

**MOOT PROPOSITION**  
**DRAFT PROBLEM**

The Deputy Director of Income-Tax, International Taxation (1), Chennai has filed an appeal to the Honorable High Court of Madras under Section 260A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal, Chennai (“Tribunal”) passed in the case of “Vulcan Satellite Corporation (VSC USA) c/o SAPR Advocates, Chennai” (“assessee”) for the Assessment Year 2008-09. The appeal has been admitted by the High Court and it is fixed for final hearing.

For sake of brevity, the following substantial question of law, as has been admitted by the Honorable High Court, are herein below enunciated:

1. *“Whether on facts and circumstances of the case and in law, the Tribunal was right in holding that payments received by VSC USA from telecast operators (or TV Channels) in India for availing of transponder capacity on VSC USA’s satellite was neither Royalty nor Fees for Technical Services under Section 9(1)(vi) and Section 9(1)(vii) of the Indian Income Tax Act, 1961 and Article 12 of the India-USA DTAA”*
2. *“Whether on facts and circumstances of the case and in law, the Tribunal was correct in holding that payments to VSC USA were not Royalty payments even after the insertion of specific retrospective amendment vide Explanations 5 & 6 to Section 9(1)(vi) of the Indian Income Tax Act, 1961 vide Finance Act, 2012?”*

In relation to the matter at hand, the following Annexures form part of the record of the case:

- Annexure A: The impugned order of the Tribunal  
Annexure B: The appeal filed before the Tribunal by the assessee  
Annexure C: The order of the CIT(A)-III  
Annexure D: The appeal filed before the CIT(A)-III  
Annexure E: The assessment order

**Memorial Taxation**  
**Moot Court Competition**

**Annexure A**  
**IN THE INCOME-TAX APPELLATE TRIBUNAL, CHENNAI**  
**BEFORE Mr.D.T.A.Senapati ., JUDICIAL MEMBER**  
**AND Mr.T.P.Vardon,ACCOUNTANT MEMBER**  
**ITA No. 007/Che/2012**  
**Assessment Year 2008-2009**

VSC (USA)  
C/o M/s. SAPR Advocates  
Chennai,  
India.....Appellant  
Vs.  
Dy. Director of Income-tax,  
International Taxation  
1(1).....Respondent

Assessee represented by: Mr.P.Anthony.  
Department represented by: Mr.F.Rebello

**Per Bench:**

The present appeal arises out of the order of the Commissioner of Income-tax (Appeals)-III.

The short point of this appeal is whether the payments made to the Appellant, (a non-resident satellite operator) by Indian telecast operators for the uplink/downlink is in the nature of Royalty or FTS under the Indian Income Tax Act, 1961 and Article 12 of the India-USA DTAA

The Learned Counsel for the assessee argued at length and supported the Grounds of Appeal; the Learned Departmental Representative on the other hand relied on both the CIT(A) and AO's speaking orders

We have heard both Parties.

At the outset we note that the fact that assessee has no PE in India and that the satellite is not positioned over India and the footprint area covers many countries including India does not have any bearing on the payments IF they are construed as Royalty or FTS because of the retrospective amendment in Section 9 which does away with the need for *territorial nexus* for Royalty & FTS.

So now we first take up the applicability of Section 9(1)(vi) i.e., Royalty to the instant case. Whether Explanation 2 clause (i), (iii), (iv) or (vi) of S.9(1)(vi) will apply is the crux of the matter. We reproduce the relevant clauses of the Explanation below

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

....

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

....

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

...

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

**With respect to clause (i)**, the transfer that is envisaged is one of “rights in respect of property” and not “right in property” with the two transfers being distinct. The former one envisages a purchase of rights which enables use of property; the latter envisages merely a right to use. Royalty does not extend to outright purchase of right to use of asset. Clearly clause (i) cannot apply as there is no *transfer of rights in respect of property* in the instant case.

**With respect to clause (iii)**, it is our view that the CIT(A) and the AO have not interpreted them in the proper light. What is required is a *process* in the first place and secondly the *use (or) right to use* of said process.

