INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "G": NEW DELHI
BEFORE SHRI H.S.SIDHU, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA No.3593/Del/2011 (Assessment Year: 2005-06)
ITA No.3594/Del/2011 (Assessment Year: 2006-07)

DDIT, Circle-2(2), Intl Taxation, New Delhi	Vs.	Shin Satellite Public Co. Ltd, C/o. Mohinder Puri & Co., 1A-D, Vandana, 11 Tolstoy Marg, New Delhi PAN:AAGCS4481E
(Appellant)		(Respondent)

ITA No.5827/Del/2011
(Assessment Year: 2008-09)

Shin Satellite Public Co. Ltd, C/o. Mohinder Puri & Co., 1A-D, Vandana, 11 Tolstoy Marg, New Delhi PAN:AAGCS4481E	Vs.	DDIT, Circle-2(2), Intl Taxation, New Delhi
(Appellant)		(Respondent)

ITA No.309/Del/2014
(Assessment Year: 2010-11)

Thaicom Public Co. Ltd, (formerly Shin Satellite Public Co. Ltd) C/o. Mohinder Puri & Co., 1A-D, Vandana, 11 Tolstoy Marg, New Delhi PAN:AAGCS4481E	Vs.	DDIT, Circle-2(2), Intl Taxation, New Delhi
(Appellant)		(Respondent)

Assessee by :	Shri F V Irani, Adv Shri Arun H Mehta, Adv
Revenue by:	Shri TS Shivkumar, CIT DR
Date of Hearing	26/09/2017
Date of pronouncement	16/10/2017

ORDER

PER PRASHANT MAHARISHI, A. M.

1. ITA No. 3593/Del/2011 is filed by the revenue against the order of the ld CIT(A)-XXII, New Delhi dated 10.05.2011 for the Assessment Year 2005-06 raising following grounds of appeal:-

"1. On the facts and circumstances of the case, the ld CIT(A) has erred in holding that the receipts of the assessee are in nature of Business Income.
2. On the facts and circumstances of the case, ld CIT(A) erred in inferring that the receipts of the assessee are not in nature of royalties.
3. On the facts and circumstances of the case, the ld CIT(A) erred in inferring that the receipts of the assessee are not taxable in India.
4. On the facts and circumstances of the case ld CIT(A) erred in deleting the interest charged u/s 234B and 234D of the Act."

2. The revenue has also filed appeal for AY 2006-07 against the order of the ld CIT(A)-XXII, New Delhi dated 11.05.2011 raising following grounds of appeal:-

"1. On the facts and circumstances of the case, the ld CIT(A) has erred in holding that the receipts of the assessee are in nature of Business Income.
2. On the facts and circumstances of the case, ld CIT(A) erred in inferring that the receipts of the assessee are not in nature of royalties.
3. On the facts and circumstances of the case, the ld CIT(A) erred in inferring that the receipts of the assessee are not taxable in India.
4. On the facts and circumstances of the case ld CIT(A) erred in deleting the interest charged u/s 234B and 234D of the Act."

3. The assessee filed appeal in ITA No. 5827/Del/2011 for the Assessment Year 2008-07 against the order of the ld Assessing Officer dated 29.09.2011 passed u/s 143(3) of the Act read with Section 144C(1) of the Act on direction of ld Dispute Resolution Panel-II, New Delhi dated 26.09.2011, raising following grounds of appeal:-

"1. The order of the Dy. Director of Income-tax, Circle 2(2), International Taxation, New Delhi (the DDIT) read with the directions of DRP. are bad in law and on facts.
2. The DDIT erred on facts and in law, in assessing the Appellant to tax in respect of the income earned by it from providing telecasting services. The DDIT erred in following, in this regard, the Assessment Orders passed in the Appellant's case for earlier Assessment years.
3. The DDIT failed to appreciate that the Appellant was not liable to Indian Taxation at all in respect of the income earned by it from providing telecasting services.
4. The DDIT erred, on facts and in law, in holding that the income earned by the Appellant from providing telecasting services ("the aforesaid Income") was taxable in India:
   (i) under the provisions of the Indian Income-tax Act, 1961 ("the Act"), and
   (ii) under the provisions of the Agreement for the Avoidance of Double Taxation between India and Thailand ("the DTA")

4.1. The DDIT erred, on facts and in law, in holding that the aforesaid income was taxable in India by virtue of Explanation 2 (iii) and (iva) to Section 9(1) (vi) of the Act.

4.2. The DDIT erred, on facts and in law, in alleging that the aforesaid Income was received by the Appellant for the use as well as right to use a process within Explanation 2(iii) to Section 9(l)(vi) of the Act, and for the right to use any industrial, commercial or scientific equipment within Explanation 2 (iva) to section 9(1) (vi) of the Act and sub¬section (c) of section 9(l)(vi).

5. The DDIT erred, on facts and in law, in holding that the aforesaid income was taxable in India under Article 12 of the DTA.

6.1 The DDIT, in any event, acted contrary to the principles of natural justice and erred on facts and in law, in holding that the receipts of the Appellant from non-residents were taxable in India.

6.2 The DDIT ought to have held that the receipts of the Appellant from non residents were not liable to taxation in India.

(i) under the provisions of the Act
(ii) under the provisions of the DTA

6.2 The DDIT acted contrary to the principles of the natural justice and on the basis of conjectures, suspicion and surmises in alleging that the non-resident channels had a Permanent Establishment ("PE") or a fixed base in India.

7.1 The quantum of Income held by the DDIT to be taxable in India in any event, erroneous and based upon conjectures, suspicion and surmises.

7.2 The DDIT erred in attributing the entire amount received by the Appellant from non resident channels to the Appellant's alleged Indian operations.

8. The DDIT erred in holding that the revenues earned by the Appellant from consultancy services were taxable in India:

(i) under the Act
(ii) under the DTA

5. The DDIT erred, on facts and in law, in holding that the aforesaid income was taxable in India under Article 12 of the DTA.

6.1 The DDIT, in any event, acted contrary to the principles of natural justice and erred on facts and in law, in holding that the receipts of the Appellant from non-residents were taxable in India.

6.2 The DDIT ought to have held that the receipts of the Appellant from non residents were not liable to taxation in India.

(i) under the provisions of the Act
(ii) under the provisions of the DTA

6.2 The DDIT acted contrary to the principles of the natural justice and on the basis of conjectures, suspicion and surmises in alleging that the non resident channels had a Permanent Establishment ("PE") or a fixed base in India.

7.1 The quantum of Income held by the DDIT to be taxable in India is in any event, erroneous and based upon conjectures, suspicion and surmises.

7.2 The DDIT erred in attributing the entire amount received by the Appellant from non-resident channels to the Appellant's alleged Indian operations.

