Article 12.3 of the respective DTAA, it has been the contention of the ld. Representatives of the assesses that neither user is provided to the customer nor any right to use has been provided. Therefore, consideration does not fall within the term 'royalty." On the other hand, it has been the contention of the revenue that "use" and "right to use" is vested with the customer (telecasting company) only. Before dealing with all these arguments, it will be appropriate to look into the activities and functions performed by the transponder.

188. If we look into the activities and functions performed by the transponder of the like nature as in our case, it can be said that it is a sophisticated scientific equipment, which, if installed on geostationary satellite, is designed to act in a predefined manner to receive uplinked signals on a particular frequency and to provide required strength to those signals in a manner so that the received signals can be downlinked at a particular frequency in viewable form in the footprint area of the satellite. It has already been mentioned that it is nobody's case that there is no process involved in the transponder. But it is the case of satellite companies that they are using the said process and the process is not provided to their customers. This argument has been raised to contend that the required "user" as envisaged in clause (iii) of the Explanation 2 to Section 9(1)(vi) cannot be inferred unless the process itself is used by the customers.

189 It has been the case of the revenue that from all practical angles the "user" can be found to have been done by the customers. To substantiate reference is made to the definition of "user" and to various clauses of the agreements entered into by satellite companies with its customers. The term "use" is neither defined under domestic law nor under the relevant DTAA.

190. According to well established principles of interpretation, while interpreting the meaning of a word which is not defined in the statute regard must be given to the context and practical aspect. The importance of context has been explained by Apex Court in the

decision of CIT vs. Sun Engineering Works (P) Ltd. 198 ITR 297 (SC) in following words:

> *"Such an interpretation would be reading that judgment totally out of context in which the questions arose for decision in that case. It is neither desirable nor permissible to pick out a word or a sentence from the judgement of this Court, divorced from the context of the question under consideration and treat it to be the complete "law" declared by this Court. The judgement must be read as a whole and the observations from the judgement have to be considered in the light of the questions which were before this Court. A decision of this Court takes its colour from the questions involved in the case in which it is rendered and, while applying the decision to a later case, the Courts must carefully try to ascertain the true principle laid down by the decision of this Court and not to pick out words or sentences from the judgment, divorced from the context of the questions under consideration by this Court, to support their reasoning."*

191. Therefore, a meaning interpreted for one word in the statute under one context may or may not be relevant for another context. As mentioned earlier, a transponder installed in a geo-stationery satellite is scientific equipment. A process has been embedded therein by which it is receiving the uplinked signal and after providing the required strength to the uplinked signals, it retransmits those processed signals to the footprint area of satellite. It is mentioned earlier that the existence of process in the satellite is not even denied by the ld. Representatives of the respective assessees. It has also been mentioned earlier that a transponder is designed to act in a predetermined & predefined manner as per required specifications. Transponder has a particular capacity to do the work. Such capacity either can be allotted to one customer or several customers for their user. Once a particular capacity of transponder is allotted to one customer under a contract, the said capacity cannot be allotted/given to other customers unless and otherwise provided in the contract. No doubt, the assessees through their control stations can instruct the transponders to act in a particular manner to give a desired result but that does not mean that they can interfere with the uplinked data to change the same in any manner. They also do not have any control over the data to be uplinked or downlinked except to stop the uplinking or downlinking of the data of the telecasting companies. So, if the practical aspect of the working of the transponder is seen, it has two main elements. One is to instruct the transponder to act in a particular and predefined manner to receive

the uplinked data at a particular frequency and providing a particular strength to the uplinked signals and then to downlink the same at a particular frequency in the footprint area of the satellite. The other is the "process" in the transpoder, which is predetermined and preguided. In other words satellite companies with the help of ground control stations are able to predetermine & preguide the "transponders" installed on their satellites to give a particular result within permissible limits according to the requirements of a customer. Thus, the "process" in the transponder is predetermined and preguided. Once "process" is predetermined and preguided to deliver desired output, it need not to be interfered unless required otherwise. Therefore, what is provided by the satellite companies to its customers is the particular capacity of a transponder's predetermined & preguided process for their user. Under these circumstances it has to be examined and determined that who is using that process. It is the claim of the satellite companies that they are using the process at their own. It has been pointed out that the process is predetermined & preguided according to the requirements of the customers. The satellite companies have no control over data to be uplinked/downlinked by the customers. The customer is authorized to uplink and downlink the data at any particular point of time according to agreement. Thus, the "process" is embedded in the transponder, which is used by the customers and not by the satellite companies as they do not have any control either on the data to be uplinked/downlinked or on the time of uplinking/downlinking. The only obligation of the satellite companies is to observe that transponder is working properly or not. In other words the obligation of the satellite companies is limited only to keep the health of transponders and satellite in a good working condition so as to ensure the uninterrupted use of transponders by the telecasting companies. Therefore, it cannot be said that the process is used by the satellite companies to uplink/downlink the data of telecasting companies. The process is used by the telecasting companies according to their requirements.

192. It will also be important to mention that practical aspect has also to be kept in mind. It is neither practical nor possible to have the physical control over the transponder either by the satellite companies or by their customers. The "control" or "user" if any of the transponder is through the sophisticated instruments either installed in the ground

stations owned by the satellite companies or on the earth stations owned by telecasting companies. Therefore, the "control" or "user" of the transponder and its capacity has to be seen from the practical angle. Once the process in the transponder is predetermined & preguided by the satellite companies, it is made available for "user" to the customers who pay a consideration for the same. Such process is used by the telecasting companies according to their need.

193. Here, it may be mentioned that according to one of the well established rules of interpretation the words should be understood in their ordinary or natural meaning in relation to the subject matter, any legislation relating to a particular trade, business, profession, and or science, words having a special meaning in that context are understood in that sense. Such a special meaning is called the "technical meaning" to distinguish it from the more common meaning that the word may have. This rule of interpretation has been discussed at page 101 of Principles of Statutory Interpretation by Justice G.P. Singh (Tenth Edition 2006) and Lord Jowitt, L.C. has stated the rule in the following words:-

> *"It is, I think, legitimate in construing a statute relating to a particular industry to give to the words used a special technical meaning if it can be established that at the date of the passing of the statute such special meaning was well understood and accepted by those conversant with the industry.*

Further, Lord Esher M.R. stated this rule as under:-

> *"If the Act is one passed with reference to a particular trade, business or transaction and words are used which everybody conversant with that trade, business or transaction knows and understands to have a particular meaning in it, then the words are to be construed as having that particular meaning."*

194. It has been mentioned that the same rule applies in construing the words in a taxing statute which describes the goods that are liable to taxation. In the case of Dunlop India Ltd. and Madras Rubber Factory Ltd. vs. Union of India AIR 1997 SC 597 it has been held that if a word has acquired a particular meaning in the trade or commercial

circles, that meaning becomes the popular meaning in the context and should normally be accepted. Therefore, it will be relevant if we examine the word "use" which has acquired a particular meaning in the trade and commercial circle relating to provision of transponder capacity (popularly known as segment capacity) by the satellite companies to the telecasting companies. For this purpose, reference can be made to the agreements entered into by the assessees with their customers, a copy of which has been placed on our record and relevant terms contained in the agreements have been referred to show on behalf of the revenue that "user" of the process is by the telecasting companies and, on the other hand, it has been the case of the ld. Representatives of the assessees that if the substance of the agreement is seen, no user is provided to the telecasting companies, but the assessee is merely providing the services to the telecasting companies.

195. First, we shall refer to the copy of agreement placed on our record on behalf of the Asia Sat. The agreement has been titled as "transponder utilization agreement." The agreement entered into by Asia Sat is with Satellite Television Asian Region Ltd. (STAR). At the first page, it is written that Asia Sat is a provider of transponder capacity in Asia. The customer wishes to utilize the services provided by Asia Sat and transponder utilization agreement comprises of various components described therein. At page 2, transponder No. is mentioned as "7H" and satellite has been named as "Asia Sat 3S." Commencement date of agreement is mentioned as 1st April, 2000. Permitted services are mentioned as for the lawful transmission of programming or any other communication services including video, audio and data services. In column 7, utilization fee has been prescribed. Under the clause 'definitions' at page 4 of the agreement, utilization fee has been defined as under:-

> "**Utilisation Fee**" means the fee payable by the Customer, in quarterly instalments, for the **use of the Transponder Capacity** and other services provided by AsiaSat pursuant to this Agreement and includes any other payments described as utilization fees herein;"

Utilisation term has been defined as under:-

> *"**Utilisation Term**" means the time period set forth in box 5 of the Summary, commencing on the Commencement Date, during which the*

*Transponder Capacity is to be provided to the Customer hereunder, unless earlier terminated in accordance with the terms herein."*

In clause 2 under the head utilization, the terms are set out as under:-

*"2.1 AsiaSat hereby agrees to make available the Transponder Capacity to the Customer during the Utilisation Term and the* ***Customer hereby agrees to use the Transponder Capacity*** *in accordance with the terms of this Agreement. The Customer acknowledges that AsiaSat may preempt or interrupt the Customer's use of the Transponder Capacity to protect the overall health and performance of the Satellite in unusual, abnormal or other emergency situations. AsiaSat shall use reasonable efforts to notify the customer of such preemption or interruption and will use all reasonable efforts to schedule and conduct its activities so as to minimize the disruption of the Permitted Service."*

Under clause 2.4 and 2.5 it has been mentioned as under:-

*"2.4* ***The Customer is hereby granted the right to use the Transponder Capacity for the Permitted Service only****. The Customer may change the Permitted Service upon the written consent from AsiaSat, which consent shall not be unreasonably withheld or delayed.*

*2.5 T****he Customer shall prior to taking up use of the Transponder Capacity provide AsiaSat with the Customer's written*** *transmission plans in sufficient detail to enable AsiaSat to ensure that the Customer's use of the Transponder Capacity does not or will not cause interference to other customers on the Satellite or other satellites and does not or will not adversely affect AsiaSat's ability to co-ordinate the Satellite with other satellite operators. AsiaSat shall promptly following receipt of such details, and in any event prior to the Commencement Date, notify the Customer in writing whether the transmission plans are acceptable to AsiaSat and, if not, shall notify the Customer insufficient detail to enable the Customer to amend the transmission plans and submit such amendments until final acceptance by AsiaSat. Provided, however, the foregoing shall not apply if :*

