

CTR ENCYCLOPAEDIA ON INDIAN TAX LAWS

B4U INTERNATIONAL HOLDINGS LTD. vs. DCIT

ITAT MUMBAI BENCH "L"

B.R. Mittal, JM & J. Sudhakar Reddy, AM.

ITA No. 3326/Mum/2006

28th May, 2012

(2012) 32 CCH 151 MumTrib

Legislation referred to

Section 90(2), 9(1)(i), 194J, 195, 40(a)(i), 80HHC, 9

Case pertains to

Asst. Year 2002-03

Decision in favour of

Assessee

TDS—Disallowance—Failure to deduct tax at source—AO disallowed the payments made to PanAmSat Ltd., Advanced Satellite, LMB (Mauritius) and LMB Isle of Man during the year contending that tax was deductible at source—Held, assessee has no PE in India—Indian Representative cannot be considered as dependent agent of the assessee—Even if it is to be held that there is a PE, since the Indian agent was remunerated at ALP, no further attribution of profits can be made—A mere rendering of service cannot be considered as making available FTS—Even otherwise as the payment is made from one non-resident to another non-resident outside India on the basis of contract executed outside India, section 195 will not apply—S 195 cannot be invoked in case of sale of program—No disallowance u/s 40(a)(i) of Income-tax Act could be made on payments made by the assessee to PanAmSat Ltd., Advanced Satellite, LMB (Mauritius) and LMB Isle of Man.

Held :

The arguments of the assessee as well as revenue on the issue are identical to the arguments advanced for the A.Y.2001-02. Consistent with the view taken in that assessment year, it is held that the assessee has no PE in India. The Indian Representative cannot be considered as dependent agent of the assessee. It is further held alternatively that even if it is to be held that there is a PE, one has to conclude that the Indian agent was remunerated at ALP and hence no further attribution of profits can be made.

(Para 3)

The issue stands covered in favour of the assessee and against the revenue by the decision of Hon'ble Delhi High Court in the case of Asia Satellite Communication Co. Ltd. Vs. DIT (332 ITR

340)

(Para 14)

Coming to argument of learned Departmental Representative that this is a process Hon'ble Madras High Court in the case of SkycellCommunications Ltd. v. Deputy Commissioner of Income-tax held as follows :-

"Merely collection of fees for use of standard facility provided to all those willing to pay for it does not amount to fees having been received for technical services".

(Para 15)

Moreover a mere rendering of service cannot be considered as making available FTS. Recently Hon'ble Karnataka High Court in the case of CIT Vs. DE BEERS India Minerals Pvt. Ltd., upheld the proposition laid down by the Mumbai Bench of the Tribunal in the case of Raymonds Ltd. (86 TTJ 791). Similarly Hon'ble Delhi High Court in the case of DIT Vs. Guy Carpenter & Co. Ltd., held that to make available technical knowledge, mere provisions of service is not enough and payer must be enabled to perform services himself. Thus, the issue in question is covered in favour of the assessee by the above decisions.

(Para 16)

Coming to the argument of learned Departmental Representative that the amendment to the Finance Act, 2012 changes the position, Court finds that there is no change in the DTAA between India and USA. Thus, the amendments have no affect on the decision.

(Para 17)

Even otherwise as the payment is made from one non-resident to another non-resident outside India on the basis of contract executed outside India, section 195 will not apply to such cases as held by Hon'ble Supreme Court in the case of Vodafone International Holdings B.V. (WP No. 1942 of 2007) 341 ITR 1 (SC). Thus on this ground also no disallowance can be made u/s. 40(a)(i) of the Act.

Even under the non-discrimination clause the disallowance cannot be made.

Advanced Satellite is tax resident of UK and does not have PE in India. Like under Indo-US DTAA, even under Indo-UK DTAA, the term FTS has been narrowly defined. The arguments of the assessee are similar to the arguments raised in Ground No. 3 on the issue of payments made to PanAmSat Limited.

(Para 20)

Conclusion drawn by the Tribunal in the case of PanAmSat Limited squarely covers the issue on hand. As there is no change in the DTAA between India and UK, no disallowance can be made u/s. 40(a)(i). No disallowance can be made in view of the nondiscrimination clause also. Thus for the very same reasons on which ground No. 3 has been allowed, ground No. 4 is also allowed.

(Para 24)

The issue as to whether it is a sale of a programme as contended by the assessee or a payment for grant of broadcasting right as contended by revenue, is to be judged based on the Agreement between the parties which is at page 119 to 126 of the assessee's paper book. Perusal of this

Agreement demonstrates that LMB (Mauritius) Ltd. is called the "seller" and B4U International is called the "buyer".

(Para 29)

There is a sale of programmes. Section 195 cannot be invoked in case of purchases. In the result, question of applying 40(a)(i) does not arise.

(Para 30)

Even otherwise, this ground has to be allowed for the same reasons as allowing the ground on payments made to "PanAmSat" as this is a payment by a non-resident to another non-resident and as non- discrimination clause also applies. Thus this ground of the assessee is allowed.