What we see here clearly is that the **user** of the satellite in the legal sense is the Appellant and not its Indian customers given that **the Indian customers of the Appellant have no control over the parts of the satellite and the Appellant is the controller and operator of the satellite**. All that the Appellant does is provide a service which is accessed by its customers. In such a scenario, there can be no use or right to use of a process.

This viewpoint that there is no *use or right to use of a process* was upheld by the AAR in ISRO (2008 307 ITR 59 AAR) after detailed analysis. The CIT(A) wrongly held that the AAR decision will not apply as it referred to a *navigational transponder* and not a *communication transponder* though the difference between the two is not the issue in question. It is to be noted that SLP filed in this case by the Department was dismissed by the Apex Court in ***Sundari Bhagawandas Kripalani (1991 2 SCC 180)***.

**With respect to clause (iva)**, similar to clause (iii), the fact remains that the Appellant’s customers do not **use** the equipment; the fact is they simply do NOT have control over it. It is like accessing an email account - you may send and receive data but it cannot be said that you have control over and hence the use (or) right to use the computer servers housed in the data center of your email provider. It is clearly used by the Appellant in that the Appellant controls the satellite and provides the service of uplink/downlink to the Indian customers

**With respect to clause (vi)**, it is clear that first (i) or (iii) or (iva) must survive for (vi) to be applicable; we have held that that is not the case here and hence there is no question of applying clause (vi) of Explanation 2 at all.

**With respect to the retrospective amendments, namely Explanation 5 and 6 introduced by Finance Act 2012 from 1<sup>st</sup> July 2012 w.r.e.f 1-4-1976**, we don't see how it can override the Treaty provisions. Unilateral changes to the Act cannot implicitly override the bilaterally agreed upon Treaty. The fact is Section 90 has not been amended and the assessee has a right to choose between the Act (or) the Treaty and given that the Treaty is not amended, the retrospective amendments have no effect. We also rely on the decision of the *CIT Vs. Siemens Aktiengesellschaft, (310 ITR 320 Bombay)* which categorically holds that amendments cannot be read into the Treaty

Furthermore, unfortunately, the CIT(A) has completely misunderstood the *Gramophone Co. of India Ltd Vs V B Pandey (AIR 1984 SC 667)* judgment in the context of Act vs. Treaty. We reproduce the discussion *ADIT vs. TII Team Telecom International Pvt. Ltd ((2011) 12 ITR 688)* which discusses the *Gramophone (supra)* case in detail in a similar context and in doing so notes:

*“10. It was in this context, and particularly in a situation in which an international convention and a bilateral treaty was being given effect to without there being any enabling provisions for such convention and treaty overriding the domestic legislation, that Justice O Chenappa Reddy, in his inimitable manner, observed as follows:*

*‘There can be no question that nations must march with the international community and the Municipal law must respect rules of International law even as nations respect international opinion. The comity of Nations requires that Rules of International law may be accommodated in the Municipal Law even without express legislative sanction provided they do not run into conflict with Acts of Parliament. But when they do run into such conflict, the sovereignty and the integrity of the Republic and the supremacy of the constituted legislatures in making the laws may not be subjected to external rules except to the extent legitimately accepted by the constituted legislatures themselves. The doctrine of incorporation also recognizes the position that the rules of international law are incorporated into national law and considered to be part of the national law, unless they are in conflict with Act of Parliament. Comity of Nations or no, Municipal Law must prevail in case of conflict. National Courts cannot say yes if Parliament has said no to a principle of international law. National Courts will endorse international law but not if it conflicts with national law. National courts being organs of the National State and not organs of international law must perforce apply national law if international law conflicts with it. But the Courts are under an obligation within legitimate limits, to so interpret the Municipal Statute as to avoid conformation with the comity of Nations or the well established principles of International law. But if conflict is inevitable, the latter must yield.’*