8. The DDIT erred in holding that the revenues earned by the Appellant from consultancy services were taxable in India:
   (i) under the Act
   (ii) under the DTA

9. The DDIT erred:

   (i) in relying upon judicial precedents which were distinguishable from and had no application to the Appellant's case;
   (ii) in alleging that the satellites were owned by the Appellant;
   (iii) in alleging that the alleged process of telecasting was secret;
   (iv) in alleging that the amount received by the Assessee is for use as well as the right to use a process and not for providing services;
   (v) in alleging that the amount received by the Appellant for providing telecasting services was disproportionate to the cost of transponder;
   (vi) in not following the judgement cited by the Appellant including as passed in the Appellant's own case and order of High Court of Delhi in the case of Asia Satellite Telecommunications Co. Limited v. DIT, ITA No. 131 of 2003.

10. The DDIT erred in directing the levy of interest under section 234B of the Act. The Appellant says that the levy of such interest is illegal and without jurisdiction and denies its liability to such interest.
11. The levy of interest under section 234D of the Act is illegal and without jurisdiction.
12. The DDIT erred in initiating penalty proceedings under section 271 (1) (c) of the Act,"

4. The assessee filed this appeal against the order of the ld Assessing Officer passed u/s 143(3) read with section 144C of the Act dated 30.10.2013 on directions of the ld Dispute Resolution Panel-II, New Delhi dated 09.10.2013 raising following grounds of appeal in ITA No. 309/Del/2014 for the Assessment Year 2010-11:-

1. The order of the learned Dy. Director of Income-tax, Circle 2(2), International Taxation, New Delhi ("DDIT") read with the directions of DRP under section 144C, are bad in law and on facts.
2. The Id. DDIT erred, on facts and in law, in assessing the Assessee to tax in respect of the income earned by it from providing transponder services. The Id. DDIT erred in following, in this regard, the Assessment Orders passed in the Assessee's case for earlier Assessment years.
3. The Id. DDIT failed to appreciate that the Assessee was not liable to Indian Taxation at all in respect of the income earned by it from providing transponder services.
4. The Id. DDIT erred, on facts and in law, in holding that the income earned by the Assessee from providing transponder services ("the aforesaid income") was taxable in India:
   (i) under the provisions of the Indian Income-tax Act, 1961 ("the Act"), and
   (ii) under the provisions of the Agreement for the Avoidance of Double Taxation between India and Thailand ("the DTA")

5.1. The Id. DDIT erred, on facts and in law, in alleging that the aforesaid income was received by the Assessee for the use as well as right to use a process within Explanation 2(iii) to Section 9(l)(vi) of the Act, and for the right to use any industrial, commercial or scientific equipment within Explanation 2 (iva) to section 9(l)(vi) of the Act.

5.2. The Id. DDIT erred, on facts and in law, in holding that the aforesaid income was taxable in India by virtue of Explanation 2 (iii) and (iva) to Section 9 (l)(vi) of the Act read with Explanation 5 and Explanation 6 as retrospectively introduced by Finance Act, 2012 under Section 9 (l)(vi).

5.3. The Id. DDIT erred in holding that the meaning of 'Royalty' under the DTA got amended by the aforesaid Explanation 5 and 6 as retrospectively introduced by Finance Act 2012.

6.1. The Id. DDIT erred, on facts and in law, in holding that the aforesaid income was taxable in India under Article 12 of the DTA.

6.2. The Id. DDIT erred in placing reliance on Article 3(2) of the DTA, the provisions of which are not attracted on the facts.

6.3. The Id. DDIT erred in holding that the expression 'process' is a 'term' within meaning of the DTA.

6.4. The Id. DDIT failed to appreciate the fact that there is no change in the definition of Royalty under the DTA and that the retrospective amendments to section 9(l)(vi) by Finance Act 2012 have no bearing in the Assessee's case.

7. The Id. DDIT erred in holding that the revenues earned by the Assessee from consultancy services were taxable in India:
   (i) under the Act
   (ii) under the DTA

8. The Id. DDIT erred:
   (i) in relying upon judicial precedents having no application to the Assessee's case;
   (ii) in alleging that the satellites were owned by the Assessee;
   (iii) in alleging thatthe alleged processof providing transponder services was secret;
   (iv) in alleging that the amount received by the Assessee is for use as well as the right to use a process and not for providing services;
   (v) in not following the judgments cited by the Assessee including those passed in its own case.

9. The Id. DDIT erred in directing the levy of interest under section 234B of the Act. The Assessee submits that the levy of such interest is illegal and without jurisdiction and denies its liability to such interest.

10. The levy of interest under section 234D of the Act is illegal and without jurisdiction.

11. The Id. DDIT erred in initiating penalty proceedings under section 271(1)(c) of the Act."

5. Brief facts of the case are that assessee is a company incorporated under the laws of Thailand engaged in the business of providing digital broadcast services through its transponder as well as consultancy services to its customers, both resident in India as well as non-resident. The assessment in the case of the assessee for earlier years were passed by the Assessing Officer and confirmed by the ld CIT(A) holding that receipts accruing and arising in India to the assessee is royalty income. Consequently, after issuing show cause notice the ld Assessing Officer held that above income is chargeable to tax as royalty as per article 12 of the DTAA between India and Thailand as well as under the Indian Income Tax Act u/s 9(1)(vi) of the Act. The ld Assessing Officer based on the finding of the earlier years also held that the assessee have office in India thereby a permanent establishment in India on account of which payments received by the assessee are liable to tax in India. Consequently, on these facts for Assessment Year 2005-06 the total receipts of the assessee of Rs. 155020870/- were held to be chargeable to tax in India and taxed at rates prescribed under Article 12 of the DTAA between India and Thailand.

6. Similarly, for Assessment Year 2006-07 the total receipts of the assessee of Rs. 131880086/- were also taxed on similar lines. However, because of the some of the amount receipt in respect of the agreement were entered into before 01.06.2005 they were held to be chargeable to tax @10% as per provisions of section 115A of the Act. The above orders were challenged before the ld CIT(A) who vide order dated 10.05.2011 and 11.05.2011 allowed the claim of the assessee relying on the decision of Hon'ble Delhi High Court and the coordinate bench has held that the service charges received from all its customers in India whether resident and non-resident are not liable to taxation in the hands of the assessee. Therefore, assessee is in appeal for these two years.

7. For Assessment Year 2008-09 and 2010-11 the ld Assessing Officer after the direction of the ld Dispute Resolution Panel has held that similar income is chargeable to tax on the basis of double taxation avoidance agreement between India and Thailand held total receipt of Rs. 8390362/- for AY 2009-10 and Rs. 147874688/- for Assessment Year 2010-11 is chargeable to tax in India as royalty. Therefore, assessee is in appeal before us.