*(a) the Transponder Capacity had been, and continues to be, utilized by the Customer upto the day before the Commencement Date pursuant to any other agreement; and*

*(b) there is no change in the Customer's transmission plans for its utilization of the Transponder Capacity hereunder from that immediately prior to the Commencement Date.*

*Thereafter, the Customer shall not amend, modify or alter its transmission plans without AsiaSat's prior approval, such approval not to be unreasonably withheld or delayed and AsiaSat shall respond with*

*reasonable promptness to requests from the Customer to approve amended transmission plans."*

Under clause 4.2 at page 8 it has been mentioned as under:-

*"4.2* ***In consideration for the use of the Transponder Capacity and the other services provided by*** *AsiaSat pursuant to this Agreement the Customer agrees to pay the Utilisation Fee at the rates specified in box 7 of the Summary payable in accordance with Clause 4.3."*

Clause 5.1(b) which relates to ground facilities prescribe as under:-

*"(b)* ***AsiaSat shall, however, maintain telemetry, tracking and control in relation to the Satellite in order to enable it to comply with its obligations under this Agreement."***

Clause 5.2 (b) read as under:-

*"(b)* ***The Customer likewise agrees to qualify the Customer's satellite ground station for access to and use of the Stellite and/or Transponder Capacity by, inter alia, supplying to AsiaSat*** *the design and other information reasonably required by AsiaSat relating to the Customer's ground station required for such purpose and by conducting pre-operational qualification tests and by conducting pre-operational access procedures all according to the requirements laid out in relevant Annex and other reasonable written requirements made by AsiaSat and of which the Customer has been given reasonable prior notice."*

196 Clause 6 describes the contingencies of interruption of services and in clause 6.1 it has been mentioned that interruptions which are not attributable to negligence or default of the customer or to the matters described in Clauses 6.3 or 6.4, will result in a refund of the Utilisation Fee calculated in a particular manner. Clause 6.3 describes as under:-

*"6.3 Interruptions caused by :-*

*(a) sun outages; and/or*

*(b) interference caused by users on the Satellite, or by owners of or users on other satellites whether or not owned and/or operated by AsiaSat (including the Customer's own use of other transponders or transponder capacity); and/or*

*(c) flood, typhoon, earthquate, natural disaster, war, civil war, government action, insurrections or other military actions, civil unrest, strikes, slow downs, lock outs, other labour actions or other events beyond the reasonable control of AsiaSat;*

*(collectively, "Force Majeure") shall not be considered Interruptions for the purposes of Clause 6.1 or Clause 6.6 (A schedule of outages due to effects of the sun expected to occur during the Utilisation Term shall be provided as soon as practicable after the Customer has provided to AsiaSat details of its proposed services and uplink and downlink facilities and shall be revised from time to time as appropriate.)*

197. Clause 7 prescribes regarding contingencies of transpnder degradation and protection and clause 7.3 read as under:-

*"7.3 (a) If all Redundant Units on the satellite have been utilized to provide protection for other transponders on the Satellite, AsiaSat shall use reasonable endeavours to provide protection to the Customer's failed Transponder Capacity through transponders on the Satellite which are operational, freely available to AsiaSat and not being used by other persons or otherwise encumbered and which meet the Performance Specifications (e.g., a C-Band transponder will be replaced by another C-Band transponder, and not by a Ku-Band transponder). Provided that such protection is available, it will be made available as soon as it is technically feasible to do so. The provisions of Clause 7.2(b) shall apply to determine, if necessary, the order by which such transponders will be allocated between users of transponder capacity on the Satellite, if one or more persons using transponder capacity on the Satellite lose transponder capacity at or about the same time."*

198. Clause 8 deals with assignment and delegation and clause 8.2 provide customer with a right to enter into sub-utilisation agreement in certain circumstances. Clause 9.2 read as under:-

*"9.2. The customer shall, upon written request from AsiaSat, promptly cease and desist from any use of the Transponder Capacity or Transponder which in the reasonable and bona fide opinion of AsiaSat is unlawful under Applicable Laws, including, but not limited to, any use of the Transponder Capacity or Transponder which in any way breaches Applicable Laws, including without limitation laws relating to defamatory, obscene or pornographic materials, or Third Party Rights or any other matter which may result in or put AsiaSat at risk of the termination, revocation, suspension or curtailment of AsiaSat's right to operate the*

*Satellite or which may result in AsiaSat or any of its assets, officers or employees becoming subject to criminal, civil or similar proceedings."*

Clause 11.3 (c) read as under:-

*"(a) ……..*
*(b) ……..*
*(c) fails to maintain its ground station facilities in accordance with the requirement of Clause 5 such that in the reasonable opinion of AsiaSat such failure may interfere with or cause damage to the services provided by AsiaSat to other customers of, or users of any of, AsiaSat's satellites, including the Satellite, or the transponders on any of AsiaSat's Satellites (including the Satellite) or other services provided by AsiaSat through any of its satellites (including the Satellite) or may interfere with or cause damage to AsiaSat's other satellites or the Satellite and in any event shall fail to rectify such default within twenty eight (28) days of the receipt by it of notice from AsiaSat requiring rectification of the same; or "*

199. A conjoint reading of all these clauses will show that the user in the present case of segment capacity of transponder is vested with telecasting company. Clause 2.1 clearly states that AsiaSat hereby agrees to make available transponder capacity to the customer during the utilization term and the customer hereby agrees to **use** the transponder capacity in accordance with the terms of this agreement. Thus, it is the satellite company who is making available the transponder capacity to the customer who has agreed to use the same in accordance with the agreement upon making the payment mutually decided consideration. It is only in a case where Satellite Company wants to protect the overall health and performance of the satellite in unusual, abnormal or other emergency situations, it can preempt and interrupt the customer's use of the transponder capacity. Clause 2.4 has granted the **right to use** the transponder capacity to the customer for preempted services. Clause 4.2 provides that the consideration stated in the agreement is for use of transponders capacity and the other services provided by the AsiaSat. To ensure the proper use of transponder's capacity it has been prescribed in clause 5.1 (b) that satellite company will maintain telemetry, tracking and control in relation to the satellite in order to enable it to comply with its obligation under the agreement. This clause shows that the use of transponders capacity by the telecasting company is ensured by the satellite company by keeping and maintaining the satellite in a

required particular position. In clause 6.3, in one of the interruption causes is mentioned as interference caused by the users on the satellite or by the owners of or users on other satellites. Unless any right to use is given how the interference can be caused by the customer who is described as user of the transponder capacity. Not only a particular transponder capacity is provided under the agreement, but a provision has been made under clause 7 of the agreement to provide the customer with an alternative facility of redundant units of transponders in a case when particular capacity of transponder provided to the customer fails to work. Under clause 8, the customer has also been given power to enter into a sub-utilisation agreement and also a power to assign that user in certain specified conditions. Under clause 9.2 a provision has been made where upon written request of satellite company the customer shall promptly cease and desist from any use of the transponder capacity or transponder in certain specified circumstances and if the "use" is not provided to the customer, then, there was no need for that clause as satellite company at its own can stop transponder to telecast the uplinked data. If the customer is not making continuous uninterrupted use, such clause had no meaning. Thus, it can be said that while applying the word "user" in the agreement, the class or section of people involved in the activity of providing and obtaining segment capacity understand the meaning as user by the person who is obtaining segment capacity. Therefore, the word "user" has acquired a particular meaning in the trade and commercial circle dealing with this type of business activity. The word "user" has become a popular meaning in the context and the same has to be understood as such according to above mentioned rule of interpretation as discussed ante and described at page 101 of above mentioned book of Justice G.P. Singh. So, the contention of Ld. Representatives of the assessees that using of the process is only by the satellite company cannot be accepted and it is held that the telecasting companies are using the process in the transponder. Now, it will be relevant to deal with the case law and other contentions of learned representatives of the assessees in this regard.

200. It may also be mentioned here that similar issue was raised by PanamSat before Chinese court in the case of PanAm Sat International Systems Inc. (supra). The issue which was proposed to be answered by the court was as under:-

a) *Secondly, under the agreement, the third party availed itself of the plaintiff's satellite equipment to transmit its television signals. This demonstrated of the plaintiff. Hence, the so called season-based service fees and equipment fees that the third party paid to the plaintiff should be classified as a royalty under the China-US Tax Treaty.*

The court has held as under:-

> *"Article 11(3) of the China-US Tax Treaty defines royalties as 'payments of any kind received s -a consideration for the use of, or the right to use, any copyright or literary, artistic or scientific work, including cinematographic films or films or tapes used for radio or television broadcasting, any patent, technical know-how, trademark, design or model, plan, secret formula or process, or for the use of, or the right to use, industrial commercial or scientific equipment, or for information concerning industrial, commercial or scientific experience.' The satellite transponder has a function of transmitting signals, or which the third party has to avail itself in order to expand its television reach to regions such as the Pacific region, America can etc. Part of the bandwidth of each single satellite, transponder can be used independently for signal transmission. Under the Agreement, in normal situations, the designated part. of the bandwidth of the satellite transponder shall be used to transmit the third party's television signal only, which means the third party solely owns the right to use the designated part of the bandwidth.* ***Since the bandwidth is provided by the satellite system, the third party's right to use the bandwidth shall be viewed as the right to use the satellite system."***

201. Thus, even the Chinese court has held that there is existence of right to use with the telecasting company for the bandwidth provided by the satellite company and it was used by the telecasting company for signal transmitting. Therefore also user of the process in the transponder by the telecasting companies cannot be denied.

202. Further, reference also can be made to "Satcom Policy" referred to by Ld. Special Counsel of the Revenue. In the said policy it has been stated clearly that Satcom Policy

shall be provided for users to avail of transponder capacity from both domestic/foreign satellites. This also shows that the user is by the communication company of the transponder capacity.

Thus, the conclusion is inevitable that the "process" in the transponder is used by telecasting companies and not by the satellite companies.