11. These observations only lay down the principle that the “rules of International law may be accommodated in the Municipal Law even without express legislative sanction provided they do not run into conflict with Acts of Parliament ” but such an accommodation to rules of international law, by convention or by treaties, does not extend to the situations in which the provisions of domestic law are clearly contrary to the rules of international law. These observations have no bearing on a situation like the one before us, i.e. in the case of the Income Tax Act, in which the Act itself provides that the provisions of a tax treaty, entered into, and duly notified under the scheme of, Section 90 will override the provisions of the Act. The observations made in *Gramophone’s* case (*supra*) could have been relevant if the provisions of Section 90 were not on the statute book. Even in the absence of the provisions of Section 90, going by the rationale of *Gramophone* judgment, the provisions of tax treaty would have had application – though only to the extent the same does not come into conflict with the provisions of the Income Tax Act. In the case before us, however, it is because of the provisions of Section 90(2), and not merely on account of the general principles of extending respect to international conventions and treaties, that the provisions of the tax treaty override the provisions of the Income Tax Act. The observations made by Hon’ble Supreme Court, in the case of *Gramophone Company of India Ltd (supra)*, are thus wholly irrelevant in the present context”

**In short, the *Gramophone (supra)* case does not apply to the present case and the retrospective amendments made in the Act will not amend or affect the Articles of the India-USA Treaty.**

**Hence, we hold that the payments made to Appellant are not in the nature of Royalty u/S. 9(1)(vi) of the Act and Article 12 of the India-USA DTAA**

Now, coming to the applicability of Section 9(1)(vii) and Article 12 of the Act i.e., FTS; it is clear, as discussed above in the Royalty section, that a *service* is indeed provided by the Appellant. Now under the Act, surely it can be construed as FTS as the definition under the Act is very wide i.e., *management, consultancy or technical service* and there is no requirement of PE for FTS payments to be taxable in India. Hence, under the Act it will be construed as FTS no doubt.

However under the India-USA DTAA, there is the *make available* clause which we believe has been wrongly interpreted by the CIT(A). The make available clause is simply explained in the *CIT vs. De Beers India Minerals Pvt. Ltd. ((2012) 72 DTR (Kar) 82)* judgment which observes as follows:

“....the DTAA defines “fees for technical services” to mean payments in consideration for the rendering of any technical or consultancy services “which **make available** technical knowledge, experience, etc or consist of the development and transfer of a

*technical plan or technical design. To be said to “make available”, the service should be aimed at and result in transmitting technical knowledge etc so that the payer of the service could derive an enduring benefit and utilize the knowledge or know-how on his own in future without the aid of the service provider. In other words, to fit into terminology “making available”, the technical knowledge, skills” etc must remain with the person receiving the service even after the particular contract comes to an end. It is not enough that the services offered are the product of intense technological effort and a lot of technical knowledge and experience of the service provider has gone into it. The technical knowledge or skills of the provider should be imparted to and absorbed by the receiver so that the receiver can deploy similar technology or techniques in the future without depending upon the provider. On facts, while the Dutch company performed the surveys using substantial technical skills, it has not made available the technical expertise in respect of such collection or processing of data to the assessee, which the assessee can apply independently and without assistance and undertake such survey independently. Consequently, the consideration is not assessable as “fees for technical services”*

In the instant case, the satellite operator does not *make available* any technical knowledge, skill, knowhow etc. Making available the transponder does not enable the telecast operator to replicate/create its own transponder the next time or use the uplink/downlink service independent of the satellite operator thenceforth.

The analogy we can think of is that of passengers going on an airplane provides a technical service to the passengers no doubt but cannot be construed to *make available* any technical service under the DTAA as the passengers/users of the plane cannot fly by themselves independently thenceforth without use of the airplane and they were mere recipients of the output of a technical service and not the recipients of transfer of technical knowhow, skill, design etc. to equip them to act independently thenceforth.

In short, there are no technical services *made available* under Article 12(4)(b) of the India-USA DTAA and hence the payments to Appellant are not FTS under Article 12(4)(b) of the India-USA DTAA

**With respect to the exception clause in S.9(1)(vi)(b) and S.9(1)(vii)(b) regarding income earned from a source outside India**, we do appreciate that the income was generated for the Appellant by the accessing of the satellite transponder which is outside India but the fact remains that source of TV content and end-user viewership are in India and hence we believe this ground of the assessee does not hold water and the Delhi High Court judgment in *Havells India (supra)* prevails. However in light of the above discussions this view is of academic importance only as we hold that the payments themselves are not in the nature of FTS or Royalty.