8. The ld Authorised Representative Shri FB Irami, Advocate submitted that all these four appeals are covered in favour of the assessee in view of the decision of the Hon'ble Delhi

High Court dated 08.02.2016 in assessee's own case in ITA NO. 500/2012 and ITA NO. 244/2014, wherein the Hon'ble High Court has dealt with the above issues on identical facts and circumstances vide para No. 28 to 60 of that decision holding that the income of the assessee is not chargeable to tax in India as royalty. He therefore, submitted that appeals for AY 2005-06 and 2006-07 filed by the Revenue are covered against the revenue and therefore, these appeals deserve to be dismissed and appeal of the for AY 2008-09 and 2010-11 deserves to be allowed accordingly.

9. The ld Departmental Representative relied upon the orders of the lower authorities however, could not controvert that the issue involved in these four appeals are covered in favour of the assessee.

10. We have carefully considered the rival contentions and also perused the orders of the lower authorities. Admittedly, the Hon'ble Delhi High Court vide order dated 80.02.2016 has considered the above issue in ITA No. 500/2012 AY 2007-08 and ITa No. 244/2014 for AY 2009-10 on the identical facts and circumstances deciding that the amendment made by the Finance Act 2012 will not affect Article 12 of the DTAA and therefore, the income earned by the assessee cannot be held to be royalty and consequently to chargeable to tax in India. The Hon'ble Delhi High Court held in 382 ITR 114 as under:-

> "28. The two clauses as applicable to data transmission services have been the subject of debate in courts as well as business circles. The debate was finally settled by the judgment delivered in Asia Satellite. In Asia Satellite this court held that income from data transmission services would not qualify as royalty in order for it to be taxable under the Act. The court first recognized that the definition of royalty in the section is with respect to permission granted to use the right in respect of the patent, invention, process, etc., all essentially forms of intellectual property. This permission restricts itself merely to the letting of the licenced asset. The permission does not go so far as to allow alienation of the asset itself. That being said, it is not so restricted as to qualify as a case where the licensor uses the asset himself, albeit for the purposes of his customers. The court took note of the features of the agreements between the assessee in that case, which was a foreign company, incorporated in Hong Kong, and its customers, which were television channels. The agreement was essentially one of allocation of the transponder capacity available on the satellite to enable the channels to relay their signals. The customers had their own relaying facilities. No different from the case at hand, the transponder receives the signal, amplifies it, and downlinks it to facilitate transmission of the signals. Quoting the judgment of the Authority for Advance Rulings in ISRO Satellite Centre [ISAC], In re [2008] 307 ITR 59 (AAR), the court held that it becomes clear that all the customers get through the agreement with the assessee is mere access to a broadband width available in the

transponder. The control over the parts of the satellite and naturally the transponder remains with the assessee. At no point does the assessee cede control over the satellite to the customers. Logically therefore, since the transponder is a part of the satellite that cannot be severed from it, there can be no independent control of the transponder without control of the satellite itself. The Authority for Advance Rulings had specifically rejected the Revenue's contention that in substance there is use of equipment ; that being the transponder. 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 does not mean that control and operation of the transponder is with the customer. Interestingly, this has not escaped the notice of the Assessing Officer, except that the assessment order conveniently employs the in-severability of the transponder from the satellite to assert that that the technology of the satellite would qualify as the "secret process" but conveniently divorces the transponder from the satellite while trying to prove that there is use of the transponder as an equipment. However, equipment as envisaged in the section must be capable of functioning independently, or in other words, must be able to perform an activity by itself without material reliance on another. Essentially therefore, Asia Satellite, held that the presence of control was a critical factor in adjudging whether there was "use" of a particular process. On the question of whether the "process" so used must be a secret process or not, the judgment did not return any finding specifically, other than quoting with approval the OECD Commentary which alludes to the indispensability of the secrecy of the process.

29. The Revenue argues that critical aspects of this judgment, primarily that the function performed by the transponder could not be categorised as a "process" and that even in the event it could be, there was no "use" of this process since there was no control exercised by the customers, is no longer good law in light of the inclusion of Explanations 4-6 by the Finance Act, 2012. In other words the Revenue contends that a mere reading of Explanations 4-6 will go to show that they are clarificatory and are therefore automatically retrospective. By this reason, as clarificatory amendments do, these explanations relate back to the time when the main provision of section 9(1)(vi) first came into force. By logical extension, the judgment in Asia Satellite was based on a misinterpretation of the section and thus no longer holds the field or corresponds to the correct interpretation of the definition of royalty.

30. Undoubtedly, the Legislature is competent to amend a provision that operates retrospectively or prospectively. None the less, when disputes as to their applicability arise in court, it is the actual substance of the amendment that determines its ultimate operation and not the bare language in which such amendment is couched. Two judgments of note have succeeded the Finance Act, 2012 in this context. In DIT v. TV Today Network Ltd. I. T. A. No. 600 of 2012 decided on November 12, 2013, a Division Bench of this court was confronted with the question of taxability of income from data transmission services. Answering the question in favour of the Revenue, the court held that as far as the domestic taxability of the said income is concerned, the Finance Act, 2012 mandates it to be as such. Interestingly however, the court did not rule out any

relief that the assessees may be entitled to by virtue of the Double Taxation Avoidance Agreement between India and the United States for the simple reason that the Income-tax Appellate Tribunal had not rendered any finding in that regard. Resultantly, the court remitted the matter to the Income-tax Appellate Tribunal to decide that question :

> "In an appeal under section 260A of the Act, we are not required to consider the constitutional validity and vires of the said amendments but have to apply the amended provision. In view of the said statutory amendments, the reasoning given by the Tribunal cannot be sus tained and has to be reversed.
>
> Learned counsel for the respondent-assessee has however rightly drawn our attention to the assessment order in which the assessee had also pleaded and submitted that the payments made cannot be considered as royalty or fee for included services as defined in the double taxation avoidance agreement (DTAA) between India and United States of America. It is submitted that the payments were business profit and accordingly not taxable or chargeable to tax under the Act . . . The Tribunal in the impugned order has not referred to and examined the effect of the Double Taxation Avoidance Agree ments between India and the USA and whether the assessee is enti tled to benefit or advantage under the said agreement and therefore, payments made were not taxable in India in the hands of the recipi ent. Accordingly while answering the question of law in favour of the Revenue we pass an order of remit and ask the Tribunal to decide the other contention raised by the respondent assessee ; whether the payments made nevertheless remain untaxable in view of the provi sions of the double taxation avoidance agreement."

31. In a judgment by the Madras High Court in Verizon Communications Singapore Pte. Ltd. v. ITO (International Taxation) [2014] 361 ITR 575 (Mad), the court held the Explanations to be applicable to not only the domestic definition but also carried them to influence the meaning of royalty under article 12. Notably, in both cases, the clarificatory nature of the amendment was not questioned, but was instead applied squarely to assessment years predating the amendment. The crucial difference between the judgments however lies in the application of the amendments to the double taxation avoidance agreement. While TV Today (supra) recognises that the question will have to be decided and the submission argued, Verizon cites no reason for the extension of the amendments to the double taxation avoidance agreement.