(Para 30)

Consideration paid for sale distribution or exhibition of Cinematographic films, does not fall within term Royalty in view of Explanation 2 sub-clause (v) to section 9(1)(vi) of the Act. Perusal of the Agreement dated 1.9.2000 between LMB Holdings Isle of Man and the assessee, demonstrate that the assessee is a buyer and LMB Holdings is a seller.

(Para 35)

As the conditions are same as in the case of purchase of programmes from LMB Mauritius, propositions followed therein applies to this issue also. Thus the amount in question is not liable to tax in India and consequently the question of deduction of tax u/s. 195 does not arise. Thus there is no liability on behalf of the assessee for deduction of tax at source.

(Para 36)

Cases relied:

Asia Satellite Telecommunications Co. Ltd. (332 ITR 340) (Del), Skycell Communications Ltd. v. Deputy Commissioner of Income-tax (251 ITR 53) (Mad), CIT Vs. DE BEERS India Minerals Pvt. Ltd., Vodafone International Holdings B.V. [341 ITR 1(SC)], B. Suresh (313 ITR 149), Far Video Films (P) Ltd Vs. ACIT Circle 1(6) (15 SOT 385) (Mum)

Conclusion:

No disallowance u/s 40(a)(i) of Income-tax Act could be made on payments made by the assessee to PanAmSat Ltd., Advanced Satellite, LMB (Mauritius) and LMB Isle of Man.

In favour of:

Assessee

Cases referred:

Asia Satellite Telecommunications Co. Ltd. Vs. DCIT (85 ITD 478), Asia Satellite Telecommunications Co. Ltd. (332 ITR 340) (Del), Vodafone International Holdings B.V. [341 ITR 1 (SC)], Harballife International India Pvt. Ltd. Vs. ACIT, 101 ITD 450 (Del), ITA No. 4155/Mum/03 and others, "F" Bench, "Central bank of India Vs. DCIT" order dated 24.9.2010, "New Sky Satellite" (121 ITD 1)(SB), DHV Consultants B.V. in RE 227 ITR 97 (AAR), "PanAmSat

Limited" (103 TTJ 861), T.V. Today Network Ltd., ITA No. 2376/Del/2010, "Times Global Broadcasting Co.Ltd." in ITA No. 5868/Mum/2010, Skycell Communications Ltd. v. Deputy Commissioner of Income-tax (251 ITR 53) (Mad), Raymond Ltd. v. Deputy Commissioner of Income-tax (86 ITD 791)(Mum), Dy.CIT Vs. Boston Consulting Group Pte Ltd.(94 ITD 31)(Mum), CIT Vs. DE BEERS India Minerals Pvt. Ltd., B. Suresh (313 ITR 149), Commissioner of Income-tax v. D. C. M. Ltd. (336 ITR 599), Far Video Films (15 SOT 385)(Mum), Sat Satellite (Singapore) Pte Ltd (132 TTJ 459).

Counsel appeared

Arvind V. Sonde for the Assessee.: Mahesh Kumar for the Respondent

{JUDGMENT}ORDER

1. This appeal filed by the assessee is directed against the order of learned CIT(A) dated 1.3.2006 for A.Y. 2002-03.

2. Ground No. 1&2 is on the issue as to whether the assessee has a PE in India.

3. The arguments of the assessee as well as revenue on the issue are identical to the arguments advanced for the A.Y.2001-02. Consistent with the view taken by us in that assessment year, we hold that the assessee has no PE in India. The Indian Representative cannot be considered as dependent agent of the assessee. We further held alternatively that even if it is to be held that there is a PE, we have to conclude that the Indian agent was remunerated at ALP and hence no further attribution of profits can be made. Hence we uphold contentions of the assessee and allow these grounds.

4. All the other grounds are on applicability of TDS provisions u/s. 195 and consequently issue of disallowance u/s. 40(a)(i) of the Act. As we have held that there is no PE, the question of a claim being made and disallowing such a claim for expenditure u/s. 40(a)(i) does not arise. In any event as we have heard the matter at length we consider the issue on merits and dispose of the issues.

5. Ground No. 3 is disallowance made u/s. 40(a)(i) on payment for hiring charges for transponder, paid to PanAmSat Limited on the ground that no tax has been deducted at source by the assessee, u/s. 195 of the Act.

6. The Assessing Officer discussed this issue at paragraph 5.6.2 of his order. He held that the payments made were for hire of transponder and hence is in the nature of 'Royalty' and hence income received by "PanAmSat Limited" and "Advanced Satellite" is taxable in India as per DTAA between India and the country of residence of PanAmSat Limited and Advanced Satellite i.e. U.S.A. and U.K. respectively.

7. On appeal, the first appellate authority observed that in the case of PanAmSat Limited, Indo-US tax treaty is applicable. He negated the contentions of the assessee.