It is also unfortunate that the CIT(A) dismisses the use of international jurisprudence on the basis of *CIT v P.V.A.L. Kulandagan Chettiar (2004) 137 Taxman 460 (SC)* decision which was rendered in specific set of facts and circumstances and should not be misconstrued. Ignoring

international jurisprudence is at our own peril. The fact is the OECD Model Commentary in Para 9.1 states specifically that

*“9.1 Satellite operators and their customers (including broadcasting and telecommunication enterprises) frequently enter into —transponder leasing agreements under which the satellite operator allows the customer to utilize the capacity of a satellite transponder to transmit 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 information, 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 simply 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, ICS 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 operator to the satellite owner could well be considered as a payment for the leasing of industrial, commercial or scientific equipment”*

In this context, the **OECD TAG Report** also makes perfect sense and relegating it to merely computer hardware goes against the grain of logic. The fact is the user must be in possession and/or control of the equipment for him to be having a use or right to use the said property

Also the authoritative commentary **“Klaus Vogel on Double Taxation Conventions (3<sup>rd</sup> Edition)”** states clearly that:

*“The use of a satellite is a service, not a rental (thus correctly, Rabe, A., 38 RIW 135 (1992), on Germany’s DTC 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 the 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”*

However the CIT(A) did not consider all these pressing arguments and held incorrectly that it is not safe to rely upon the same. However, what the CIT(A) fundamentally ignored is that when the technical terms used in the DTAA 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 holding very clearly that well-settled internationally accepted meanings/interpretations placed on identical or similar terms employed in various DTAA's should be followed by the Courts in India when it comes to construing similar terms occurring in the Indian Income Tax Act. We reproduce the following passage from the judgment of the Court in the case of ***Union of India and Another Vs. Azadi Bachao Andolan and Another***, [(2003) 263 ITR 706] :

*85. In our view, the contention of the respondents proceeds on the fallacious premise that liability to taxation is the same as payment of tax. Liability to taxation is a legal situation; payment of tax is a fiscal fact. For the purpose of application of Article 4 of the DTAC, what is relevant is the legal situation, namely, liability to taxation, and not the fiscal fact of actual payment of tax. If this were not so, the DTAC would not have used the words liable to taxation, but would have used some appropriate words like pays tax. On the language of the DTAC, it is not possible to accept the contention of the respondents that offshore companies incorporated and registered under MOBA are not liable to taxation under the Mauritius Income Tax Act; nor is it possible to accept the contention that such companies would not be resident in Mauritius within the meaning of Article 3 read with Article 4 of the DTAC.*

*86. There is a further reason in support of our view. The expression liable to taxation has been adopted from the Organisation for Economic Co-operation and Development Council (OECD) Model Convention 1977. The OECD commentary on article 4, defining resident, says : "Conventions for the avoidance of double taxation do not normally concern themselves with the domestic laws of the Contracting States laying down the conditions under which a person is to be treated fiscally as "resident" and, consequently, is fully liable to tax in that State". The expression used is liable to tax therein, by reasons of various factors. This definition has been carried over even in Article 4 dealing with resident in the OECD Model Convention 1992.*

*87. In A Manual on the OECD Model Tax Convention on Income and On Capital, at paragraph 4B.05, while commenting on Article 4 of the OECD Double Tax Convention, Philip Baker points out that the phrase liable to tax used in the first sentence of Article 4.1 of the Model Convention has raised a number of issues, and observes : "It seems clear that a person does not have to be actually paying tax to be "liable to tax" otherwise a person who had deductible losses or allowances, which reduced his tax bill to zero*



would find himself unable to enjoy the benefits of the convention. It also seems clear that a person who would otherwise be subject to comprehensive taxing but who enjoys a specific exemption from tax is nevertheless liable to tax, if the exemption were repealed, or the person no longer qualified for the exemption, the person would be liable to comprehensive taxation."