**WHETHER ABSENCE OF COMMA AFTER THE WORDS SECRET FORMULA OR PROCESS IN THE INCOME TAX ACT AND EXISTENCE OF SUCH COMMA IN THE PROVISIONS OF DTAA IS RELEVANT FOR CONSIDERING THE RELEVANT PROVISIONS.**

203. There was consensus amongst the ld. representatives of the assesses that while construing the provisions of the Act, generally punctuation does not have important role to play but it will be necessary to deal with this aspect as certain arguments were submitted before us that the word "secret" preceding "formulae" should also be read with the word "process" while construing domestic provisions as well as DTAA provisions. Both the provisions have already been reproduced above. The law is well settled that punctuations are not relevant while interpreting a statute. Punctuation plays only a marginal role in the interpretation of the statute. The only exception under this rule is that when a statute is carefully punctuated and there is a doubt about its meaning, then only weight should be given to punctuation. Reference in this regard can be made to the following decisions which have been relied upon by the learned representatives of the assessee:-

1) Lewis Pugh Evans Pugh vs. Ashutosh Sen AIR 1929 Privy Council 69.
2) Ashwini Kumar Ghose v. Arbinda Bose AIR 1952 SC 369
3) Pope Alliance Corporation v. Spanish River Pulp and Paper Mills Ltd. AIR 1929 Privy Council 38

204. In the case Lewis Pugh Evans Pugh vs. Ashutosh Sen (supra) while construing Article 48 of the Indian Limitation Act, 1908, which read as "for specific moveable property lost or acquired by theft, or dishonest misappropriation or conversion, or for compensation for wrongfully taking or detaining the same". LORD WARRINGTON rejected the contention that the word 'dishonest' qualified not only 'misappropriation' but also 'conversion' bringing only dishonest conversion within the Article, and observed : "The truth is that, if the article is read without the commas inserted in the print, as a court of law is bound to do, the meaning is reasonably clear."

205. In the case of Ashwini Kumar Ghose vs. Arbinda Bose (supra), Justice B.K. Mukherjee observed : "Punctuation is after all a minor element in the construction of a statute, and very little attention is paid to it by English Courts – It seems, however, that in the vellum copies printed since 1850, there are some cases of punctuation, and when they occur they can be looked upon as a sort of *contemporanea expositio* - . When a statute is carefully punctuated and there is doubt about its meaning, a weight should undoubtedly be given to punctuation -. I need not deny that punctuation may have its uses in some cases, but it cannot certainly be regarded as a controlling element and cannot be allowed to control the plain meaning of a text." Similarly, Lord Hobhouse stated : "It is an error to rely on punctuation in construing Acts of the Legislature."

206. In the case of Pope Alliance Corporation v. Spanish River Pulp and Paper Mills Ltd (supra) it was held that it will be antecedently very improbable that it was meant really to alter the liability by displacement of a 'comma'.

207. A careful perusal of above decisions will reveal that if the statute in question is found to be carefully punctuated, in that case punctuation, though a minor element may be resorted to for the purpose of construction. If it is so, it has to be shown that the comma in DTAA has been placed carefully to give the phrase a different meaning. The format of Article 12 is based either on OECD model or on UN model and a universal approach has been adopted while drafting the DTAA. No material has been placed on record by the learned representatives of the satellite companies to show that the relevant

provision in Article 12 of DTAA are carefully punctuated so as to alter the meaning of royalty as given in DTAA as compared to the provisions of Income-Tax Act. It has been discussed elsewhere in this order that the intention of the contracting countries has never been to restrict the scope of royalty by placing comma after the words "secret formula or process" while drafting the DTTAA as compared to the legislature while drafting the provisions of Section 9(1)(vi). Therefore, there is no force in the claim of Ld. Representatives of the respective assessees that simply as comma is placed after the word secret formula or process, the process should also be construed to be "secret" to bring the consideration within the ambit of royalty. Moreover, principles of literal interpretation do not apply to interpretation of tax treaties. To find the meaning of words employed in the tax treaties we have to primarily look at the ordinary meanings given to those words in that context and in the light of its objects and purpose. Literal meanings of these items are not really conclusive factors in the context of interpreting a tax treaty which ought to be interpreted in good faith and *ut res magis valeat quam pereat, i.e.,* to make it workable rather than redundant. This position of law has been explained by this Tribunal in the case of Hindalco Industries Ltd. *v.*Assistant Commissioner of Income-tax, TDS Range 1 [2005] 94 ITD 242 (mum.) and the relevant observations are reproduced below:-

> **"9.** Before we address ourselves to the aforesaid questions, it is necessary to bear in mind the principles governing the interpretation of tax treaties. It will be useful to briefly touch upon the principles governing interpretation of treaties. Are these principles any different from the principles of interpretation of statutes, and, if so, to what extent and in what manner?
>
> **10.** Double Taxation Avoidance Agreements are international agreements entered into between states. The conclusion and interpretation of such conventions is governed by public international law, and particularly, by the Vienna Convention on the Law of Treaties of 23rd May 1969. The rules of interpretation contained in the Vienna Convention, being customary international law, also apply to the interpretation of tax treaties. This view also finds mention in the Tribunal's order in the case of *Modern Threads India Ltd.* v. *Dy. CIT* [1999] 69 ITD 115 (Jp.) (TM). Article 31(1) of the Vienna Convention states that "A treaty shall be interpreted in good faith in accordance with the ordinary meaning given to the terms of the treaty in their context and in the light of its object and purpose".
>
> **11.** Elaborating upon the principles governing interpretation of tax treaties, Lord Denning, in *Bulmer Ltd.* v. *S.A. Bollinger* [1972] 2 AER 1226, said

"...The treaty...is quite unlike any of the enactments we have been accustomed...It lays down general principles. It expresses aims and purposes... what are English Courts to do when they are faced with a problem of interpretation? They must follow the European pattern. No longer must they examine the words in meticulous detail. No longer must they argue about the precise grammatical sense. They must look to the purpose or intent..."

**12.** Echoing these views and justifying his departure from the plain meaning of the words used in the treaty, Goulding J. in *IRC* v. *Exxon Corporation* [1982] STC 356 at page 359, observed:

"In coming to the conclusion, I bear in mind that the words of the Convention are not those of a regular Parliamentary draftsman but a text agreed on by negotiations between the two contracting

governments. Although I am thus constrained to do violence to the language of the Convention, I see no reasons to inflict a deeper wound than necessary. In other words, I prefer to depart from the plain meaning of language only in the second sentence of Article XV and I accept the consequence (strange though it is) that similar words mean different things in the two sentences."

**13.** In a later judgment, Harman J. in *Union Texas Petroleum Corporation* v. *Critchley* [1988] STC 69, affirmed the above observations of Goulding, J. and added :

"I consider that I should bear in mind that this double tax agreement is an agreement. It is not a taxing statute, although it is an agreement about how taxes should be imposed. On that basis, in my judgment, this agreement should be construed as *ut res magis valeat quam pereat,* as should all agreements. The fact that the parties are 'high contracting parties', to use an old description, does not change the way in which the Courts should also approach the construction of any agreement".

We are in considered agreement with this school of thought which lays down the proposition that, strictly speaking the principles of literal interpretation do not apply to the interpretation of tax treaties. To find the meaning of words employed in the tax treaties, we have to primarily look at the ordinary meanings given to those words in that context and in the light of its objects and purpose. Literal meanings of these terms are not really conclusive factors in the context of interpretating a tax treaty which ought to be interpretated in good faith and *ut res magis valeat quam pereat, i.e.,* to make it workable rather than redundant.

208. It can be seen from the above observations that DTAA are not to be interpreted as statute despite the fact that it is an agreement about how taxes should be imposed. DTAA should be interpreted like an agreement. To find the meaning of words employed in tax treaties, one has to primarily look at the ordinary meanings given to those words in that context and in the light of its object and purpose. It has already been pointed out that no material has been brought on record to show that comma has been placed in the respective DTAAs after the words "secret formula or process" with an intention to restrict the scope of royalty by the contracting parties. Reference has been made to some of the treaties wherein the receipts from satellite, etc. have been treated as royalty by specifically including the same within the relevant articles. That position rather supports the view that such receipts are in the nature of royalty. It has been also discussed elsewhere in this order that the word "royalty" has a wide meaning and a particular receipt, which otherwise fall within the ambit of royalty, cannot be excluded from its scope unless it is shown that it has been specifically excluded to be considered as royalty.

There being no material on record to show such exclusion, the contention that such receipts do not fall within the ambit of royalty cannot be accepted particularly in the position when consideration for use of process is included within the ambit of royalty both under the domestic law as well as under the relevant DTAAs.

209. Here it will be relevant to mention that so far as it relates to existence of the 'process' in the transponder neither there is any difference between the two decisions of this Tribunal (AsiaSat & PanamSat), nor the existence of such process is denied by the ld. Representatives of the assessees. This position is also clarified by the questions posed to this Special Bench. The questions proposed to this Bench are limited to the proposition that whether or not the word "secret" qualifies the word "process" also. The answer to that question has elaborately been discussed above and it is held that the word "secret" does not qualify the word "process".

210. There is one more aspect of this issue. If such contention of ld. representatives of the assessee is accepted than it will tantamount to restrict the scope of word royalty, which may not be the intention of the legislature. For ascertaining this aspect, it will be helpful to go through explanatory notes on the provisions of Explanation 2 to Section 9(1)(vi) when they were introduced. Reference can be made to Circular No.202 dated 5th July, 1976 and relevant para 15.5 is reproduced [source: 105 ITR 27 (St.)]:-

> *"15.5 For the purposes of the aforesaid source rule, "royalty" has been defined in Explanation 2 to section 9(1)(vi).* ***It will be seen that the definition is wide enough to cover both industrial royalties as well as copyright royalties.*** *Further, the definition specifically excludes income which would be chargeable to tax under the head "Capital gains" and accordingly such income will be charged to tax as capital gains on a net basis under the relevant provisions of the law."*

211. Therefore, it can be seen that there is no legislative intent to restrict the scope of royalty rather the intention of legislature is to make the scope wider. The word royalty has been explained by Hon'ble Madras High Court in the case of CIT vs. Neyveli Lignite Corporation Ltd. 113 Taxman 206 (Mad) in the following words:-

> *"10. The term 'royalty' **normally connotes the payment made to a person who has exclusively 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'."*

212. If the word "royalty" has to be construed according to above decision, then it is an object which may be either **physical** or **intellectual property** or **thing**. Thus, to fall under the purview of royalty, it is not necessary that the consideration should be for the use of intellectual property only. It may be either for intellectual property or anything else which falls under the definition of royalty. If cumulative reading is given to the explanatory notes and above decision of Hon'ble Madras High Court, it will become clear that definition of royalties is wide enough to cover both industrial royalties as well as copyright royalties. It has already been pointed out that to fall within the ambit of royalty the "process" is not required to be secret one. The process can be any process which also include scientific process. The consideration for use of "process" has been treated to be as royalty under the provisions of domestic law as well as under DTAA. Therefore, in view of above position of law, the consideration paid for the user of process in transponder will fall within the ambit of royalty irrespective of the fact that the said process is secret or not.