8. Learned counsel for the assessee contended that learned CIT(A) followed the order of the ITAT Delhi Bench in the case of Asia Satellite Telecommunications Co. Ltd. Vs. DCIT (85 ITD 478) and that this decision has been reversed by Hon'ble Delhi High Court in the case of Asia Satellite Telecommunications Co. Ltd. (332 ITR 340) and hence learned CIT(A)'s order has to be reversed.

9. The other contentions of the learned counsel can be summarised as follows:-

(a) The payment by the assessee to PanAmSat Limited was in respect of facility which is provided to anyone willing to pay and not in respect of any technology which is "made available"and thus do

not fall under Article 12 of the India USA/UK DTAA.

(b) Since PanAmSat Limited does not have a PE in India, the above payments are covered under Article-7 of the DTAA and hence cannot be taxed in India.

(c) The payment has been made by a non-resident to another nonresident, outside India and hence not taxable in India. Reliance was placed on Vodafone International Holdings B.V. [341 ITR 1(SC)]

(d) He relied on 'non-discrimination' article in Indo-US DTAA and submitted that no disallowance can be made in the case of the non-resident assessee u/s. 40(a)(i), as under similar circumstances 40(a)(i) cannot be invoked in the case where similar payment are made to a resident of India. He relied on the following case laws :-

- Harballife International India Pvt. Ltd. Vs. ACIT, 101 ITD 450 (Del)
- ITA No. 4155/Mum/03 and others, "F" Bench, "Central bank of India Vs. DCIT" order dated 24.9.2010

10. On the other hand learned Departmental Representative relied solely on the proposed amendment to the Finance Bill, 2012 which are retrospective w.e.f. 1.6.1976. He argued that by the said amendment royalty includes and as always included consideration for transfer/use of any right, property or information,

(i) The possession or control of such right, property or information is with the payer or not.

(ii) Such right, property or information is used directly by the payer or not.

(iii) To location of such right, property or information is in India or not.

11. Learned Departmental Representative submits that the Judgement of Hon'ble Delhi High Court in the case of "Asia Satellite Telecommunication Co. Ltd." [332 ITR 340(Del)] will not survive in view of the amendments and that in terms of Explanation 9(1) of the Act, the source rule will apply and non-existence of a PE, is not relevant. He contended that in the decision of ITAT in "PanAmSat Limited", it was held that the term "royalty" in Article 12 of Indo-US DTAA, there was a 'comma' after the word "secret formula or process" and it was only "secret process" which would qualify as royalty and not what was provided by the assessee and therefore payment made to "PanAmSat Limited" will not be held as royalty as there is no "secrete process".

12. He pointed out that Special Bench in the case of "New Sky Satellite" (121 ITD 1)(SB), reversed this proposition and it was held that, provision of a transponder through which telecasting companies are able to uplink the desired images/data and de-link the same in the desired areas is a "process". To constitute 'royalty' it is not necessary that the 'process' be a "secrete process". Hence he submits that the fact that there is a coma after the words "secrete formula or process" in the DTAA does not mean that different interpretation has to be given to the DTAA, as compared to the Act. Thus he contends that the payment for use of process is assessable as royalty both under the Act and DTAA.

He submitted that the AR is making fresh argument that the payment is not borne by the PE. He argued that this should not be entertained. He relied on the AAR ruling in DHV Consultants B.V. in RE 227 ITR 97 (AAR) and argued that the expression "borne by" means "deductable" or "liable to be deducted" Alternatively he submitted that the payment to PanAmSat Limited is taxable as "Fee for technical services". On discrimination clause, he submitted that the provisions of the Act have to be considered and implemented.

13. In reply learned counsel for the assessee submits that the proposed amendment to the Finance Bill, 2012 will have no bearing on the case as there is no change in the relevant DTAA and the beneficial provisions of DTAA will be applicable in terms of section 90(2) of the Act. On the argument that under provisions of Income tax Act, source rule is attracted, it was submitted that "PanAmSat Limited" is resident of USA and application of source rule is to be examined under the DTAA between India and USA and that clause (a) and clause (b) of Article 12.7 of the said DTAA is mutually exclusive. He submitted that if income arise in USA in accordance with clause (a), then in respect of such income, clause (b) is irrelevant and it is not permissible to look into it. He argued that the payment received by PanAmSat Limited from a non-resident arises in USA. With regard to the argument on FTS, he submitted that "fee for included services", should relate to the services performed in India. He argued that the word "perform" is equivalent to "render" and that a service could be performed or rendered in a place which is different from the place where it is utilized. For the proposition he relied on the prima facie view expressed by ITAT in the case of "PanAmSat Limited" (103 TTD 861). He relied on the Delhi High Court decision in the case of Asia Satellite Telecommunication Co. Ltd. (supra) and submitted that both Delhi and Bombay Bench have followed this decision in the case of T.V. Today Network Ltd., ITA No. 2376/Del/2010 and in the case of "Times Global Broadcasting Co.Ltd." in ITA No. 5868/Mum/2010 order dated 13.1.2012. He repeated his contention that a standard facility or services was provided by PanAmSat Limited, to all those who are willing to pay for the same and hence it is not consideration for the use of any process. Reliance was placed on the decision of Hon'ble Madras High Court in the case of Skycell Communications Ltd. v. Deputy Commissioner of Income-tax (251 ITR 53) for the proposition that the payment is not in consideration for making available technical services. Reliance was placed on the following case laws :-