32. Explanations 4-6 are designed as clarificatory amendments. Unarguably they have all the apparent characteristics of one. The words "for the removal of doubts, it is hereby clarified . . . includes and has always included" qualify the interpretation in Explanation 5. In Explanation 6, the same words have been modified and they state "includes and has always deemed to have always included". This is the standard language used to communicate an intended retrospective effect.

33. There is a general presumption against retrospectivity of an amendment. This is the principle of lex prospicit non respicit which implies that unless explicitly

stated, a piece of legislation is presumed not to be intended to have retrospective operation.

34. Most recently in CIT v. Vatika Township P. Ltd. [2014] 367 ITR 466 (SC) ; [2015] 1 SCC 1, the Constitution Bench, while quoting Govinddas v. ITO [1976] 103 ITR 123 (SC) ; [1976] 1 SCC 906 and CIT v. Scindia Steam Navigation Company Ltd. [1961] 42 ITR 589 (SC) ; [1962] 1 SCR 788 held as follows (page 486 of 367 ITR) :

> "Of the various rules guiding how a legislation has to be inter preted, one established rule is that unless a contrary intention appears, a legislation is presumed not to be intended to have a ret rospective operation. The idea behind the rule is that a current law should govern current activities. Law passed today cannot apply to the events of the past. If we do something today, we do it keeping in view the law of today and in force and not tomorrow's backward adjustment of it. Our belief in the nature of the law is founded on the bed rock that every human being is entitled to arrange his affairs by relying on the existing law and should not find that his plans have been retrospectively upset. This principle of law is known as lex pro spicit non respicit : law looks forward not backward. As was observed in Phillips v. Eyre (1870) LR 6 QB 1, a retrospective legislation is con trary to the general principle that legislation by which the conduct of mankind is to be regulated when introduced for the first time to deal with future acts ought not to change the character of past transactions carried on upon the faith of the then existing law."

35. This presumption against retrospectivity stems from an indispensable need for each rule of law to answer to the principle of fairness. L'Office Cherifien des Phosphates v. Yamashita-Shinnihon Steamship Company Ltd. [1994] 1 AC 486 (HL). This presumption can be displaced in either of two situations, (i) where the words of the amendment specifically indicate the retroactivity of the law or (ii) in the case of declaratory or clarificatory amendments. Clarificatory amendments are a special class of amendments the object of which is self-evident, that is to say, it purports to "clarify" law that has already been legislated, essentially an Act to remove doubts existing as to the meaning or effect of a statute. Naturally therefore, they must be read as intrinsic and implicit, but overlooked elements of the original section itself. They thus dictate the interpretation of law since the time it was first drafted or brought into force. However, in order for such clarificatory amendments to be sustained as retrospective, they must answer to this description.

36. A clarificatory amendment presumes the existence of a provision the language of which is obscure, ambiguous, may have made an obvious omission, or is capable of more than one meaning. In such case, a subsequent provision dealing with the same subject may throw light upon it. Yet, it is not every time that the Legislature characterises an amendment as retrospective that the court will give such effect to it. This is not in derogation of the express words of the law in question, (which as a matter of course must be the first to be given effect to), but because the law which was intended to be given retrospective effect to as a clarificatory amendment, is in its true nature one that expands the scope of the

section it seeks to clarify, and resultantly introduces new principles, upon which liabilities might arise. Such amendments though framed as clarificatory, are in fact transformative substantive amendments, and incapable of being given retrospective effect. In R. Rajagopal Reddy v. Padmini Chandrasekharan [1995] 213 ITR 340 (SC) ; [1995] 2 SCC 630, it was held that the use of the words "it is declared" is not conclusive that the Act is declaratory because it may be used to introduce new rules of law. If the amendment changes the law it is not presumed to be retrospective irrespective of the fact that the phrase used is "it is declared" or "for the removal of doubts". In determining, therefore, the nature of the Act, regard must be had to the substance rather than to form. While adjudging whether an amendment was clarificatory or substantive in nature, and whether it will have retrospective effect or not, it was held in CIT v. Gold Coin Health Food (P.) Ltd. [2008] 304 ITR 308 (SC) ; [2008] 9 SCC 622 and CIT v. Podar Cement (P.) Ltd. [1997] 226 ITR 625 (SC) ; [1997] 5 SCC 482 that, (i) the circumstances under which the amendment was brought in existence, (ii) the consequences of the amendment, and (iii) the scheme of the statute prior and subsequent to the amendment will have to be taken note of.

37. An important question, which arises in this context, is whether a "clarificatory" amendment remains true to its nature when it purports to annul, or has the undeniable effect of annulling, an interpretation given by the courts to the term sought to be clarified. In other words, does the rule against clarificatory amendments laying down new principles of law extend to situations where law had been judicially interpreted and the Legislature seeks to overcome it by declaring that the law in question was never meant to have the import given to it by the court ? The general position of the courts in this regard is where the purpose of a special interpretive statute is to correct a judicial interpretation of a prior law, which the Legislature considers inaccurate, the effect is prospective. Any other result would make the Legislature a court of last resort. United States v. Gilmore 8 Wall (75 US) 330, 19 L Ed 396 (1869), Peony Park v. O'Malley 223 F.2d 668 (8th Cir. 1955). It does not mean that the Legislature does not have the power to override the judicial decisions which in its opinion it deems as incorrect, however to respect the separation of legal powers and to avoid making a Legislature a court of last resort, the amendments can be made prospective only (Ref. County of Sacramento v. State of California 134 Cal. App. 3d 428, In re, Marriage of Davies, In re 105 Ill App 3d 661 [1982]).

38. The circumstances in this case could very well go to show that the amendment was no more than an exercise in undoing an interpretation of the court which removed income from data transmission services from taxability under section 9(1)(vi). It would also be difficult, if not impossible to argue, that inclusion of a certain specific category of services or payments within the ambit of a definition alludes not to an attempt to illuminate or clarify a perceived ambiguity or obscurity as to interpretation of the definition itself, but towards enlarging its scope. Predicated upon this, the retrospectivity of the amendment could well be a contentious issue. Be that as it may, this court is disinclined to conclusively determine or record a finding as to whether the amendment to section 9(1)(vi) is indeed merely clarificatory as the Revenue suggests it is, or prospective, given

what its nature may truly be. The issue of taxability of the income of the assessees in this case may be resolved without redressal of the above question purely because the assessee has not pressed this line of arguments before the court and has instead stated that even if it were to be assumed that the contention of the Revenue is correct, the ultimate taxability of this income shall rest on the interpretation of the terms of the double taxation avoidance agreements. Learned Counsel for the assessee has therefore contended that even if the first question is answered in favour of the Revenue, the income shall nevertheless escape the Act by reason of the double taxation avoidance agreement. The court therefore proceeds with the assumption that the amendment is retrospective and the income is taxable under the Act.