## APPLICATION OF PRINCIPLES OF INTERPRETATION KNOWN AS *"EJUSDEM GENERIS"* AND *"NOSCITUR A SOCIIS"*

213. The other arguments of the representatives of the assessees are that the process should be considered to be a right protected as intellectual property right. For this purpose, reliance has been placed on two principles of interpretation, namely, *ejusdem generis* and *noscitur a sociis*. The principle of *ejusdem generis* has been recently described by Hon'ble Supreme Court in the case of CIT vs. McDowell & Company Ltd.

314 ITR 167. The observations of their Lordships at page 172 in this regard are as under:-

> *"The principle of statutory interpretation is well known and well-settled that when particular words pertaining to a class, category or genus are followed by general words, the general words are construed as limited to things of the same kind as those specified. This rule is known a the rule of* ***ejusdem generis****. It applies when:*
>
> *(1) the statute contains an enumeration of specific words;*
> *(2) the subjects of enumeration constitute a class or category;*
> *(3) that class or category is not exhausted by the enumeration;*
> *(4) the general terms follow the enumeration; and*
> *(5) there is no indication of a different legislative intent.*
>
> *Reference in this connection may be made to Amar Chandra v. Collector of Central Excise, AIR 1972 SC 1863 and Housing Board of Haryana v. Haryana Housing Board Employees' Union, AIR 1996 SC 434."*

214. Rule of *noscitur a sociis* has been explained by Hon'ble Supreme Court in the case of State of Bombay vs. Hospital Mazdoor Sabha AIR 1960 SC 610 at pages 613 and 614: "Associated words take their meaning from one another under the doctrine of noscitur a sociis, the philosophy of which is that the meaning of the doubtful word may be ascertained by reference to the meaning of words, associated with it; such doctrine is broader than the maxim *ejusdem generis*. In fact the latter maxim 'is only an illustration or specific application of the broader maxim *noscitur a sociis*.' It must be borne in mind that *noscitur a sociis,* is merely a rule of construction and it cannot prevail in cases where it is clear that the wider words have been deliberately used in order to make the scope of the defined word correspondingly wider. It is only where the intention of the Legislature in associating wider words with words of narrower significance is doubtful, or otherwise not clear that the present rule of construction can be usefully applied."

215. At the same time, it may be mentioned that this rule has no application when the meaning is not in doubt. Reference can be made to the decision of Hon'ble Supreme Court in the case of Bank of India vs. Vijay Transport AIR 1988 SC 151.

216. It has been the contention of Ld. representatives of the assessees that the words mentioned in clause (iii) of Explanation 2 to Section 9(1)(vi) are indicating to a class and category which are in the nature of intellectual property right. It was pointed out that the words patent, invention, model, design, secret formula or process or trade mark indicates that all these are in the nature of protected rights and the user of words "similar property" indicate that the class and category of protected intellectual right has not been exhausted by the enumeration and, therefore, general term has followed the enumeration and there being no different legislative intent, the word "process" should be understood in the nature of intellectual property right and, therefore, the process involved in transponder cannot be interpreted in the manner so as to make the consideration received by the assessee in the nature of royalty.

217. No doubt, clause (iii) of Explanation 2 to Section 9(1)(vi) describe a class or category as the words mentioned therein enumerates the things which may fall in the category of intellectual property. However, it does not mean that consideration for protected intellectual property only can be considered as royalty. Such interpretation shall be against the provisions of DTAA/Act. The provision covers protected as well as unprotected Intellectual Properties. For example, 'patent' in itself is a protected item. Invention itself can be protected or not protected. Similar is the position with the model, design and secret formula or process. Trade mark can also be registered or unregistered. Thus, clause (iii) to Explanation 2 to Section 9(1)(vi) describes the things, which may constitute intellectual property but at the same time it is not necessary that intellectual property must also be a protected one. Therefore, the consideration for use of the "process" in transponder, even if it is not protected, will fall within the definition of "royalty" as nowhere in the provisions it is stated that the process also should be protected one. Therefore, the process as described in clause (iii) of Explanation 2 to Section 9(1)(vi) cannot be construed to be a "protected process" as argued by ld. representatives of the assessees. The process in transponder is an invention which is quite like intellectual property. However, its position, dimension and physical appearance is such that it cannot be protected like a patent invention, model, design, secret formula or trade mark although it is a similar property having all the attributes of such property. It

has already been pointed out that scope of royalty cannot be restricted even according to legislative intent. Thus, the consideration received by these assessees for giving the right of user to their customers of the process in the transponder will be a consideration received as royalty to fall within the ambit of clause (iii) of Explanation 2 to Section 9(1)(vi).

218. Before dealing with the case law and commentaries, etc. relied upon by Ld. AR for construction of word "use", it may be mentioned that we have already pointed out that the while construing a word or statute, the context has to be kept in mind and for this purpose reference has been made to the decision of Hon'ble Supreme Court in the case of Sun Engineering Works (supra). Therefore, while construing a word, the context is very much relevant.

219. The first argument in this regard is based on the definition of word 'use' as interpreted by the Hon'ble Bombay High Court in the case of Diamond Services International Pvt. Ltd. vs. Union of India (supra). In the said case, the petitioner was a company incorporated in Singapore and was a tax resident of Singapore. It provided value added services which supported the development of free, fair and competitive global diamond markets. The Petitioner charged Indian customers for grading and certification of diamond and giving reports in that regard. According to Section 195, if any person responsible for paying to a non-resident any sum chargeable under the provisions of IT Act, then, he is required to deduct income-tax thereon at the prescribed rates. Under sub-section (3) of Section 195, such person can apply to income-tax officer for grant of a certificate for receipt of income without deduction of tax. It was the claim of the assessee therein that according to DTAA between India and Singapore such income was not taxable; therefore, certificate under section 195 was to be granted. It is for that purpose Article 12 relating to royalty and fee for technical services was examined by the Hon'ble Bombay High Court along with the provisions of Explanation 2 to section 9(1)(vi). It is in that context the definition of the word 'use' was considered. The question which was considered by their Lordships of Bombay High Court was whether by issuing certificate of gradation of diamond, the assessee had imparted any information

concerning industrial, commercial or scientific experience. It was observed that the assessee did not part with information concerning industrial, commercial or scientific experience when it issued the grading certificate. It also was not a payment received by them in consideration for services of managerial, technical or consultancy nature which could include to the application or enjoyment of the right, property or information. It also does not make available technical knowledge, experience, skill, etc. to enable the person acquiring the service to apply the technology contained therein. The facts in that case were entirely different from the facts of the present case. The provisions considered therein were also different as they relates to consideration received for information concerning industrial, commercial or scientific experience which are contained in Article 12.3.a and Clause (iv) of Explanation 2 to Section 9(1)(vi) which also deals with the imparting of any information concerning technical, industrial, commercial or scientific knowledge, experience or skill. However, in the present case what is considered by the authorities is clause (iii), Explanation 2 to Section 9(1)(vi). The word 'use' was considered for the purposes of those clauses only for which there is no relevance in the present case. It has already been elaborately discussed that the word "use" for the purpose of present appeal is to be construed as understood in the trade circle of that particular business activity.

220. It has already been pointed out that existence of comma in the provisions of DTAA after the word "secret formula or process" does not make any difference and, thus, simply on the basis that there is comma after the word "secret formula or process" in DTAA does not in itself mean that process also be understood as a "secret process." It has been pointed out that the process has been defined in Oxford Concise dictionary as "series of action or steps towards achieving a particular end. In Black's Law dictionary it means "a series of action, motions or occurrences; progressive act or transaction; continuous operation; method, mode or operation, whereby a result or effect is produced." The picture which one views in T.V. is produced through a process starting with TV cameras uplinking the images which is very important part of this process which is started by the telecasting companies. The process involved in transponder is to receive uplinked data at a particular frequency as transmitted by the earth station of the

telecasting company and to provide a requisite strength to uplinked data and then to transmit it back to the footprint area of the satellite at a particular frequency, so that the same can be viewed by the persons who are authorized to receive that data. If we go by the simple definition assigned to the word "process", then the process involved in transponder fulfill all the criteria. It is a series of actions, motions or occurrences and it is a continuous operation whereby a result or effect is produced. Picture which one views in TV is produced through a process starting with TV cameras uplinking the images which is very important part of this process which is started by the telecasting companies. Thus, a process is involved in the transponder which is utilised by the telecasting company to uplink their data and to receive the same back in the footprint area of the satellite at desired destinations. Thus, the consideration paid by the telecasting company is a consideration for user of the process.

221. Further reliance has been placed on the views given in the book written by well-known author Klaus Vogel. While defining the word 'use' for the purpose of letting in Article 12, it has been stated that whenever the term royalty relates to payment in respect of proprietary rights, processes, or equipments, application of Article 12 requires the payments to be made for use or right to use, the asset in question. It has further been stated that a distinction must be made between letting the licensed asset for use on the one hand and transferring its substance on the other hand. The decisive difference in this connection is degree of change in the attraction of the asset from licensor to licensee. On the other hand, another definition to be made is letting the proprietary right, experience, etc., on the one hand and use of it by the licensor himself e.g., within the framework of an advisory activity . Within the range from "services", via "letting" to "alienation" outright alienation is one clear-cut extreme, viz., outright transfer of the asset in favour of the payer of the royalty. The other distinction as clear-cut extreme is the exercise by the payee of the activities in the services of the payer activities for which the payee uses his own proprietary rights, know how, etc. While not letting or transferring them to the payer and neither extreme comes under Article 12, all that does is central category viz., letting. In this regard it may be stated that all these observations are in respect of leasing the property or right. However, in the present case the consideration is paid by the

assessee for using the process as described in clause (iii) of Explanation 2 to Section 9(1)(vi). It is not even the case of the revenue that it is a case of leasing either of property or of right. Therefore, these observations cannot be relied upon to hold that "user" only should be construed to have either the physical control or the possession over the property or right. What is required to fall under royalty for using a process does not require that any type of control or possession should be vested with the person who is obtaining the use of the process.