There are judgments of other High Courts also to the same effect such as *Commissioner of Income Tax Vs. Ahmedabad Manufacturing and Calico Printing Co.*, (139 ITR 806 (Guj.)), *CIT vs. Vs. Vishakhapatnam Port Trust* ((1983) 144 ITR 146 (AP)) and *N.V. Philips Vs. Commissioner of Income Tax* (172 ITR 521)

Finally, we believe that the decision of Asia Satellite Communications indeed does cover squarely the instant case. The fact that it did not discuss *New Skies Satellites N.V. vs. ADIT – 76y(International Taxation)* (319 ITR 269, ITAT Delhi SB) and that it has certain facts, which do not change the crux of the argument in the instant case, should not deter one from following the Hon'ble Delhi High Court decision. Furthermore, the recent Mumbai Tribunal in the recent *B4U International Holdings Ltd. Vs. DCIT (18 ITR (Trib)62 (Mumbai))* judgment rendered after the retrospective amendments is clearly in favour of the assessee. We do not see the requirement to go into all the other non-jurisdictional ITAT decisions amongst other decisions quoted by the Appellant as we believe the instant case is squarely covered by the Delhi High Court decision.

**In conclusion, we hold that**

- the payments made by the Appellant's customers are not Royalty under the Act and the DTAA and
- the payments are not Fees for Technical Services under the DTAA and
- the retrospective amendments of Finance Bill 2012 have not changed the India-USA Treaty and
- the international jurisprudence on the use of satellite transponder service is clearly not Royalty or FTS.

**Hence, to sum it all up the payments made to the Appellant are not taxable in India. We therefore allow this Appeal in favour of the assessee company.**

Sd/-  
(T.P.Vardon)  
Accountant Member

Sd/-  
(D.T.A. Senapati)  
Judicial Member

Chennai: Dated 1-11-2012

Copy to:

1. Parties
2. The CIT(A)-III;
3. The CIT
4. The DR, A-Bench  
(True Copy)

By Order  
Asst. Registrar, ITAT Chennai

**Annexure B**

VSC, USA c/o M/s. SAPR Advocates  
Assessment Year 2008-09.

**Grounds of Appeal before The Income-tax Appellate Tribunal, Chennai**

1. The Dy. Director of Income-tax, International Taxation, Chennai (AO) erred in concluding that the Appellant's income from providing transponder capacity on its satellite to Indian telecast operators (or TV Channels) was in the nature of Royalty as well as Fees for Technical Services and therefore said income of the Appellant was taxable as per the provisions of Section 9 of the Indian Income Tax Act, 1961 and Article 12 of the India-USA DTAA.
2. The Learned CIT(A) erred in holding that the payments are taxable in India as they constitute **Royalty** as per clauses (i), (iii), (iva) and (vi) of Explanation 2 to Sec.9(1)(vi).
3. The Learned CIT(A) erred in not following the decision of the Hon'ble Delhi High Court in *Asia Satellite Telecommunications Co. Ltd. Vs. DIT (332 ITR 340)* which squarely covers the instant case in favour of the assessee.
4. The Learned CIT(A) ignored the decision of *ISRO Satellite Centre (307 ITR 59 AAR)* which is on almost identical issue and whose SLP has been dismissed by the Apex Court in *Sundari Bhagawandas Kripalani (1991 2 SCC 180)*.
5. The Learned CIT(A) erred in holding that the appellant's services are taxable as **Fees for Technical Services**.
6. The Learned CIT(A) ought to have appreciated that there was **no technical knowhow, skill etc. made available by the Appellant to its customers** and the Learned CIT(A) should have followed the decisions of *CIT & ITO Vs. De Beers India Minerals (P.) Ltd. (2012) 72 DTR (Kar) 82*, *B4U International Holdings Ltd. Vs. DCIT (18 ITR (Trib.)62 (Mumbai))*, *DIT Vs. Guy Carpenter & Co. Ltd. ((2012) 81 CCH 42 (Del HC))*, *Raymond Limited Vs. Deputy Commissioner of Income Tax (86 ITD 791)* etc.
7. The Learned CIT(A) ought to have followed the jurisdictional High Court in *Aktiengesellschaft Kuhnle Kopp & Kausch (262 ITR 513 Madras HC)* wherein it was held that income earned from a source outside India is not taxable under the exception clause present in Section 9(1)(vi)(b) and 9(1)(vii)(b) of the Indian IT Act.
8. The Learned CIT(A) erred in **ignoring the wealth of international jurisprudence** that payments for satellite transponder usage is not in the nature of Royalty by misinterpreting the decision of *CIT v P.V.A.L. Kulandagan Chettiar (2004) 137 Taxman 460 (SC)* and ignoring an OECD TAG Report dated 1<sup>st</sup> February 2001, the updated OECD Model Commentary and the seminal book *Prof.Klaus Vogel on Double Taxation Conventions (Article 12, pages 765-809, Volume II)*