- Raymond Ltd. v. Deputy Commissioner of Income-tax (86 ITD 791)(Mum).
- Dy.CIT Vs. Boston Consulting Group Pte Ltd.(94 ITD 31)(Mum)

14. Rival contentions heard. On careful consideration of the facts and circumstances of the case and the papers on record and case law cited, we hold as follows :-

The issue stands covered in favour of the assessee and against the revenue by the decision of Hon'ble Delhi High Court in the case of Asia Satellite Communication Co. Ltd. Vs. DIT (332 ITR 340), where it is held as follows:-

"Held, (i) that under the agreement with television channels, the role attributed to the assessee was as follows : (i) programmes were uplinked by the television channels (admittedly not from India) ; (ii) after receipt of the programmes at the satellite (at locations not situated in Indian airspace), these were amplified through complicated process ; and (iii) the programmes so amplified were relayed in the footprint area including India where the cable operators caught the waves and passed them over to the Indian population. The first two steps were not carried out in India. Merely because the footprint area included India and the programmers by ultimate consumers/ viewers watched the programmes in India, even when they were uplinked and relayed outside India, that would not mean that the assessee was carrying out its business operations in India. The expressions "operations" and "carried out in India" occurring in Explanation 1(a) to section 9(1)(i) signify that it was necessary to establish that any part of the assessee's operations were carried out in India. No machinery or computer was installed by the assessee in India through which the programmes reached India. The process of amplifying and relaying the programmes was performed in the satellite which was not situated in Indian airspace. Even the tracking, telemetry and control operations were performed outside India in Hong Kong. There was no contract or agreement between the assessee either with the cable operators or viewers for reception of signals in India. Thus, section 9(1)(i) was not attracted.

(ii) That the process of transmission of television programmes started with television channels (customers of the assessee) uplinking the signals containing the television programmes ; thereafter

the satellite received the signals and after amplifying and changing their frequency relayed it down in India and other countries where the cable operators caught the signals and distributed them to the public. Any person who had a dish antenna, could also catch the signals relayed from these satellites. The role of the assessee was that of receiving the signals, amplifying them and after changing the frequency relaying them on the earth. For this service, the television channels made payment to the assessee. The assessee was the operator of the satellites and was in control of the satellite. It had not leased out the equipment to the customers. The assessee had merely given access to a broadband width available in a transponder which can be utilized for the purpose of transmitting the signals of the customer. A satellite is not a mere carrier, nor is the transponder something which is distinct and separable from the satellite as such. The transponder in fact cannot function without the continuous support of various systems and components of the satellite. Consequently, it is entirely wrong to assume that a transponder is a self-contained operating unit, the control and constructive possession of which is or can be handed over by the satellite operator to its customers. The terms "lease of transponder capacity", "lessor", "lessee" and "rental" used in the agreement would not be the determinative factors. There was no use of "process" by the television channels. Moreover, no such purported use had taken place in India. The telecast companies/customers were situated outside India and so was the assessee. The agreements under which the services were provided by the assessee to its customers were executed abroad. The transponder was in orbit. Merely because it had its footprint on various continents that would not mean that the process had taken place in India.

ISRO Satellite Centre [ISAC], In re [2008] 307 ITR 59 (AAR), Ishikawajima-Harima Heavy Industries Ltd. v. DIT [2007] 288 ITR 408 (SC) and Lakshmi Audio Visual Inc. v. Asst. CCT [2001] 124 STC 426 (Karn) applied.

(iii) That the money received from the cable operators by the telecast operators was treated as income by these telecast operators which had accrued in India and they had offered and paid tax. Thus, the income generated in India had been duly subjected to tax in India. The payment made by the telecast operators situated abroad to the assessee which was also a non-resident did not represent income by way of royalty as defined in Explanation 2 to section 9(1)(vi) of the Act. Article 12 of the model double taxation avoidance agreement framed by the Organisation of Economic Co-operation and Development contains a definition of "royalty" which is in all material respects virtually the same as the definition of "royalty" contained in clause (iii) of Explanation 2 to section 9(1)(vi) of the Act. The commentary issued by the OECD can be relied upon.

(iv) That the Tribunal rightly admitted the additional ground on the question of applicability of section 9(1)(vii) on the ground that it was purely legal and did not require consideration of any fresh facts, as all necessary facts for adjudication whether the amount received was chargeable to tax under section 9(1)(vii) were available on record. However, no arguments having been advanced by the Department on this ground, it had to be presumed that the case was not sought to be covered under this provision."