222. It will be important to mention here that development in technology has to be taken into account. The control over the process or equipment has to be seen in the context of a particular situation. For that purpose it has to be determined that who owns and control the process. No material has been brought on record by the satellite companies to show that they have better control on the process in the transponder as compared to the telecasting companies. Both the satellite companies as well as telecasting companies control their processes through the equipments installed at their respective ground station and earth stations. Even the satellite companies cannot have the physical control over the satellite as the same has to be accessed through the equipments installed on their ground stations. Similarly, the user of the transponder capacity is affected by the telecasting company through the equipments installed at their earth stations. Therefore, the control and management has to be seen in the context of satellite. Though the control of satellite is vested with the satellite companies, but after providing the required capacity of transponder by the satellite company to the telecasting company for a consideration, the process in the transponder is controlled by the telecasting companies as they use that transponder as a medium to uplink and to receive back their data/images at any desired point of time covered by the agreement in the footprint area. Thus, effective user of the transponder is vested in the telecasting companies and not with the satellite companies.

223. Here it will also be relevant to mention that considering the commentary written by Klaus Vogel, AAR in its decision (238 ITR 0296 (supra), has held that the consideration received by the applicant was 'royalty'. The facts in that case are as under:-

"The applicant, one American company 'Y' belongs to 'ABC' group which operates in the worldwide credit and travel business. 'Z' is a wholly-owned subsidiary company of 'Y' and 'XT' is an Indian company wholly-owned subsidiary of 'Z'. 'XT' has set up a 100 per cent EOU for performing activities of 'Data management information analysis and control/for its customers. 'XT' has its own infrastructure in terms of processors/related computer equipment, microwave towers, etc. The applicant-company 'Y' having a worldwide Information Processing Telecommunication Centre in USA, allows its customers such as 'XT' to have access to, and to use, its Central Processing Unit (CPU) in USA against payment. 'XT' uses Y's CPU set up to meet part of its processing needs. The CPU of 'Y' is accessed and used through a Consolidated Data Network (CDN) maintained at Hong Kong. 'XT' has its microwave/worldwide link up to CDN at Hong Kong through VSNL. 'XT' receives information about use of credit cards and travellers cheque by travellers all over the country. The information is then passed on to the Hong Kong Computer Centre of the applicant and 'XT' pays amount of invoices raised by 'Y' after making necessary withholding of tax. The question raised is whether charges receivable by the applicant from 'XT' would be chargeable to tax in India as royalty and, if so, whether the same would be considered for use of or the right to use designs or model, plan, secret formula or process within the meaning of the term 'royalties' as envisaged in article 12(3)(*a*) of the DTAA and the same is not payment of any kind received as consideration for use of or the right to use any industrial, commercial or scientific equipment as covered under article 12(3)(*b*)."

The questions posed in that case were as under:-

(*i*) Whether payment due to the applicant under the transaction mentioned in Annexure B is liable to tax in India?

(ii)If the answer to the question No. 1 is in the affirmative, whether the payment due to the applicant under the transaction mentioned in Annexure B is covered under article 12(3)(*a*) or article 12(3)(*b*) of the Double Taxation Avoidance Agreement between India and USA ?

The provisions of DTAA considered therein were as under:-

(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 or 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 or 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."

224. After considering the various observations from the said commentary of Klaus Vogel, the term royalty was analyzed as under:-

"**31.** It would appear that there are three main ingredients which partake of the character of royalty payment:

(1) It is a payment made in return for a right to exercise a beneficial privilege or right.

(2) The payment is made to the person who owns the right.

(3) The consideration payable is determined on the basis of the amount of use.

The answer to the questions was given as under:-

**33.** The answer to the above question has to be determined with reference to the facts and circumstances of this case mentioned above. We are moving increasingly towards a digital age. With increasing globalization, both labour and capital have become more mobile and markets more integrated and business being conducted across borders on a day-to-day basis. It is well-known that

> globally, enterprises are becoming completely networked, more so in the field of software, 'Y', in the present case, is a service-provider which, *inter alia*, allows the 'XT' to use its bandwidth as also its networking-infrastructure for the consideration spelt out in the agreement. In the instant case, though workers are less mobile than the capital and technology, the access to it has been made possible through the CPU & CDN.
>
> From the facilities provided by the applicant to the Indian company, which are in the nature of online, analytical data processing, it would be quite clear that the payment has been received as 'consideration for use of, or the right to use. . . design or model, plan, secret formula or process. . .' within the meaning of the term 'royalties' in article 12(3)(*a*).

225. Further reference is made to the extract of OECD tag report on treaty characterization of e-commerce payments which are placed at pages 288 to 295 of paper book III by the Ld. Counsel. First reference is made to para 14 to contend that direct object of the consideration is the use of the process and not merely where process is used to facilitate service for which consideration is paid. We may state here that we have gone through para 14. It is under the head "Business profits and payments for use of or right to use, a copy right." A tag is a report submitted by the Technical Advisory Group on the treaty characterization of electronic commerce payments. This report deals with the issues arising from e-commerce. Para 14 deals with the transactions which permit the customer to electronically download computer programmes or other digital contents which may give rise to give copy right by the customer because a right to make one or more digital content is granted under the contract. Therefore, report submitted by Technical Advisory Group on treaty chracterisation of electronic commerce payments is not relevant at all for deciding the issue that whether or not consideration paid for granting space segment in transponder attracts the definition of royalty as given under the DTAA provisions.

226. It was submitted that whenever the word "use" or right to use is provided, then:

(ii) there is complete control by the user or the person who is entitled to use;

(iii) it is an exclusive use by such person and excludes multi-user or its very connotation;

(iv) the provider of use does not bear any risk of either diminished receipts or increased expenditure if there is non-performance under the contract; and

(v) a concern for confidentiality exists. For raising such contentions reference is made to para 28 of tag report and on the decision of Hon'ble Supreme Court in the case of Bharat Sanchar Nigam Ltd. and Another 282 ITR 273 (SC) and OECD Commentary paras 11.1 to 11.3.

227. Para 28 of tag report is under the head "computer equipment." It has been described in para 27 that the group has examined a few transactions where it could be argued that tangible computer equipments (hardware) was being used by a customer so as to allow the relevant payment to be characterized as "payments for use of, or right to use, industrial commercial or scientific equipment" and in para 28 it has been observed that various factors have been examined to distinguish rental from service contracts for the purposes of section 7701 (e) of US Internal Revenue Code and it was found that those factors are useful for purpose of determining that whether the payments are for "the use of or the right to use, industrial, commercial or scientific equipment" and once adopted to the transactions examined by the group, these factors which indicate a lease rather than the provision of services, can be formulated as follows. The test given are as under:-

(a) the customer is in physical possession of the property,

(b) The customer controls the property,

(c) The customer has a significant economic or possessory interest in the property,

(d) The provider does not bear any risk of substantially diminished receipts or substantially increased expenditures if there is non-performance under the contract.

(e) The provider does not use the property concurrently to provide significant services to entities unrelated to the service recipient, and

(f) The total payment does not substantially exceed the rental value of the computer equipment for the contract period

29. This is a non-exclusive list of factors, and some of these factors may not be relevant in particular cases. All relevant facts bearing on the substance of the transaction should be taken into account when determining whether the agreement is a service contract or a lease."

228. A perusal of para 28 reveal that these tests have been laid down only in respect of computer equipment (hardware). It cannot be made applicable to the transponder capacity for which it is difficult to assume a situation that the customer will be in the physical possession of the property. Moreover, the clause which has been considered by the tag is in respect of use or right to use of an industrial, commercial or scientific equipment whereas in the present case it is not with respect to use or right to use of, industrial, commercial or scientific equipment. This tag report to that extent is not relevant for the purpose of deciding the present issue.

229. The reliance has been placed on the following concurring observations of Hon'ble Justice Dr. A.R. Lakshmanan from the decision in the case of Bharat Sanchar Nigam Ltd. (supra):

*"DR. AR. LAKSHMANAN J.—I had the privilege of perusing the judgment proposed by my learned sister hon'ble Mrs. Justice Ruma Pal. While respectfully concurring with the conclusion arrived by the learned judge, I would like to add the following few paragraphs:*

*The principal issue that arises in this batch of cases relate to the imposition of sales tax in the light of article 366(29A) clause (d) on different activities carried on by telecommunication service providers.*

*The petitioner, Bharat Sanchar Nigam Ltd. (for short "BSNL"), is a licensee under the Indian Telegraph Act, 1885. The licence of the petitioner is obtained from the Government of India which is the same as the licence given also to various private telecom operators which entitles the BSNL to carry the activity of operating telegraph limited to the scope of telecommunication facilities.*

*The entire infrastructure/instruments/appliances and exchange arc in the physical control and possession of the petitioner at all times and there is neither any physical transfer of such goods nor any transfer of right to use such equipment or apparatuses.*

*To constitute a transaction for the transfer of the right to use the goods the transaction must have the following attributes:*

*a. there must be goods available for delivery;*

*b. there must be a consensus ad idem as to the identity of the goods ;*

*c. the transferee should have a legal right to use the goods—consequently all legal consequences of such use including any permissions or licenses required therefor should be available to the transferee ;*

*d. for the period during which the transferee has such legal right, has to be the exclusion to the transferor—this is the necessary concomitant of the plain language of the statute—viz., a "transfer of the right to use and not merely a licence to use the goods;*

*e. having transferred the right to use the goods during the period of which it is to be transferred, the owner cannot again transfer the same rights to others.*

*In my opinion, none of these attributes are present in the relationship between a telecom service provider and a consumer of such services. On the contrary, the transaction is a transaction of rendition of service. "*

230. As it can be seen from the above decision that the principal question before their Lordships of Hon'ble Supreme Court was imposition of sales-tax in the light of the Article 366 (29A) (d) on different activities carried on by telecommunication service providers. It was observed that Bharat Sanchar Nigam Ltd. is a licencee under the Indian Telegraph Act, 1885 which was obtained from Government of India and similar licence was also given to various private telecom operators according to which Bharat Sanchar Nigam Ltd. was entitled to carry the activity of operating telegraph limited to the scope of telecommunication facilities. It was observed that entire infrastructure/instrument/appliances and exchange are in the physical control and

possession of the Petitioner (BSNL) at all times and there is neither any physical transfer of such goods nor any transfer of right to use such equipment or apparatus. It was observed that to constitute a transaction for the transfer of the right to use the goods, the transaction must have some attributes described as above. Firstly, there should be "goods" available for delivery; there must be a consensus *adidum* as to the identity of goods; the transferee should have a legal right to use the goods – consequently all legal consequences of such use including any permission or licenses required thereof should be available to the transferee; for the period during which the transferee has such legal right, has to be the exclusion of the transferor and it was observed that this is necessary concomitant of the plain language of the statute viz., a "transfer of the right to use and not merely a licence to use the goods"; having transferred the right to use the goods during the period for which it is to be transferred the owner cannot again transfer the same right to others and it was observed that none of these attributes were present in the relations between telecom service provider and the consumer of such service and, on the contrary, the transaction was a transaction of rendition of service. It can be seen that what has been considered by their Lordships of Hon'ble Supreme Court was the transaction whether the same can be held to be transaction of sale. Transfer of right to use the goods is to be considered to be transaction of sale when the above conditions laid down are fulfilled. The test laid down by Hon'ble Supreme Court in BSNL's case cannot be applied to the present case as in the present case we are not considering the transactions which are considered to be for the transfer of right to use the goods for which it is very much necessary that there must be goods available for delivery. Therefore, these observations of Hon'ble Supreme Court are not relevant for deciding the present case.