**3<sup>rd</sup> K.R.RAMAMANI MEMORIAL TAXATION MOOT COURT COMPETITION**

9. The Learned CIT(A) erred in holding that the **retrospective amendments** introduced by Finance Bill 2012 w.r.e.f 1-4-76 override the provisions of the India-USA Treaty. The Learned CIT(A) has misinterpreted the decision of *Gramophone Co. of India Ltd Vs V B Pandey (AIR 1984 SC 667)*

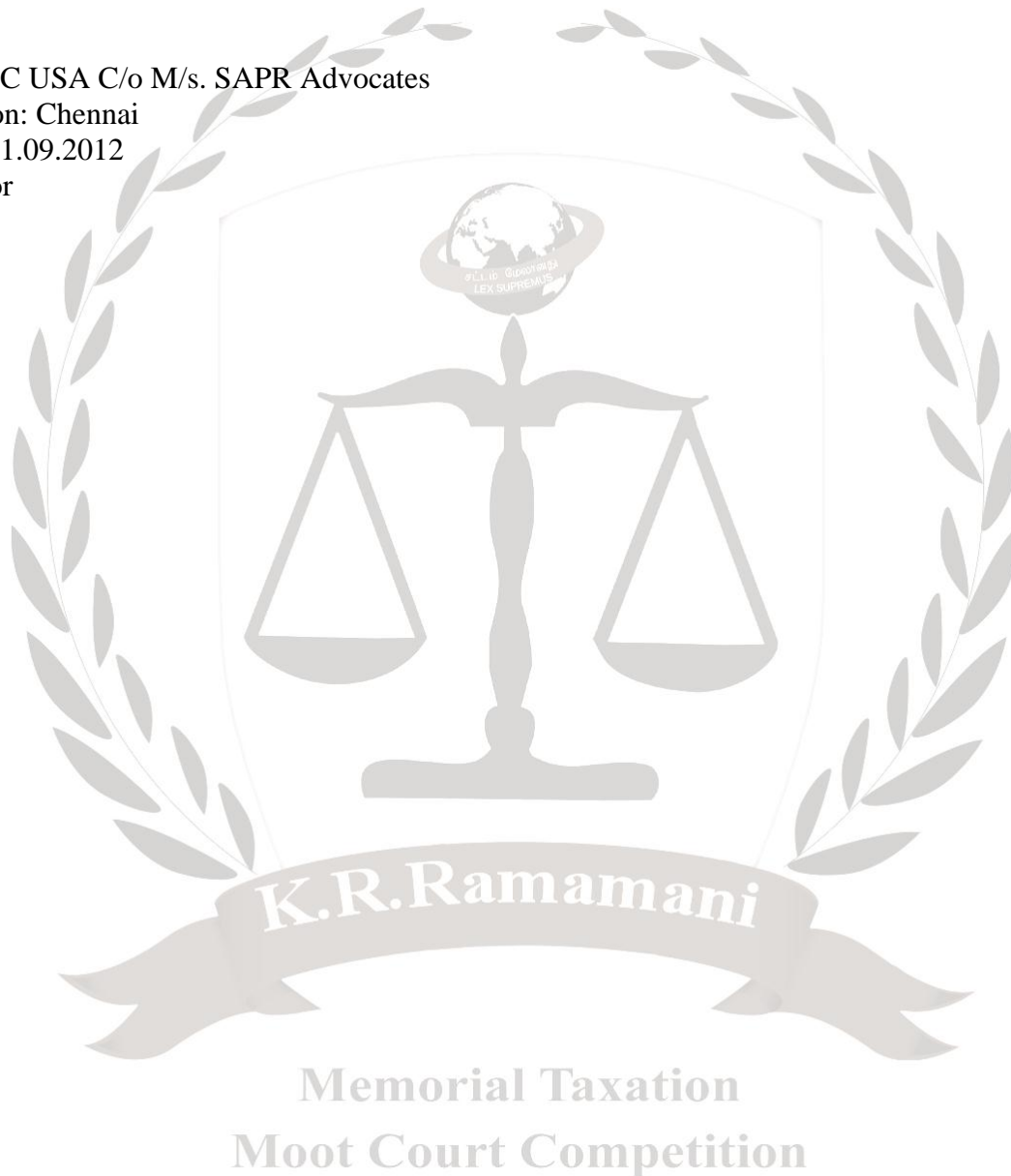
10. The Appellant seeks leave to add to, amend or withdraw any of the aforesaid grounds of appeal.