15. Coming to argument of learned Departmental Representative that this is a process Hon'ble Madras High Court in the case of Skycell Communications Ltd. v. Deputy Commissioner of Income-tax held as follows :-

"Merely collection of fees for use of standard facility provided to all those willing to pay for it does not amount to fees having been received for technical services".

At page 58 (b) & (c) it is held as follows :-

"Satellite television has become ubiquitous, and is spreading its area and coverage, and covers millions of homes. When a person receives such transmission of television signals through the cable provided by the cable operator, it cannot be said that the home owner who has such a cable connection is receiving a technical service for which he is required to deduct tax at source on the

payments made to the cable operator.

Installation and operation of sophisticated equipments with a view to earn income by allowing customers to avail of the benefit of the user of such equipment does not result in the provision of technical service to the customer for a fee.

When a person decides to subscribe to a cellular telephone service in order to have the facility of being able to communicate with others, he does not contract to receive a technical service. What he does agree to is to pay for the use of the airtime for which he pays a charge. The fact that the telephone service provider has installed sophisticated technical equipment in the exchange to ensure connectivity to its subscriber, does not on that score, make it provision of a technical service to the subscriber. The subscriber is not concerned with the complexity of the equipment installed in the exchange, or the location of the base station. All that he wants is the facility of using the telephone when he wishes to, and being able to get connected to the person at the number to which he desires to be connected. What applies to cellular mobile telephone is also applicable in fixed telephone service. Neither service can be regarded as "technical service" for the purpose of section 194J of the Act".

16. Moreover a mere rendering of service cannot be considered as making available FTS. Recently Hon'ble Karnataka High Court in the case of CIT Vs. DE BEERS India Minerals Pvt. Ltd., upheld the proposition laid down by the Mumbai Bench of the Tribunal in the case of Raymonds Ltd. (86 TTJ 791). Similarly Hon'ble Delhi High Court in the case of DIT Vs. Guy Carpenter & Co. Ltd., held that to make available technical knowledge, mere provisions of service is not enough and payer must be enabled to perform services himself. Thus, the issue in question is covered in favour of the assessee by the above decisions.

17. Coming to the argument of learned Departmental Representative that the amendment to the Finance Act, 2012 changes the position, we find that there is no change in the DTAA between India and USA. Thus, the amendments have no effect on our decision.

Even otherwise as the payment is made from one non-resident to another non-resident outside India on the basis of contract executed outside India, section 195 will not apply to such cases as held by Hon'ble Supreme Court in the case of Vodafone International Holdings B.V. (WP No. 1942 of 2007) 341 ITR 1 (SC). Thus on this ground also no disallowance can be made u/s. 40(a)(i) of the Act.

Even under the non-discrimination clause the disallowance cannot be made. In the case of Herbelife International India (P) Ltd., it is held as follows :-

"Held : The provisions of s. 40(a)(i) as it existed prior to its amendment by Finance Act, 2003, w.e.f. 1st April, 2004 provided for disallowance of payment made to a nonresident only where tax is not deducted at source on such payment at source. A similar payment to a resident does not result in disallowance in the event of non-deduction of tax at source. Thus, a nonresident left with a choice of dealing with a resident or a non-resident in business would opt to deal with a resident rather than a non-resident owing to the provisions of s. 40(a)(i). To this extent the non-resident is discriminated. Article 26(3) of Indo-US DTAA seeks to provide against such discrimination and says that deduction should be allowed on the same condition as if the payment is made to a resident. Thus this clause in DTAA neutralizes the rigour of the provisions of s. 40(a)(i). By virtue of the provisions of s. 90(2) the law which is beneficial to the assessee to whom the DTAA applies, should be followed. Therefore, in view of art. 26(3) of Indo-US DTAA, the AO cannot seek to invoke the provisions of s. 40(a)(i) to disallow the claim of the assessee for deduction even on the assumption that the sum in question is chargeable to tax in India."

Similar is the view taken in Central Bank of India (supra), wherein it is held as follows:-

"The dispute was regarding disallowance of deduction claimed by the assessee on account of payments made to Master Card and VISA cards. The said payments were made by it for the services rendered by the foreign non-residents and disallowance had been made under section 40(a)(i) on the ground that no tax had been deducted at source. The assessee's case was that the said payments were not taxable in the hands of the payees-nonresidents as they did not have any permanent establishment in India. Alternatively, it was argued that even if the amounts were taxable in the name of the non-residents, the deduction claimed on account of payments could not be disallowed in case of the assessee in view of the article 26(3) of the Indo-US Double Taxation Avoidance Agreement. On perusal of said article, it became apparent that the said article protects the interests of the non-residents vis-a-vis residents. The article provides that payments made to the non-resident would be deductible under the same conditions as the payments were made to a resident. The exceptions provided in the article 26(3) were not applicable to case of the assessee as paragraph 8 of the article 12 would not apply to the assessee, as there was no relationship between the assessee and the payee-concerns. As per the provisions of section 40(a)(i) applicable to the relevant year no disallowance could be made in respect of payments made to the residents on the ground of non-deduction of tax at source. Therefore, in view of the provisions of article 26(3), no disallowance could be made in case of payments to the non-residents also even if the amount was found taxable in India in their hands. Thus, the order of Commissioner (Appeals) confirming the disallowance could not be upheld. Accordingly, the order of the Commissioner (Appeals) was to be set aside and the claim of the assessee was to be allowed."