231. It is observed that the similar proposition on the basis of BSNL's case was considered in the case of Dell International Service India Pvt. Ltd. [AAR decision (supra)] and it was observed as under:-

> "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.
>
> (*emphasis supplied).*

232. Therefore also, it has to be held that the decision of Hon'ble Supreme Court in the case of BSNL vs. Union of India (supra) has no application on the issue that arises in the present appeals. No doubt, the transaction has to be examined by applying the well known test of dominant intention of the parties and the essence of the transaction. The relevant terms of agreement entered into between the parties have elaborately been discussed in the earlier part of this order and it has been found that the dominant intention of the parties and essence of the transaction is that telecasting companies are making payment of consideration for use of the process in the transponder to enable themselves to carry on their business of telecasting the programmes through which they are earning profit. Without using the process in the transponder they cannot relay their programmes to the end user out of which they are earning income. It has already been pointed out that use of transponder capacity is one of the necessary elements in the business activity of the telecasting companies and providing the segment capacity by installing transponder on satellites is the business activity of the satellite companies. Therefore, the dominant intention and essence of transaction is that the satellite companies are providing segment capacity through transponders installed on their satellites to the telecasting companies for a consideration as a part of their business activity. Similarly, telecasting companies are using the segment capacity (the process in the transponder) for a consideration paid by them to satellite companies as a part of their business activity to enable themselves to

telecast the desired programmes. Thus, even applying the dominant intention of the parties and essence of the transactions, a conclusion can be arrived at that the payment of consideration is for use of the process in the transponder.

233. Here, it will be relevant to discuss the decision of AAR in the case of ISRO Satellite Centre (supra) which has been vehemently relied upon by the learned representatives of the assessees to contend that on similar facts and circumstances AAR has held that utilizing the transponder's segment capacity cannot be termed to be royalty to be taxable either under the provisions of domestic law or under the provisions of DTAA. We have carefully gone through the said decision of AAR. At the cost of repetition, it may be stated that the decision of any authority has to be seen in the context in which it has been rendered. The decision in the case of ISRO Satellite Centre is distinguishable on the facts of present case. No doubt, that the said case relates to provision of segment capacity in the transponder, but it can be seen from the said decision that while examining whether such payment is "royalty", the Article which has been considered is Article 13.3(b). It can be seen from the following observations:-

> *"6. The principal question that arises for consideration is whether the payment made to IGL, UK by the applicant is in the nature of royalty' within the meaning of Art. 13 of the Convention between the Government of Republic of India and the Government of the United Kingdom of Great Britain and Northern Ireland for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and capital gains (hereinafter referred to as 'treaty') and s. 9( l)(vi) of IT Act. 1961.*
>
> *6.1. The relevant portion of Art. 13 is extracted below :-*
>
> *"Article 13: Royalties and fees for technical services*
>
> *I. Royalties and fees for technical services arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.*
>
> *2. However, such royalties and fees for technical services may also be taxed in the Contracting State in which they arise and according to the law of that State but if the beneficial owner of the royalties or fees for technical services is a resident of the other Contracting State, the tax so charged shall not exceed*

*(a) in the case of royalties within para 3(a) of this articles, and fees for technical services within para 4(a) and (c) of this article,-…… (b) in the case of royalties within para 3(b) of this article and fees for technical services defined in para 4(b) ofthis article, 10 per cent ofthe gross amount ofsuch royalties and fees for technical services.*

*3. For the purposes of this Article, the term "royalties" 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 cinematography films or work on films, 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; and*

***(b) payments of any kind received as consideration for the use of, or the right to use, any industrial, commercial or scientilic equipment, other income derived by an enterprise of a Contracting State from the operation of*** *ships* ***or aircraft*** *in* ***international traffic.***

*6. The provisions of paras I and 2 of this article shall not apply if the beneficial owner of the royalties or fees for technical services, being a resident ofa Contracting State. carries on business in the other Contracting State in which the royalties or fees for technical services arise through a PE situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the right. property or contract in respect of which the royalties or fees for technical services are paid is effectively connected with such PE or fixed base. In such case, the provisions of art. 7 (business profits) or art. 15 (independent personal services) of this convention, as the case may be. shall apply."*

***We are more concerned herewith para 3(b) of art.13.***

*6.2.* ***'I'he definition of royalty' under the domestic law i.e. [I' Act, 1961 is almost similarly worded. Clause (iva) of the Expln. 2 to s. 9(1)(vi) of IT Act speaks of consideration for the "use or right to use any industrial, commercial or scientific equipment".***

*6.3. It may be noticed that sub-art. (6) provides for a situation in which the income in the nature of'royalty' arising in a Contracting State (which is not the State of residence of the beneficial owner) is to be dealt with under art. 7 governing business protit if the business is carried on in that other State through a permanent establishment.*

*7. As IGL does not carry on any business in India through PE. as discussed towards the end, the main contention of Revenue is that the 'charges' paid by the applicant—ISRO under the terms of the agreement*

*is in the nature of consideration paid for the 'use of' or 'right to use' the scientific equipment within the meaning of cl. (b) of Art.13(3)of the treaty.*

*7. I. The crucial question that needs to be addressed, therefore, is whether the payment made to IGL under the aforementioned contract constitutes consideration for the use of or right to use equipment of IGL. To answer this question. we have to discern the substance and essence of the contract as revealed from the terms of the contract document, the technical report and other facts furnished by the applicant. The first Article in the contract makes it clear that the payment is for the 'lease of navigation transponder segment capacity'. From the designated transponder (LI and L5) of Inmarsat satellite. this capacity at a particular frequency is made available to the applicant through INLUS (Navigation Land Uplink Station) which is set up and operated by the applicant. The capacity is meant to be used for the purpose of providing an augmentation to global satellite navigation system. The capacity will be utilized through data commands issued from the ground station (INLUS). Undeniably. the applicant will not be able to operate the transponder in the space bLit it will be transmitting/uplinking the augmented data to the navigation transponder. Access to the transponder's space capacity is established through the applicant's operations at the ground station ( INL.US) pursuant to which the transponder transmits signals/data received fl'om INl.tJS from the geo-stationary orbits. The Inmarsat satellite carries many transponders out of which the transponder for navigation purposes will provide the SBAS signals in space at two frequencies i.e. 1575.42 MHz (LI) and 1176.45 MHz (L5) which are accessed for the GAGAN project undertaken by the applicant. It is also seen that the navigation transponder which uplinks and downlinks the data is a passive transponder unlike the communication transponder.*

*(emphasis ours)*

234. From the above observations, it is clear that AAR while considering the consideration in the nature of royalty has dealt with only to Article 13.3.(b) whereas what we are considering in the present case is Article 13.3.(a) as it is not even the case of the revenue that the payment has been made by the telecasting company to the satellite companies as consideration for 'use' of or 'right to use' of any industrial, commercial or scientific equipment and it is the case of the revenue that it is a payment made for using the process. Similarly, while construing the domestic provisions the reference has been made to clause (iv)(a) whereas in the present case we are concerned with clause (iii). So, the said decision shall have no application to the facts of the present case as the provisions considered therein are different.

235. It may further be seen that the transponder segment capacity which was given in the case of ISRO was a navigational transponder. Though it has been the case of learned representatives of the assessees that the transponders in the case of assessees are no more different than the transponders involved in the case of ISRO, but such contention is not acceptable as AAR itself has pointed out such difference and it has been specifically mentioned by the authority that navigational transponder is unlike a communication transponder which is an active transponder as navigational transponder does not amplify. This difference has been clearly brought out in the following observations:-

> *7.4. Ii is contended by the Revenue that in substance, there is use of equipment i.e. transponder by the applicant. The exclusive capacity of specific transponder is kept entirely at the disposal of the applicant. The use of transponder is ensured when it responds to the directions sent through the ground station. Such directions,* ***it*** *is stated, are akin to the operation of TV by remote control apparatus. We find it difficult to accept this contention. The fact that the transponder automatically responds to the data commands sent from the ground station network and retransmits the same data over a wider footprint area covered by Inmarsat satellite does not mean that the control and operation of transponder is with the applicant. Undoubtedly. the applicant does not operate the transponder: it gets access to the navigation transponder through the applicant's on network apparatus. The data sent by the applicant does not undergo any change or improvements through the media of transponder. In essence,* ***it*** *amounts to the provision of a communication navigational link through a facility owned by IGL and exclusively operated/controlled by it. The operation and regulation of' transponder is always with IGL.* ***It*** *is* ***also pertinent to notice that a navigation transponder unlike a communication transponder is not an active transponder in the sense it does not amplify. It is a passive transponder, as pointed out by the applicant. 'I'his*** *is* ***also a pointer that the applicant does not use the equipment (transponder) as such.***
>
> (emphasis supplied).

236. In the present case, it has been admitted that the signal uplinked by the telecasting company to the transponder are amplified and are given required strength so as they are received in a good condition in the footprint area. Thus, there is a difference between the transponder as considered in the case of ISRO and as being considered in the present cases.

237. Therefore, it is clear that what was considered by ISRO was either the Article 13.3(b) of the DTAA or clause (iva) of explanation 2 to 9(1)(vi). Moreover, considering the facts involved in the present cases, we have given detailed reasons showing how the use of a process is involved in these cases, which has not been discussed in the case of ISRO. Therefore, on facts also the present cases are different than the facts involved in the case of ISRO. Hence, the ratio of decision in the case of ISRO cannot be applied to the present case.