39. It is now essential to decide the second question, i.e., whether the assessees in the present case will obtain any relief from the provisions of the double taxation avoidance agreement. Under article 12 of the double taxation avoidance agreement, the general rule states that whereas the State of residence shall have the primary right to tax royalties, the source State shall concurrently have the right to tax the income, to the extent of 15 per cent. of the total income. Before the amendment brought about by the Finance Act of 2012, the definition of royalty under the Act and the double taxation avoidance agreement were treated as pari materia. The definitions are reproduced below :

> Article 12(3), Indo-Thai Double Taxation Avoidance Agreement :
>
> "3. The term 'royalties' as used in this article means payments of any kind received as a consideration for the alienation or the use of, or the right to use, any copyright of literary, artistic or scientific work (including cinematograph films, phonographic records and films or tapes for radio or television broadcasting), any patent, trade mark, design or model, plan, secret formula or process, or for the use of, or the right to use industrial, commercial or scientific equipment, or for information concerning industrial, commercial or scientific experience."
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> Article 12(4), Indo-Netherlands Double Taxation Avoidance Agreement :
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> "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 cinemat ograph films, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, com mercial or scientific experience."
>
> Section 9(1)(vi), Explanation 2, Income-tax Act, 1961 :
>
> "(iii) the use of any patent, invention, model, design, secret for mula or process or trade mark or similar property."

40. In Asia Satellite the court, while interpreting the definition of royalty under the Act, placed reliance on the definition in the OECD Model Convention. Similar cases, before the tax tribunals through the nation, even while disagreeing on the

ultimate import of the definition of the word royalty in the context of data transmission services, systematically and without exception, have treated the two definitions as pari materia. This court cannot take a different view, nor is inclined to disagree with this approach for it is imperative that definitions that are similarly worded be interpreted similarly in order to avoid incongruity between the two. This is, of course, unless law mandates that they be treated differently. The Finance Act of 2012 has now, as observed earlier, introduced Explanations 4, 5, and 6 to the section 9(1)(vi). The question is therefore, whether in an attempt to interpret the two definitions uniformly, i.e. the domestic definition and the treaty definition, the amendments will have to be read into the treaty as well. In essence, will the interpretation given to the double taxation avoidance agreement fluctuate with successive Finance Act amendments, whether retrospective or prospective ? The Revenue argues that it must, while the assessees argue to the contrary. This court is inclined to uphold the contention of the latter.

41. This court is of the view that no amendment to the Act, whether retrospective or prospective can be read in a manner so as to extend in operation to the terms of an international treaty. In other words, a clarificatory or declaratory amendment, much less one which may seek to overcome an unwelcome judicial interpretation of law, cannot be allowed to have the same retroactive effect on an international instrument effected between two sovereign states prior to such amendment. In the context of international law, while not every attempt to subvert the obligations under the treaty is a breach, it is nevertheless a failure to give effect to the intended trajectory of the treaty. Employing interpretive amendments in domestic law as a means to imply contoured effects in the enforcement of treaties is one such attempt, which falls just short of a breach, but is nevertheless, in the opinion of this court, indefensible.

42. It takes little imagination to comprehend the extent and length of negotiations that take place when two nations decide to regulate the reach and application of their legitimate taxing powers. In Union of India v. Azadi Bachao Andolan [2003] 263 ITR 706 (SC), where the Indo-Mauritius Double Taxation Avoidance Convention was before the Supreme Court, the court said the following of the essential nature of these treaties (page 751) :

> "An important principle which needs to be kept in mind in the interpretation of the provisions of an international treaty, including one for double taxation relief is that treaties are negotiated and entered into at a political level and have several considerations as their bases. Commenting on this aspect of the matter, David R. Davis in Principles of International Double Taxation Relief, (see David R. Davis, Principles of International Double Taxation Relief, Pg.4 (Lon don Sweet and Maxwell, 1985)) points out that the main function of a Double Taxation Avoidance Treaty should be seen in the context of aiding commercial relations between treaty partners and as being essentially a bargain between two treaty countries as to the division of tax revenues between them in respect of income falling to be taxed in both jurisdictions. It is observed (vide para. 1.06) :

'The benefits and detriments of a double taxation treaty will pro bably only be truly reciprocal where the flow of trade and investment between treaty partners is generally in balance. Where this is not the case, the benefits of the treaty may be weighted more in favour of one treaty partner than the other, even though the provisions of the treaty are expressed in reciprocal terms. This has been identified as occur ring in relation to tax treaties between developed and developing countries, where the flow of trade and investment is largely one way.

Because treaty negotiations are largely a bargaining process with each side seeking concessions from the other, the final agreement will often represent a number of compromises, and it may be uncertain as to whether a full and sufficient quid pro quo is obtained by both sides.' "

43. The Vienna Convention on the Law of Treaties, 1969 ("VCLT") is universally accepted as authoritatively laying down the principles governing the law of treaties. Article 39 therein states the general rule regarding the amendment of treaties and provides that a treaty may be amended by agreement between the parties. The rules laid down in Part II of the Vienna Convention on the Law of Treaties apply to such an agreement except in so far as the treaty may otherwise provide. This provision therefore clearly states that an amendment to a treaty must be brought about by agreement between the parties. Unilateral amendments to treaties are therefore categorically prohibited.

44. We do not however rest our decision on the principles of the Vienna Convention on the Law of Treaties, but root it in the inability of Parliament to effect amendments to international instruments and directly and logically, the illegality of any executive action which seeks to apply domestic law amendments to the terms of the treaty, thereby indirectly, but effectively amending the treaty unilaterally. As held in Azadi Bachao Andolan [2003] 263 ITR 706 (SC) these treaties are creations of a different process subject to negotiations by sovereign nations. The Madras High Court, in CIT v. VR. S.R.M. Firm [1994] 208 ITR 400 (Mad) held that "tax treaties are . . . considered to be mini legislation containing in themselves all the relevant aspects or features which are at variance with the general taxation laws of the respective countries".

45. At the very outset, it should be understood that it is not as if the double taxation avoidance agreements completely prohibit reliance on domestic law. Under these, a reference is made to the domestic law of the Contracting States. Article 3(2) of both double taxation avoidance agreements state that in the course of application of the treaty, any term not defined in the treaty, shall, have the meaning which is imputed to it in the laws in force in that State relating to the taxes which are the subject of the Convention.

"Indo-Thailand Double Taxation Avoidance Agreements ([1986] 161 ITR (St.) 82, 83) :

'Article 3 : General definitions

2. In the application on the provisions of this Convention by one of the Contracting States, any term not defined herein shall, unless the context otherwise requires, have the meaning which it has for the purposes of the laws in force in that State relating to the taxes which are the subject of this Convention.'

Indo-Netherlands Double Taxation Avoidance Agreement (see [1989] 177 ITR (St.) 72, 74) :

'Article 3 : General definitions

2. As regards the application of the Convention by one of the States any term not defined herein shall, unless the context otherwise requires, have the meaning which it has under the law of that State concerning the taxes to which the Convention applies.'"