The Delhi Bench of the Tribunal in Millennium Infocom Technologies Ltd. v/s ACIT, [2008] 21 SOT 152 (Del.), has also taken a similar view.

The learned Departmental Representative could not bring on record any contrary decision. Under these circumstances, we follow the decisions of co-ordinate bench of the Tribunal and dismiss this ground of the Revenue.

18. Thus on this ground also, no disallowance can be made. Thus for all these reasons we allow this ground of the assessee and hold that the assessee need not deduct tax at source u/s. 195 and consequently there can be no disallowance u/s. 40(a)(i) of the Act.

19. Ground No. 4 is against the disallowance made u/s. 40(a)(i) on payments made to Advanced Satellite.

20. Advanced Satellite is taxed resident of UK and does not have PE in India. Like under Indo-US DTAA, even under Indo-UK DTAA, the term FTS has been narrowly defined. The arguments of the assessee are similar to the arguments raised in Ground No. 3 on the issue of payments made to PanAmSat Limited.

21. The learned Departmental Representative on the other hand argued that the payments made to Advanced Satellite are not similar to payments for transponder and that it is a payment for equipment and technical fees. He referred to Agreement dated 11.4.2000 between Advanced Satellite and the assessee at paper book 43 to 62. The other arguments were the same as in the case of PanAmSat Limited.

22. In reply, learned counsel submits that, if the contention of learned Departmental Representative is that the nature of services provided by PanAmSat Limited is different from the nature of services provided by Advanced Satellite then in such a case, amendment will not have any bearing on the payments to Advanced Satellite. He referred to the Agreement and submitted that conceptually nature of services is the same in both the cases. He pointed out that the Agreement for the use of facilities which are standard facilities i.e. reception and transmission of signals wherein programme is delivered by the assessee to the Advanced Satellite on video tape for transmission via a circuit. It was submitted that technical staff and equipments used to provide technical services are belonging to or hired by or under the control of Advanced Satellite. It was

submitted that the application of source rule is to be examined under Indo-UK DTAA Article 13.7.

23. On the other issues similar arguments were advanced by learned AR as in the case of payments made to PanAmSat Limited. Referring to Article 13.7 of Indo-UK DTAA, he submitted that the payment has been made by the appellant who is a non-resident to another non-resident and accordingly royalty did not arise in India, in terms of the said Article. He reiterated his contention that the burden of the payment is not borne by PE in India. He clarified that payments to Advanced Satellite and Advanced Broadcast are two separate payments which are evidenced by two separate invoiced and hence there is no ambiguity.

24. After hearing rival contentions, we are of the considered opinion that the conclusion drawn by us in the case of PanAmSat Limited squarely cover the issue on hand. As there is no change in the DTAA between India and UK, we have to hold that no disallowance can be made u/s. 40(a)(i). No disallowance can be made in view of the nondiscrimination clause also. Thus for the very same reasons on which ground No. 3 has been allowed, we allow ground No. 4.

25. Ground No. 5 is on the disallowance u/s. 40(a)(i) on payments made to LMB(Mauritius) Ltd. which is a resident of Mauritius. The assessee submits that the payment in question is for outright purchase of programmes and hence it should be considered as business receipts of the foreign company. Referring to the Agreement, specific reference is made to clause 2(ii), 2(iv), 3&4. It is submitted that these clauses deal with the sale and delivery of programmes to the assessee, which are existing as on the date of the Agreement and also which are to be developed over a period of six years. The assessee, has right to sub- license to the third party, promote and amend programmes without approval of the LMB(Mauritius) and hence it is claimed that this is a sale. It is further submitted that after delivering the programmes there is no liability of BIHL to return back or restrict the rebroadcast of programmes on termination. Further clause 9.2, 10,12&15 are relied upon to argue that it is a outright sale of programme for Asian and Indian territories which is perpetual in nature. On the issue of charges, it is submitted that these are levied on annual basis, only because the contract is ongoing contract. He submitted that under Article 12 of Indo-US DTAA, if payment is made for use of programmes, then it will fall within definition of 'royalty' and as in the case of the assessee, it was purchase of programmes, section 9(1)(vii) cannot be attracted. Reliance was placed on the Judgement of B. Suresh (313 ITR 149), Commissioner of Income-tax v. D. C. M. Ltd. (336 ITR 599) and Far Video Films (15 SOT 385)(Mum).