238. Further, the reference is made to para 11.1 to 11.3 of the OECD commentary. It is seen that in para 11.1 what is considered in OECD commentary deals with the royalty payments received as consideration for information concerning industrial, commercial or scientific experience and referred to para 2 which refers to "know-how". Para 11.1 deals with the know-how contract where one of the parties agrees to impart to the other, so that he can use them for his own account, his special knowledge and experience which remain unrevealed to the public. It was recognized that granter is not required to play any part himself in the application of the formulae granted to the licensee and that he does not guarantee the result thereof.

239. In para 11.2, it has been mentioned that the contracts relating to know-how differ from contracts for the provision of services in which one of the parties undertakes to use the customary skills of his calling to execute work himself for the other parties and it is described that such contract will generally fall under article 7.

240. Para 11.3 deals with the need of distinguishing two types of payments, namely,

(ii) payments for supply of know how; and
(iii) payments for provision of services.

241. Some criteria have been prescribed to make distinction in these two types of payments which are described as follows:-

- Contracts for the supply of know-how concern information of the kind described in paragraph 11 that already exists or concern he supply of that type of information after its development or creation and include specific provisions concerning the confidentiality of that information.
- In the case of contracts for the provision of services, the supplier undertakes to perform services which may require the use, by that supplier, of special knowledge, skill and expertise but not the transfer of such special knowledge, skill or expertise to the other party.
- In most cases involving the supply of know-how, there would generally be very little more which needs to be done by the supplier under the contract other than to supply existing information or reproduce existing material. On the other hand, a contract for the performance of services would, in the majority of cases, involve a very much greater level of expenditure by the supplier in order to perform his contractual obligations. For instance, the supplier, depending on the nature of the services to be rendered, may have to incur salaries and wages for employees engaged in researching, designing, testing, drawing and other associated activities or payments to sub-contractors for the performance of similar services.

242. It can be seen that all these paras deals with the consideration relating to know how and they do not deal with the payments relating to space segment provided in transponder capacity.

243. From the above discussion it is clear that the consideration paid by the telecasting companies to the satellite companies is for the ‘use’ and ‘right to use’ the process involved in the transponder. For the purpose of considering the said amount received by the satellite companies as ‘royalty’, it is not necessary that the payment of such consideration should be only for a ‘secret process’. The decision of this Tribunal in the case of AsiaSat (supra) has rightly held that such consideration is liable to be taxed as ‘royalty’. The decision in the case of PanAmSat (supra) has not properly appreciated the position of law as the existence of comma after the words “secret formula or process’

cannot alter the interpretation of a provision of the statute as of like in present case. In other words, simple existence of comma in the provisions relating to DTAA relating to definition of 'royalty' after the words "secret formula or process' does not change the meaning of this expression. Even after considering the commentary of OECD, TAG report and that of Klaus Vogel, it cannot be held that the consideration received by the satellite companies does not fall within the ambit of royalty. Moreover, the language of domestic law as well as the provisions of DTAA are clear and not ambiguous. Therefore, it is not necessary even to refer to the OECD model and commentaries etc. as per law explained by Apex court in the case of CIT Vs. P.V.A.L.Kulandagan (276 ITR 654). The relevant observations of their lordships from the said decision are as under:-

> " Taxation policy is within the power of the Government and section 90 of the Income-tax Act enables the Government to formulate its policy through treaties entered into by it and even such treaty treats the fiscal domicile in one State or the other and thus prevails over the other provisions of the Income-tax Act, **it would be unnecessary to refer to the terms addressed in OECD or in any of the decisions of foreign jurisdiction or in any other agreements.**"
>
> *(Emphasis ours)*

244. It was vehemently submitted by Mr. F.V. Irani that payment received by the assessee is not for the use of process. He insisted on the word "for" used in the statute to bring home the issue that the payments not being for use of process should not be considered as royalty. According to him, the telecasting companies were only interested in telecasting their programme and not in using the process. They are unconcerned with the process. We do not find any force in such argument of Ld. Counsel as, according to the needs of the business, telecasting companies know that without using the process involved in the transponder, they will not be able to telecast their programmes in the desired area at a particular point of time. Thus, the payment of consideration is for the purpose of business which is being carried on by the telecasting companies in India. Without availing the said process, it is not possible for telecasting companies to telecast their programmes in India. It has been discussed above that the main intent and purpose of paying the consideration by the telecasting company is for the purpose of their business. Availing transponders capacity is one of the main ingredients of the business of

the telecasting companies. To provide transponder capacity by the satellite company is the main part of the business activity of satellite companies. Thus, it cannot be said that telecasting companies are not interested in the process involved in the transponder as without availing the same they are unable to conduct their business in India. After entering into contract, satellite companies have no right to interfere in the process involved in the transponder except as provided in the agreement. The process is being used by the telecasting companies according to their needs. There is no control whatsoever of satellite companies over the time or programmes being telecasted by the telecasting companies. Unless the process in the transponder is not compatible enough to deliver the desired result it will be of no use to the telecasting companies. Therefore, it will be incorrect to say that telecasting companies are not interested in the process.

245. So as it relates to applicability of decision of Hon'ble Madras High Court in the case of Sky Cell Communication Ltd. Vs. DCIT (supra) to the present case, it may be mentioned that the provisions considered by their Lordships of Madras High Court were in relation to 194-J of Income-tax Act i.e., tax deduction in respect of fee for technical services. "Fee for technical services" has been defined in Explanation (b) which provides that the said expression shall have some meaning as is provided in Explanation 2 to Clause (vii) of sub-section (1) of Section 9. The definition shows that the consideration paid for the rendering of any managerial, technical or consultancy service, as also the consideration paid for the provisions of services of technical or other personnel, would be regarded as fee paid for "technical services." The said definition excludes from its ambit the consideration paid for construction, assembly or mining or like project undertaken by the recipient, as also consideration which would constitute income of the recipient chargeable under the head "salaries". It was observed that having regard to the fact that term is to be required to be understood in the context in which it is used. Under the context "fee for technical services" could only be meant to cover such things taken as are capable of being provided by way of service for a fee. It was observed that popular meaning associated with "technical" is involving or concerning applied on the industrial signs. "Technical Service" referred to in Section 9(1) contemplates rendering of "service" to the payer of the fee. Mere collection of a fee for use of a standard facility

provided to all those willing to pay for it does not amount to fee having been received for technical services. Thus, it can be seen that what was interpreted was in the context of "fee for technical services" vis-a-vis deduction of tax for such fee. Whereas in the present case the issue is entirely different. We are concerned with the provisions defining the royalty which includes in its ambit many other aspects also. However, as discussed earlier, context is much important. The context before Hon'ble Madras High Court in that case was much different than the context involved in the present appeals. Therefore, decision in the case of Sky Cell Communications Ltd. (supra) cannot be applied to the present case. It can be seen that similar view has been taken by AAR in the case of Dell International Ltd.(supra). The decision in the case of Sky Cell Communication Ltd. (supra) was distinguished by the AAR on the ground that the said decision could not be applied because the same was rendered in respect of "fee for technical services", which falls within the ambit of clause 9(1)(vii). The relevant observations are reproduced below:-

> "Counsel for the applicant has drawn our attention to the decision of Madras High Court in *Skycell Communication Ltd.* v. *Dy. CIT* [2001] 251 ITR 53/119 Taxman 496 and the decision of ITAT (Bangalore Bench) in *Wipro Ltd.* v. *ITO* [2003] 86 ITD 407 and sought to derive support from these decisions. The first one relates to mobile telephone facility provided to the subscribers. The High Court held that technical service referred to in section 9(1)(*vii*) contemplates rendering of a service to the payer of the fee. Mere collection of a 'fee' for use of a standard facility does not amount to a receipt for technical service. We are not concerned here with the clause relating to the fees for technical service. The ratio of that decision cannot be applied here. The case of Wipro, though closer to the facts of the present case did not consider the applicability of clause (*iva*) of *Explanation 2* to section 9(1)(*vi*)."
>
> (*Emphasis ours)*

246. It is also the contention of Shri F.V. Irani that the consideration received by his client could not be assessed in India for the reason that income neither has accrued nor has arisen in India as no part of the activity of the assessee can be considered to be

carried on in India. In this regard, reference was made to the decision of Hon'ble Supreme Court in the case of Ishikawajima-Harima Heavy Industries Ltd. vs. Director of Income-tax (supra). It was submitted that it is necessary that the consideration in respect of which tax is sought to be levied must be for the services which are rendered in India. It was also submitted that Explanation inserted to Section 9 with retrospective effect has not changed the position as according to the decision of Hon'ble Bombay High Court in the case of Clifford Chance (supra) even after insertion of Explanation with retrospective effect, two conditions must have to be fulfilled to bring the relevant transaction to be taxed in India, namely, i) services from which the income is earned must be utilised in India; and (ii) these services should be rendered in India.

247. We have carefully considered these submissions of Shri F.V. Irani. In the case before the Hon'ble Supreme Court, as pointed out earlier, the assessee entered into a composite indivisible turnkey project for setting up of a gas terminal in Gujarat. The contract consisted of both offshore and onshore services. It was not disputed by the parties that the assessee had a business connection in India and it had a permanent establishment in India. There was no dispute so as it relates to taxability of onshore supplies and on shore services. The dispute related only to the taxability of offshore supply and offshore services component. According to the revenue, offshore component was taxable under section 9(1)(vi)(c) of the Act as they were payments made by non-resident in respect of services utilised by a business or profession carried on by such non-resident in India or for the purpose of making or earning any income from any source in India and for considering such question that is regarding taxability of offshore supply and offshore service component under the provisions of Section 9(1)(vi) (c) it was observed that to attract the tax liability the services should be utilised in India and they should also be rendered in India. Thus, the question before their Lordships were regarding taxability of the global receipts. So far as it relates to onshore supplies and on shore services, there was no dispute regarding the taxability of the income. This case was relied upon by Shri F.V. Irani to show that the consideration received by the assessee cannot be taxed as the services rendered by the assessee and the process employed by the assessee were all outside India i.e., in outer space which is not even above the territory of

India as the satellites are not positioned over Indian territory. In our considered opinion, no help can be drawn by Shri F.V. Irani from the said decision of Hon'ble Supreme Court as the issue considered therein was in respect of global income of the assessee The issue in the present case is regarding taxability of amount received by the assessee as royalty u/s 9(1)(vi)(c). The consideration has been received by the satellite company from non-residents and it is in respect of services utilised for the purposes of a business or profession which is carried on by telecasting companies in India for the purposes of making or earning any income from any source in India. The doubt, if any, has been clarified by the insertion of Explanation inserted at the end of Section 9 by Finance Act, 2007 with retrospective effect from 01.06.1976. The Explanation read as under:-

> "*Explanation* - For the removal of doubts, it is hereby declared that for the purposes of this section, where income is deemed to accrue or arise in India under clauses (*v*), (*vi*) and (*vii*) of sub-section (1), such income shall be included in to income of the non-resident, whether or not the non-resident has a residence or place of business or business connection in India."