The treaties therefore, create a bifurcation between those terms, which have been defined by them (i.e the concerned treaty), and those, which remain undefined. It is in the latter instance that domestic law shall man datorily supply the import to be given to the word in question. In the former case however, the words in the treaty will be controlled by the definitions of those words in the treaty if they are so provided.

46. Though this has been the general rule, much discussion has also taken place on whether an interpretation given to a treaty alters with a transformation in, or amendments in, domestic law of one of the State parties. At any given point, does a reference to the treaty point to the law of the Contracting States at the time the treaty was concluded, or relate to the law of the States as existing at the time of the reference to the treaty ? The former is the "static" approach while the latter is called the "ambulatory" approach. One opportunity for a State to ease its obligations under a tax convention comes from the ambulatory reference to domestic law. States seeking to furtively dodge the limitations that such treaties impose, sometimes, resort to amending their domestic laws, all the while under the protection of the theory of ambulatory reference. It thereby allows itself an adjustment to broaden the scope of circumstances under which it is allowed to tax under a treaty. A convenient opportunity sometimes presents itself in the form of ambiguous technical formulations in the concerned treaty. States attempting to clarify or concretise any one of these meanings, (unsurprisingly the one that benefits it) enact domestic legislation which subserves such purpose.

47. In this context, recently in Sanofi Pasteur Holding SA v. Department of Revenue [2013] 354 ITR 316 (AP), the Andhra Pradesh High Court discussed and subscribed to the ratio of the Supreme Court of Canada in R. v. Melford Developments Inc. 82 DTC 6281 (1982) with respect to the applicability of domestic amendments to international instruments. In R. v. Melford Developments Inc. 82 DTC 6281 (1982), the Canadian Supreme Court held that the ambulatory approach is antithetical to treaty obligations :

"There are 26 concluded and 10 proposed tax conventions, treaties or agreements between Canada and other nations of the world. If the submission of the appellant is correct, these agreements are all put in peril by any legislative action taken by Parliament with reference to the revision of the Income-tax Act. For this practical reason one finds it difficult to conclude that Parliament has left its own handiwork of 1956 in such inadvertent jeopardy. That is not to say that before the 1956 Act can be amended in substance it must be done by Parliament in an Act entitled 'An act to Amend the Act of 1956'. But neither is the converse true, that is that every tax enactment adopted for what ever purpose, might have the effect of amending one or more bilateral or multilateral tax conventions without any avowed purpose or inten tion so to do."

48. In CIT v. Siemens Aktiongesellschaft [2009] 310 ITR 320 (Bom), the Bombay High Court citing R. v. Melford Developments Inc. held that (page 333 of 310 ITR) :

"The ratio of the judgment, in our opinion, would mean that by a unilateral amendment it is not possible for one nation which is party to an agreement to tax income which otherwise was not subject to tax. Such income would not be subject to tax under the expression 'laws in force'. . .

While considering the Double Tax Avoidance Agreement the expression 'laws in force' would not only include a tax already covered by the treaty but would also include any other tax as taxes of a substantially similar character subsequent to the date of the agree ment as set out in article I(2). Considering the express language of article I(2) it is not possible to accept the broad proposition urged on behalf of the assessee that the law would be the law as applicable or as define when the double taxation avoidance agreement was entered into."

49. It is essential to note the context in which this judgment was delivered. There, the court was confronted with a situation where the word royalty was not defined in the German Double Taxation Avoidance Agreements. Following our previous discussion on the bifurcation of terms within the treaty, in situations where words remain undefined, assistance is to be drawn from the definition and import of the words as they exist in the domestic "laws in force". It was in this context that the Bombay High Court held that they were unable to accept the assessee's contention that the law applicable would be the law as it existed at the time the double taxation avoidance agreement was entered into. This is the context in which the ambulatory approach to tax treaty interpretation was not rejected. The situation before this court however is materially different as there is in fact a definition of the word royalty under article 12 of both double taxation avoidance agreements, thus dispensing with the need for recourse to article 3.

50. There are therefore two sets of circumstances. First, where there exists no definition of a word in issue within the double taxation avoidance agreements itself, regard is to be had to the laws in force in the jurisdiction of the State called upon to interpret the word. The Bombay High Court seems to accept the

ambulatory approach in such a situation, thus allowing for successive amendments into the realm of "laws in force". We express no opinion in this regard since it is not in issue before this court. This court's finding is in the context of the second situation, where there does exist a definition of a term within the double taxation avoidance agreements. When that is the case, there is no need to refer to the laws in force in the Contracting States, especially to deduce the meaning of the definition under the double taxation avoidance agreements and the ultimate taxability of the income under the agreement. That is not to say that the court may be inconsistent in its interpretation of similar definitions. What that does imply however, is that just because there is a domestic definition similar to the one under the double taxation avoidance agreement, amendments to the domestic law, in an attempt to contour, restrict or expand the definition under its statute, cannot extend to the definition under the Double Taxation Avoidance Agreement. In other words, the domestic law remains static for the purposes of the double taxation avoidance agreement. The court in Sanofi (supra) had also held similarly (page 442 of 354 ITR) :

> "We are in agreement with the petitioners and in the light of our preceding analyses, discern no textual, grammatical or syntactic ambi guity in article 14(5), warranting an interpretive recourse. In the cir cumstances, invoking the provisions of article 3(2) by an artificial insemination of ambiguity (to accommodate an expanded meaning to the double tax avoidance agreement provision), would be contrary to good faith interpretation. A further problematic of contriving an ambiguity to unwarrantedly invite application of domestic law of a Contracting State would be that while India would interpret an unde fined double taxation avoidance agreement provision according to the provisions of the Act, France could do so by reference to its tax code. As a consequence, the purpose of entering into a treaty with a view to avoiding double taxation of cross-border transactions would be frus trated."

51. Pertinently, this court in DIT v. Nokia Networks OY [2013] 358 ITR 259 (Delhi) specifically dealt with the question of the effect of amendments to domestic law and the manner of their operation on parallel treaties. The court delivered its judgment in the context of the very amendments that are in question today ; the Explanations to section 9(1)(vi) vis a vis the interpretation of a double taxation avoidance agreement. This court rejected that any amendment could change the situation and render the service or activity taxable, in the following observations (page 281 ITR 358 ITR) :

> "He, thus submitted that the question of 'copyrighted article' or actual copyright does not arise in the context of software both in the double taxation avoidance agreement and in the Income-tax Act since the right to use simpliciter of a software program itself is a part of the copyright in the software irrespective of whether or not a further right to make copies is granted. The decision of the Delhi Bench of the Income-tax Appellate Tribunal has dealt with this aspect in its judg ment in Gracemac Corporation v. Asst. DIT [2010] 134 TTJ (Delhi) 257; [2011] 8 ITR (Trib) 522 (Delhi) pointing out that even software bought off the shelf, does not constitute a 'copyrighted article' as sought to be made out by

the Special Bench of the Income-tax Appel late Tribunal in the present case. However, the above argument misses the vital point namely the assessee has opted to be governed by the treaty and the language of the said treaty differs from the amended section 9 of the Act. It is categorically held in CIT v. Sie mens Aktiongesellschaft [2009] 310 ITR 320 (Bom) that the amend ments cannot be read into the treaty. On the wording of the treaty, we have already held in Ericsson A. B. [2012] 343 ITR 470 (Delhi) that a copyrighted article does not fall within the purview of royalty. Therefore, we decide question of law Nos. 1 and 2 in favour of the assessee and against the Revenue."