For VSC USA C/o M/s. SAPR Advocates

Location: Chennai

Date: 11.09.2012

Director



**Annexure C**

IN THE OFFICE OF THE COMMISSIONER OF INCOME-TAX (APPEALS)-III, CHENNAI

Date of Order: 10.09.2012

Appeal No. : ITA No./187/2012

1. Date of the institution of appeal: 12.02.2010
2. Designation of the Officer who made the assessment : Deputy Director of Income-tax, International Taxation 1(1), Chennai
3. Assessment Year: 2008-09
4. Name of The Appellant: VSC, USA c/o M/s SAPR Advocates
5. Income Assessed: NIL Rs.7,41,26,385/-
6. Income-tax Demanded: Total Rs.8,14,26,375 /- (Principal Rs7,41,26,385 + Interest Rs.72,99,990/- S.234B & 234C interest)
7. Section under which order appealed against was passed: Section 143(3) of IT Act,1961
8. Date of hearing: As per Order Sheet
9. Present for the appellant : Mr.P.Anthony
10. Present for Department: None

**APPELLATE ORDER AND GROUNDS OF DECISION**

This is an appeal against order under section 143(3) dated 31.12.2009 passed by the Dy. Director of Income-tax, International Taxation 1(1), Chennai. Mr.P.Anthony attended and discussed the case.

In support of the grounds raised in this appeal, the learned Counsel raised several grounds which we discuss one by one below in question & answer form:

- 1. The Appellant contends that the DDIT “erred in concluding that the Appellant’s income from providing transponder capacity on its satellite to Indian telecast operators (or TV Channels) was in the nature of Royalty as well as Fees for Technical Services and therefore said income of the Appellant was taxable as per the provisions of Section 9 of the Indian Income Tax Act, 1961 and Article 12 of the India-USA DTAA”.**

Section 9 is a *deeming provision*; it introduces a fiction that income would be deemed to accrue or arise in India if certain criteria are met. One of the criteria is if the payments are in the nature of Royalty or Fees for Technical Services. As pointed out rightly by the AO, Explanation to Section 9 clearly does not require any business connection (or office, in the instant case) if the payments are Royalty or FTS in nature which is the case here according to the AO. Hence, this argument that because the satellite is not over India and/or the Appellant does not have PE in India and/or the footprint area includes many countries as well as India are all inconsequential and not relevant. Are the payments in the nature of Royalty or FTS? That is what we must examine; if so then the income is

taxable in India regardless of office or satellite positioning. Article 12 also does not require any such PE for the Royalty payment to be taxed – PE's (Article 5) and business profits (Article 7) come into play only if the payments are not Royalty (Article 12). Hence, overall, I dismiss this ground of the Appellant.

**2. The Appellant contends that “The AO erred in holding that the payments are taxable in India as they constitute Royalty as per Explanation 2 to Sec.9(1)(vi)”**

Under this overarching Ground, the Appellant has taken a number of sub-grounds each of which we believe is important to discuss individually and do so below:

**Ground #2.1:** “The AO erred in holding that the use of transponder in a satellite amounts to a “process” as used in clauses (i) and (iii) of Expln 2 to Sec. 9(1)(vi).”

**The first argument under this ground (Ground #2.1.a)** of the Appellant is that there is only a service and there is no process. The normal definition of “process” is A “series of actions or steps taken to achieve an end” and clearly usage of a transponder to uplink, amplify and broadcast involves a series of steps to disseminate the signals all over the footprint area including India. How can it *not* be a process then? Even assuming for a moment, the Appellant’s argument that it is a *service* be taken, then clearly it has to come under Fees for Technical Service (S.9(1)(vii)) dealt with in more detail below and hence taxable in India in any case.