26. The learned counsel for the assessee further argued that without prejudice, if payment is categorized as royalty, then it does not accrue in India as it is not incurred in relation to PE in India and such royalty is not required to be borne by PE in India. He pointed out that Mauritius Company does not have PE in India. Reliance was placed on the decision of Sat Satellite (Singapore) Pte Ltd (132 TTJ 459).

27. Learned Departmental Representative on the other hand contended that this is not a case of outright purchase of programmes, but a payment for use of broadcasting rights. He contended that Hon'ble Supreme Court Judgement in the case of B. Suresh (supra) pertains to provisions of section 80HHC and hence cannot be relied upon. He argued that Mauritius Company has not produced tax residency certificate and hence the benefit of treaty cannot be given.

28. In the reply learned counsel for the assessee submitted that tax residency certificate is filed as additional evidence and is at page 175 of assessee's paper book-2. It was stated that tax residency certificate was not available earlier and it was subsequently obtained and hence it should be admitted as additional evidence. It was reiterated that this is a case of purchase of films.

29. After hearing rival contentions, we find that the issue as to whether it is a sale of a programme as contended by the assessee or a payment for grant of broadcasting right as contended by revenue, is to be judged based on the Agreement between the parties which is at page 119 to 126 of the assessee's paper book. Perusal of this Agreement demonstrates that LMB (Mauritius) Ltd. is

called the "seller" and B4U International is called the "buyer". At page 119 the Agreement reads as follows :-

"(A) The Seller is the sole and exclusive owner of Indian Film and Music based "programming content" ("said Programmes") details of which are set out in Schedule A to this Agreement.

(B) The Buyer is desirous of obtaining broadcasting rights of the said Programmes on B4U Music for the territory of the India Sub Continent and or other Asian countries, the Middle East wherever relevant (the "Territory") for the purpose of exploiting such rights through the broadcasting operations of its subsidiaries, associates operating in the Territory.

(C) The Buyer has approached the Seller for the grant of such Buyer rights ("License") of the said Programmes, for the Territory.

(D) This Agreement sets out the terms agreed by both parties for the grant of the License of the said Programme.

2.1 In consideration of the undertakings of the Buyer in this Agreement and subject to and conditional on the full and timely warranties and undertakings in this Agreement the Seller grants to the Buyer:

(i) The License to all commercial & non-commercial "Broadcasting Rights" of the said Programmes, either by Satellite, Cable or DTH during the Contracted Period in the Territory.

(ii) The License includes the right to package the Channels on the relevant platforms and to do all that is necessary to that end including but not limited to entering into contracts/deals with third parties such as service providers, platform owners and other channel owners.

(iii) The License includes the right to sub-license the said Programme Rights to any third party without the approval of the Seller.

(iv) It includes the right to promote and advertise the Programme and to edit it as suitable for telecast for the Territory.

3. SELLER'S OBLIGATIONS

The Seller agree and covenant with the Buyer that: _

a. The Seller shall affect delivery of the Programmes listed in Schedule A (Schedule A is not exhaustive as it only contains Programmes which are already produced or is under production and does not include Programmes what are likely to be produced in the near future).

b. The Seller shall also deliver free of charge such available publicity material such as promos, photo sets, posters, trailers, extracts etc and other materials in respect of the said Programmes.

c. The Seller shall, deliver on loan to the Buyer specified play out center good Digi-Betacam copies of all Programmes at least 48 hours in advance of the scheduled broadcast of the Programme.

4. BUYER'S OBLIGATIONS

The Buyer agree and covenant with the Seller that: -

b. In consideration of the License granted hereunder by the Seller, the Buyer shall pay to the Seller

the Programming Charges as set out in Paragraph 5.1 and payment shall be made in accordance to the terms and conditions provided in Paragraph 6.

10. The Buyer shall have the right to take all necessary steps (including registration of copyright where the Buyer shall deem necessary) to have the copyright in the Programme and the Delivery Material and the rights granted to the Buyer under this agreement protected throughout the Territory."

30. Hon'ble Supreme Court in the case of B. Suresh (supra) has considered a case where the assessee has bought rights of various decoders, recorded movies on beta-cam tapes and transferred them as telecasting rights to Star TV for five years and claimed for deduction u/s. 80HHC of the Income Tax Act, 1961. Hon'ble Supreme Court held that telecasting rights fell in the category of articles of trade and commerce and hence within category of "merchandise" and the transfer of the said rights by way of lease fell within the meaning of "sale" and attract 80HHC. Mumbai Bench of the Tribunal in the case of Far Video Films (P) Ltd Vs. ACIT Circle 1(6) (15 SOT 385) was considering a case where the assessee company was engaged in the business of producing TV commercials, as per specifications of clients located abroad. The assessee claimed deduction u/s. 80HHC on the basis that it was an exporter of films. The Assessing Officer disallowed the claim on the ground that the exhibition and telecast rights were intangible and could not be termed as goods and merchandise in respect of export of advertisement films. Commissioner (Appeals) held that the assessee was rendering only job work services and no goods were sold. On appeal, the Tribunal held that the transaction was that of 'sale'. Thus proposition laid down in these case laws, when applied to the facts of the case, we have to hold that there is a sale of programmes, section 195 cannot be invoked in case of purchases. In the result, question of applying 40(a)(i) does not arise.