52. Thus, an interpretive exercise by Parliament cannot be taken so far as to control the meaning of a word expressly defined in a treaty. Parliament, supreme as it may be, is not equipped, with the power to amend a treaty. It is certainly true that law laid down by Parliament in our domestic context, even if it were in violation of treaty principles, is to be given effect to ; but where the State unilaterally seeks to amend a treaty through its Legislature, the situation becomes one quite different from when it breaches the treaty. In the latter case, while internationally condemnable, the State's power to breach very much exists ; courts in India have no jurisdiction in the matter, because in the absence of enactment through appropriate legislation in accordance with article 253 of the Constitution, courts do not possess any power to pronounce on the power of the State to enact a law contrary to its treaty obligations. The domestic courts, in other words, are not empowered to legally strike down such action, as they cannot dictate the executive action of the State in the context of an international treaty, unless of course, the Constitution enables them to. That being said, the amendment to a treaty is not on the same footing. Parliament is simply not equipped with the power to, through domestic law, change the terms of a treaty. A treaty to begin with, is not drafted by Parliament ; it is an act of the executive. Logically therefore, the executive cannot employ an amendment within the domestic laws of the State to imply an amendment within the treaty. Moreover, a treaty of this nature is a carefully negotiated economic bargain between two States. No one party to the treaty can ascribe to itself the power to unilaterally change the terms of the treaty and annul this economic bargain. It may decide to not follow the treaty, it may chose to renege from its obligations under it and exit it, but it cannot amend the treaty, especially by employing domestic law. The principle is reciprocal. Every treaty entered into be the Indian State, unless self-executory, becomes operative within the State once Parliament passes a law to such effect, which governs the relationship between the treaty terms and the other laws of the State. It then becomes part of the general conspectus of domestic law. Now, if an amendment were to be effected to the terms of such treaty, unless the existing operationalising domestic law states that such amendments are to become automatically applicable, Parliament will have to by either a separate law, or through an amendment to the original law, make the amendment effective. Similarly, amendments to domestic law cannot be read into treaty provisions without amending the treaty itself.

53. Finally, States are expected to fulfil their obligations under a treaty in good faith. This includes the obligation to not defeat the purpose and object of the

treaty. These obligations are rooted in customary international law, codified by the Vienna Convention on the Law of Treaties, especially article 26 (binding nature of treaties and the obligation to perform them in good faith) ; article 27 (Internal law and observance of treaties, i.e., provisions of internal or municipal law of a nation cannot be used to justify omission to perform a treaty) ; General rule of interpretation under article 31(1) (i.e., that it shall be interpreted in good faith, in accordance with ordinary meaning to be given to the terms of a treaty) and article 31(4) (A special meaning shall be given to a term if it is established that the parties so intended).

The expression "process" and treaty interpretation in this case

54. Neither can an act of Parliament supply or alter the boundaries of the definition under article 12 of the Double Taxation Avoidance Agreement by supplying redundancy to any part of it. This becomes especially important in the context of Explanation 6, which states that whether the 'process' is secret or not is immaterial, the income from the use of such process is taxable, none the less. Explanation 6 precipitated from confusion on the question of whether it was vital that the "process" used must be secret or not. This confusion was brought about by a difference in the punctuation of the definitions in the double taxation avoidance agreements and the domestic definition. For greater clarity and to illustrate this difference, we reproduce the definitions of royalty across both double taxation avoidance agreements and clause (iii) to Explanation 2 to 9(1)(vi).

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

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

Article 12(4), Indo-Netherlands Double Taxation Avoidance Agree ment :

"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 cinema tograph films, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commer cial or scientific experience." (emphasis1 supplied)

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

"(iii) the use of any patent, invention, model, design, secret for mula or process or trade mark or similar property ;" (emphasis1 sup plied)

55. The slight but apparently vital difference between the definitions under the double taxation avoidance agreements and the domestic definition is the presence of a comma following the word process in the former. In the initial determinations before various Income-tax Appellate Tribunals across the country, much discussion took place on the implications of the presence or absence of the "comma". A lot has been said about the relevance or otherwise of punctuation in the context of statutory construction. In spoken English, it would be unwise to argue against the importance of punctuation, where the placement of commas is notorious for diametrically opposite implications. However in the realm of statutory interpretation, courts are circumspect in allowing punctuation to dictate the meaning of the provisions. Judge Caldwell once famously said "The words control the punctuation marks, and not the punctuation marks the words." Holmes v. Pheonix Insurance Co. 98 F 240 (1899). It has been held in CGT v. Budur Thippaiah [1976] 103 ITR 189 (AP) and Hindustan Construction Co. Ltd. v. CIT [1994] 208 ITR 291 (Bom) that while punctuation may assist in arriving at the correct construction, yet it cannot control the clear meaning of a statutory provision. It is but, a minor element in the construction of a statute, Hindustan Construction Co. Ltd.

56. The courts have however created an exception to the general rule that punctuation is not to be looked at to ascertain meaning. That exception operates wherever a statute is carefully punctuated. Only then should weight undoubtedly be given to punctuation ; CIT v. Loyal Textile Ltd. [1998] 231 ITR 573 (Mad) ; Sama Alana Abdulla v. State of Gujarat, AIR 1996 SC 569 ; Mohd. Shabbir v. State of Maharashtra, AIR 1979 SC 564 ; Lewis Pugh Evans Pugh v. Ashutosh Sen, AIR 1929 PC 69 ; Aswini Kumar Ghose v. Arbinda Bose, AIR 1952 SC 369 ; Pope Alliance Corporation v. Spanish River Pulp and Paper Mills Ltd., AIR 1929 PC 38. An illustration of the aid derived from punctuation may be furnished from the case of Mohd. Shabbir v. State of Maharashtra, AIR 1979 SC 564 where section 27 of the Drugs and Cosmetics Act, 1940 came up for consideration. By this section whoever "manufactures for sale, sells, stocks or exhibits for sale or distributes" a drug without a licence is liable for punishment. In holding that mere stocking shall not amount to an offence under the section, the Supreme Court pointed out the presence of comma after "manufactures for sale" and "sells" and the absence of any comma after "stocks" was indicative of the fact "stocks" was to be read along with "for sale" and not in a manner so as to be divorced from it, an interpretation which would have been sound had there been a comma after the word "stocks". It was therefore held that only stocking for the purpose of sale would amount to an offence but not mere stocking.