248. It has been clarified by the aforementioned Explanation that where the income is deemed to accrue or arise in India inter alia under clause (vi) of sub-section (1), then, such income shall be included in the total income of non-resident irrespective of the fact that the non-resident has a residence or place of business or business connection in India. Thus, existence of satellite in the territory of India is not a condition precedent for taxability of royalty received by the assessee. The necessary condition is that the amount is received by the satellite company from a person who is non-resident where the amount is payable in respect of any right, property or information used or services utilised for the purpose of a business or profession carried on by such person in India or for the purposes of making or earning any income from any source in India. Here, in the present case telecasting companies are payer of consideration to satellite companies and the telecasting companies are utilising these services for the purposes of either carrying on business or profession in India or for the purpose of making or earning any income from any source in India i.e., the amount received by them either from the persons who seek to advertise their products or from the cable operators who receive the transmitted signals

by way of television programmes. Unless the beam through which the signals are retransmitted by the transponder cover the area in India, no effective business can be carried out either by satellite company or by telecasting company in the territory of India. The purpose of establishing geostationary satellite in the orbit which inter alia covers the footprint in India by the satellite company is only for the purpose of carrying on business. Similarly, obtaining transponder capacity to telecast desired programmes in India by the telecasting companies is also a business activity for earning profits. Therefore, the ratio of aforementioned decision of Hon'ble Supreme Court in the case of Ishikawajima-Harima Heavy Industries Ltd. vs. Director of Income-tax (supra) is not applicable.

249. Now, coming to the contention of Shri F.V. Irani regarding the decision of Hon'ble Bombay High Court in the case of Clifford Chance vs. DCIT (supra). We have carefully gone through the said decision. The assessee in that case was appointed as English Law Legal Advisors for four infrastructure projects in India. Partners of the assessee in that case had visited India for rendering services from time to time aggregating to more than 90 days in the relevant financial year. The return of income filed by the assessee was in respect of services rendered in India to the clients and services rendered to these clients from abroad were excluded from that income. However, the Assessing Officer assessed the entire income of all the above mentioned four projects. So far as it relates to income for services rendered in India, there was no dispute and dispute was only with respect to global income relating to four projects. Applying the test of 90 days, as laid down in Article 15 of DTAA between India and UK, it was observed that it virtually took the assessee out of the treaty and taxability of income was to be determined only u/s 9(1). Analysing Section 9(1)(vii) (c) it was observed that two conditions have been envisaged to be fulfilled: services, which are source of income sought to be taxed in India must be; (i) utilised in India; and (ii) rendered in India, and it was held that income of the assessee for services rendered in India and utilised in India as disclosed by the assessee in its return was only income chargeable to tax in India and no income could be assessed in respect of services rendered out of India. The question before us is entirely different. Therefore, the scope of explanation was not under consideration of their Lordships of Bombay High Court. Though the reliance was placed by the revenue on the said Explanation, but, Hon'ble

High Court while considering the issue has not considered the said Explanation relevant for deciding the issue. It can be seen from the decision that the provisions which was considered by their Lordships were Section 5(2), Section 9(1)(i) and Section 9(1)(vii). The provisions of treaty which was considered were Article 15. On finding that test of 90 days was satisfied, it was ruled that the income relating to services rendered out of India could not be taxed under DTAA. Reference was made to Section 9(1) (vii) (c) and it was held that the income which has been earned by the assessee from services rendered out of India could not be taxed. Here, in the present case, the consideration which is considered as royalty is not in respect of any services rendered out of India. Consideration is paid by the telecasting company in respect of transmission of signals to the Indian viewers. Therefore, the said decision of Hon'ble Bombay High Court also cannot be applied to the facts of the present case.

APPLICABILITY OF CLAUSE (vi) OF EXPLANATION 2 TO SECTION 9(1)(vi)

250. It has been held that process is involved in the transponder. The telecasting companies are using that process to uplink and downlink the data/images by obtaining segment capacity from satellite companies for which purpose the consideration is being paid by telecasting companies to satellite companies. Satellite companies and telecasting companies both of them are carrying on these activities to earn income. The source of income of satellite companies originate from India as the telecasting companies are making payment to satellite companies out of income received by them either from viewers in India or from advertisers who telecast their advertisements in India, etc. It is also held that to fall within the ambit of word "royalty", it is not necessary that the consideration should be for secret process. Payment made for process as involved in the transponder shall also be considered as royalty which falls within the ambit of clause (iii) of Explanation 2 to Section 9(1)(vi). Having held so, the amounts received by satellite companies shall also fall within clause (vi) of Explanation 2 to Section 9(1)(vi) which read as under:-

"(vi) the rendering of any services in connection with the activities referred to in sub-clauses (i) to (iv), (iva) and (v)."

251. Clause (iii) to Explanation 2 to Section 9(1)(vi) is covered by Clause (vi) reproduced above. The process being one of the activities referred to in clause (iii), the services rendered in connection therewith shall also fall within clause (vi) of Explanation 2 to Section 9(1)(vi) de horse the applicability of clause (iii) of Explanation 2 to Section 9(1)(vi). Therefore, even if the claim of Ld representatives of the satellite companies is accepted that the satellite companies are only rendering the services by making available the process of transponder to the telecasting companies, then also, these are services rendered by satellite companies to the telecasting companies with respect to the user of process in the transponder. Thus, the clause (vi) of Explanation 2 to Section 9(1)(vi) is also applicable to the present cases.

SUMMARY OF THE FINDINGS

252. To briefly state, our findings in respect of issues raised and argued before us are as under:-

On facts, it is held that a process is involved in the transponder through which the telecasting companies are able to uplink the desired images/data and downlink the same in the desired area which inter alia covers Indian territory. For the purpose of falling within the scope of royalty, it is not necessary that the process which has been used and in respect of which the consideration is paid should be a secret process. Even consideration paid in respect of simple process shall be covered by the scope of royalty. The scope of "royalty" has not been restricted either by the domestic provisions or by the provisions contained in respective DTAA's. Insertion of 'comma' after the words "secret formula or process" in the respective DTAA's does not give different interpretation to the provisions of DTAA as compared to the provisions of domestic law. The process, even if it is construed to be intellectual property, for falling within the ambit of royalty, it is not necessary that the process should be protected one. The simple process, even if it is intellectual property, will fall within the ambit of royalty. For holding that consideration

is in respect of royalty, it is not necessary that the instruments through which the process is carried on should be in the control or possession of the person who is receiving the payment. The context and factual situation has to be kept in mind while finding out that whether a process was actually 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 control of the process, by either of them will be through sophisticated instruments either installed at the ground stations owned by the satellite companies or through the instruments installed at the earth stations owned and operated by telecasting companies. The use of process, according to agreement, was provided by the satellite companies to the telecasting companies whereby the telecasting companies are enabled to telecast their programmes by uplinking and downlinking the same with the help of that process. Time of telecast and the nature of programme, all depends upon the telecasting companies and, thus, they are using that process. The consideration paid by telecasting companies to satellite companies is for the purpose of providing use and right to use of the process and, thus, it is royalty within the meaning of clause (iii) of Explanation 2 to Section 9(1)(vi). It is also a royalty within the meaning of clause (vi) of Explanation 2 to Section 9(1)(vi).

253. In the light of the above discussion, our answer to the proposed three questions are as under:-

*Question No.1*

*Whether on the facts and in the circumstances of the case, the services rendered by the assessees involved in these appeals, through their satellites for telecommunication or broadcasting, amount to 'secret process' or only 'process'?*

Answer

On the facts and in the circumstances of the case, the services rendered by the assessees involved in these appeals through their satellites for telecommunication or broadcasting amounts to "process."

*Question No.2*

*Whether the term 'secret' appearing in the phrase 'secret formula or process' in Explanation 2 to Section 9(1)(vi) and in the relevant article of the Treaties, will qualify the word 'process' also? If so, whether the services rendered through secret process only will be covered within the meaning of royalty?*

Answer

The terms "secret" appearing in the phrase "secret formula or process" in Explanation 2 to Section 9(1)(vi) and in the relevant Article of DTAA will not qualify the word "process." Therefore, to fall within the meaning of royalty as envisaged in these provisions, it is not necessary that the services rendered must be through "secret process" only. Even services rendered through simple process will also be covered within the meaning of royalty.

Question No.3

*Whether, on the facts and in the circumstances of the case, the payment received by the assessees from their customers on account of use of their satellites for telecommunication and broadcasting, amounts to 'royalty' and if so, whether the same is liable to tax under section 9(1)(vi) of the Income Tax Act, 1961 read with relevant provisions of DTAA?*

Answer

The payments received by assessee from their customers is on account of use of process involved in the transponder and it amounts to royalty within the meaning of Section 9(1)(vi) of IT Act, 1961. It also amounts to royalty within the meaning of respective Articles of DTAA.

254. Before parting, it may be mentioned that all the learned representatives of the respective assessees and revenue have argued their cases extensively. We have tried our best to incorporate their submissions in this order. While deciding the questions proposed to be answered by this Special Bench, we have kept in consideration all those

submissions, arguments and case law. However, for the sake of brevity and for avoiding repetition some of the authorities may not find place in the conclusion arrived at by us, but that does not mean that the same have not been given due consideration. We put our appreciation on record for the detailed and elaborate arguments advanced by the learned representatives of the assessees and revenue which enabled us to answer the proposed questions.

The order pronounced in the open court on 16th October 2009.

| [R.C. SHARMA] | [VIMAL GANDHI] | [I.P. BANSAL] |
|---|---|---|
| ACCOUNTANT MEMBER | PRESIDENT | JUDICIAL MEMBER |

Dated, October 16th, 2009.

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Copy forwarded to: -

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2. Respondent
3. CIT
4. CIT(A)
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By Order,

Deputy Registrar,
ITAT, Delhi Benches