Even otherwise, this ground has to be allowed for the same reasons as allowing the ground on payments made to "PanAmSat" as this is a payment by a non-resident to another non-resident and as non- discrimination clause also applies. Thus this ground of the assessee is allowed.

31. Ground No. 6 is on the issue of disallowance u/s. 40(a)(i) on purchase of films from LMB Isle of Man.

32. Learned counsel for the assessee submitted that there is no tax treaty with Isle of Man and hence provisions of section 9 of the Income Tax Act governed taxability of the payments. He contended that Explanation 2 to section 9(1)(vi) defines the term "royalty" and that the amount paid for "Cinematographic films" do not fall within the definition. He submitted that Cinematographic films, should be treated as "business profit" of seller of the films, as they are not covered under the definition of 'royalty' and as LMB Isle of Man has no business operations in India nor business connection, profit from sale of films cannot be taxed in India. Thus he argues that section 40(a)(i) cannot be invoked. It is argued that alternatively if the payment is considered as for royalty, then it is related to business of broadcasting carried outside India and hence not covered by section 9(1)(vi). Reliance was also placed on the decision of Supreme Court in the case of Vodafone International Holdings B.V. and argued that the payment of a non-resident to another non-resident does not attract T.D.S. provisions.

33. Learned Departmental Representative argued that the payments made for Cinematographic films is covered by clause (v) of Explanation 2 to section 9(1)(vi). He referred to the Agreement between the assessee and LMB Isle of Man which is at page 238 to 246 of the assessee's paper book and submitted that it was a case of obtaining broadcasting right of films on B4U Movies on the territory of Indian sub-continent and other Asian countries and hence not sale of films.

34. Learned counsel for the assessee replied that the assessee is carrying on its broadcasting business outside India and this is a case of purchase of Cinematographic films for LMB Holdings for Television broadcasting and hence 40(a)(i) does not apply.

35. After hearing rival contentions, we hold as follows :-

Explanation 2 to section 9(1)(vi) defines the term "royalty". In sub-clause (v) reads as follows :-

"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."

Thus, consideration paid for sale distribution or exhibition of Cinematographic films, does not fall within term Royalty in view of Explanation 2 sub-clause (v) to section 9(1)(vi) of the Act. Perusal of the Agreement dated 1.9.2000 between LMB Holdings Isle of Man and the assessee, demonstrate that the assessee is a buyer and LMB Holdings is a seller. At paragraph 2.1, 3&4 & 10 reads as follows :-

"2.1 In consideration of the undertakings of the Buyer in this Agreement and subject to and conditional on the full and timely warranties and undertakings in this Agreement the Seller grants to the Buyer:

(v) The License to all commercial & non-commercial "Broadcasting Rights" of the said Programmes, either by Satellite, Cable or DTH during the Contracted Period in the Territory.

(vi) The License includes the right to package the Channels on the relevant platforms and to do all that is necessary to that end including but not limited to entering into contracts/deals with third parties such as service providers, platform owners and other channel owners.

(vii) The License includes the right to sub-license the said Programme Rights to any third party without the approval of the Seller.

(viii) It includes the right to promote and advertise the Programme and to edit it as suitable for telecast for the Territory.

3. SELLER'S OBLIGATIONS

The Seller agree and covenant with the Buyer that:

d. The Seller shall affect delivery of the Programmes listed in Schedule A (Schedule A is not exhaustive as it only contains Programmes which are already produced or is under production and does not include Programmes what are likely to be produced in the near future).

e. The Seller shall also deliver free of charge such available publicity material such as promos, photo sets, posters, trailers, extracts etc and other materials in respect of the said Programmes.

f. The Seller shall, deliver on loan to the Buyer specified play outcenter good Digi-Betacam copies of all Programmes at least 48 hours in advance of the scheduled broadcast of the Programme.

4. BUYER'S OBLIGATIONS

The Buyer agree and covenant with the Seller that:

b. In consideration of the License granted hereunder by the Seller, the Buyer shall pay to the Seller the Programming Charges as set out in Paragraph 5.1 and payment shall be made in accordance to the terms and conditions provided in Paragraph 6.

10. The Buyer shall have the right to take all necessary steps (including registration of copyright where the Buyer shall deem necessary) to have the copyright in the Programme and the Delivery Material and the rights granted to the Buyer under this agreement protected throughout the Territory."

36. As the conditions are same as in the case of purchase of programmes from LMB Mauritius in our opinion propositions followed by us applies to this issue also. Thus the amount in question is not liable to tax in India and consequently the question of deduction of tax u/s. 195 does not arise. Thus there is no liability on behalf of the assessee for deduction of tax at source.

37. In the result, appeal of the assessee is allowed.

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