57. However, the question, which then arises, is as follows. How is the court to decide whether a provision is carefully punctuated or not ? The test to decide whether a statute is carefully (read consciously) punctuated or not- would be to see what the consequence would be, had the section been punctuated otherwise. Would there be any substantial difference in the import of the section if it were not punctuated the way it actually is ? While this may not be conclusive evidence of a carefully punctuated provision, the repercussions go a long way to signify intent. If the inclusion or lack of a comma or a period gives rise to diametrically

opposite consequences or large variations in taxing powers, as is in the present case, then the assumption must be that it was punctuated with a particular end in mind. The test therefore is not to see if it makes "grammatical sense" but to see if it takes on any "legal consequences".

58. Nevertheless, whether or not punctuation plays an important part in the statute interpretation, the construction Parliament gives to such punctuation, or in this case, the irrelevancy that it imputes to it, cannot be carried over to an international instrument where such comma may or may not have been evidence of a deliberate inclusion to influence the reading of the section. There is sufficient evidence for us to conclude that the process referred to in article 12 must in fact be a secret process and was always meant to be such. In any event, the precincts of Indian law may not dictate such conclusion. That conclusion must be the result of an interpretation of the words employed in the law and the treatises, and discussions that are applicable and specially formulated for the purpose of that definition. The following extract from Asia Satellite takes note of the OECD Commentary and Klaus Vogel on Double Taxation Conventions, to show that the process must in fact be secret and that specifically, income from data transmission services do not partake of the nature of royalty (page 391 of 332 ITR) :

> "Even when we look into the matter from the standpoint of double taxation avoidance agreement (DTAA), the case of the appellant gets boost. The Organisation of Economic Co-operation and Development (OECD) has framed a model of Double Taxation Avoidance Agree ment (DTAA) entered into by India are based. Article 12 of the said model double taxation avoidance agreement contains a definition of royalty which is in all material respects virtually the same as the defi nition of 'royalty' contained in clause (iii) of Explanation 2 to section 9(1)(vi) of the Act. This fact is also not in dispute. The learned counsel for the appellant had relied upon the commentary issued by the OECD on the aforesaid model double taxation avoidance agreements and particularly, referred to the following amendment proposed by the OECD to its commentary on article 12, which reads as under :
>
> > '9.1 Satellite operators and their customers (including broadcast ing and telecommunication enterprises) frequently enter into trans ponder leasing agreements under which the satellite operator allows the customer to utilize the capacity of a satellite transponder to trans mit over large geographical areas. Payments made by customers under typical transponder leasing agreements are made for the use of the transponder transmitting capacity and will not constitute royalties under the definition of paragraph 2 ; these payments are not made in consideration for the use of, or right to use, property, or for infor mation, that is referred to in the definition (they cannot be viewed, for instance, as payments for information or for the use of, or right to use, a secret process since the satellite technology is not transferred to the customer). As regards treaties that include the leasing of industrial, commercial or scientific (ICS) equipment in the definition of royalties, the characterization of the payment will depend to a large extent on the relevant

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

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

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

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

'On the other hand, another distinction to be made is letting the proprietary right, experience, etc., on the one hand and use of it by the licensor himself, e.g., within the framework of an advisory activity. Within the range from services', viz. outright transfer of the asset involved (right, etc.) to the payer of the royalty. The other, just as clear- cut extreme is the exercise by the payee of activities in the service of the payer, activities for which the payee uses his own proprietary rights, know-how, etc., while not letting or transferring them to the payer.'

The Tribunal has discarded the aforesaid commentary of OECD as well as Klaus Vogel only on the ground that it is not safe to rely upon the same. However, what is ignored is that when the technical terms used in the double tax avoidance agreements are the same which appear in section 9(1)(vi), for better understanding all these very terms, OECD commentary can always be relied upon. The apex court has emphasized so in number of judgments clearly holding that the well-settled internationally accepted meaning and interpretation placed on identical or similar terms employed in various double tax ation

avoidance agreement should be followed by the courts in India when it comes to construing similar terms occurring in the Indian Income-tax Act . . .

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

(a) CIT v. Ahmedabad Manufacturing and Calico Printing Co. [1983] 139 ITR 806 (Guj) at pages 820-822.

(b) CIT v. Visakhapatnam Port Trust [1983] 144 ITR 146 (AP) at pages 156-157.

(c) N. V. Philips v. CIT (No. 1) [1988] 172 ITR 521 (Cal) at pages 527 and 538-539."

59. On a final note, India's change in position to the OECD Commentary cannot be a fact that influences the interpretation of the words defining royalty as they stand today. The only manner in which such change in position can be relevant is if such change is incorporated into the agreement itself and not otherwise. A change in executive position cannot bring about a unilateral legislative amendment into a treaty concluded between two sovereign States. It is fallacious to assume that any change made to domestic law to rectify a situation of mistaken interpretation can spontaneously further their case in an international treaty. Therefore, mere amendment to section 9(1)(vi) cannot result in a change. It is imperative that such amendment is brought about in the agreement as well. Any attempt short of this, even if it is evidence of the State's discomfort at letting data broadcast revenues slip by, will be insufficient to persuade this court to hold that such amendments are applicable to the double taxation avoidance agreement.

60. Consequently, since we have held that the Finance Act, 2012 will not affect article 12 of the double taxation avoidance agreement, it would follow that the first determinative interpretation given to the word "royalty" in Asia Satellite, when the definitions were in fact pari materia (in the absence of any contouring explanations), will continue to hold the field for the purpose of assessment years preceding the Finance Act, 2012 and in all cases which involve a double taxation avoidance agreement, unless the said double taxation avoidance agreement are amended jointly by both parties to incorporate income from data transmission services as partaking of the nature of royalty, or amend the definition in a manner so that such income automatically becomes royalty. It is reiterated that the court has not returned a finding on whether the amendment is in fact retrospective and applicable to cases preceding the Finance Act of 2012 where there exists no double taxation avoidance agreement."

11. In view of the above decision of the Hon'ble Delhi High Court in case of the assessee, respectfully following, we also hold that the receipt by the assessee is not " Royalty" under Article 12 of the Double Taxation Avoidance Agreement between India and Thailand , hence , same is not chargeable to tax in India despite the amendment in the Income tax Act with retrospective effect by the Finance Act 2012.

12. In view of this appeals of the revenue for AY 2005-06 and 2006-07 are dismissed and appeals of the assessee for AY 2008-09 and 2010-11 are allowed accordingly.

Order pronounced in the open court on 16/10/2017.

-Sd/-	-Sd/-
(H.S.SIDHU) JUDICIAL MEMBER	(PRASHANT MAHARISHI) ACCOUNTANT MEMBER

Dated: 16/10/2017
A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
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ITAT, New Delhi