**The second argument under this ground (Ground #2.1.b)** of the Appellant is that the user of the satellite is the Appellant and not the customers and hence the payments made for the **use or right to use** the satellite does not apply to its customers and consequentially the payments made by its customers. In other words, the Learned Counsel’s contention is that satellite companies themselves use the said process. According to the Counsel’s arguments, as per various views given in commentaries and decisions, the use of process should be by the person who is availing the benefit for the consideration. In other words, the main contention in this regard of satellite companies is that user of the process by satellite companies themselves does not fall within the ambit of word ‘use’, therefore, the consideration is not in the shape of ‘royalty’ which could be taxed either under domestic law or under the provisions of DTAA.

The real reasoning behind this contention of the Appellant that it controls the satellite and not the telecast operators seems to stem from the fact that the required “user” as envisaged in clause (iii) of the Explanation 2 to Section 9(1)(vi) cannot be inferred unless the process itself is used by the customers of the Appellant.

In this context, we use the discussion in *New Skies Satellites N.V. vs. ADIT (International Taxation) (319 ITR 269, ITAT Delhi SB)* where it is analyzed as to how the transponder of the satellite is used. The transponder is designed to act in a predetermined & predefined manner as per required specifications. Once a particular

capacity of transponder is allotted to one customer under a contract, the said capacity cannot be allotted/given to other customers unless and otherwise provided in the contract. The Appellant through its control stations can instruct the transponders to act in a particular manner to give a desired result but that does not mean that they can interfere with the uplinked data to change the same in any manner. The Appellant does not control the data to be uplinked or downlinked except it can, if necessary, stop the up/downlinking of the data. Therefore, what is provided by the satellite companies to its customers is the particular capacity of a transponder's predetermined & pre-guided process for their user. Under these circumstances it has to be examined and determined that who is using that process. It is the claim of the satellite companies that they are using the process on their own. The process is predetermined according to the customer requirements with the satellite companies having no control over data to be uplinked/downlinked by the customers. The customer is authorized to uplink and downlink the data at any particular point of time according to agreement. Thus, the "process" is embedded in the transponder, which is used by the customers and not by the satellite companies as they do not have any control either on the data to be uplinked/downlinked or on the time of uplinking/downlinking. The only obligation of the satellite companies is to observe that transponder is working properly or not. In other words the obligation of the satellite companies is limited only to keep the health of transponders and satellite in a good working condition so as to ensure the uninterrupted use of transponders by the telecasting companies. **Therefore, it cannot be said that the process is used by the satellite companies to uplink/downlink the data of telecasting companies. The process is used by the telecasting companies according to their requirements.**

**The third argument (ground #2.3) of the Appellant** is that the *process* referred to in the IT Act has to be 'secret process' and not any 'process'. Furthermore, it is submitted that there is an absence of comma after the phrase *secret formula or process* in the IT Act but such comma exists in the DTAA is relevant to interpretation of whether the payments are Royalty or not.

**I find there is no force in the claim of Ld. Counsel of the assessee that simply a comma placed after the phrase *secret formula or process* implies that the process should also be construed to be "secret" to bring the consideration within the ambit of Royalty.** Moreover, I feel that the principles of literal interpretation do not apply to interpretation of tax treaties and the treaties should be read more as Agreements than taking a microscope to their wordings and punctuations. In other words we have the ordinary meanings given to those words in that context and in the light of its objects and purpose and *ut res magis valeat quam pereat, i.e., to make it workable rather than redundant is the correct approach in my view.*

In *Lewis Pugh Evans Pugh vs. Ashutosh Sen (AIR 1929 Privy Council 69)*, as referred to in page 119 of the *New Skies Satellite* (supra) ITAT order, while construing Article 48 of the Indian Limitation Act, 1908, which read as "for specific

*moveable property lost or acquired by theft, or dishonest misappropriation or conversion, or for compensation for wrongfully taking or detaining the same*". Lord Warrington rejected the contention that the word 'dishonest' qualified not only 'misappropriation' but also 'conversion' bringing only dishonest conversion within the Article, and observed : "*The truth is that, if the article is read without the commas inserted in the print, as a court of law is bound to do, the meaning is reasonably clear.*" Hence, I reject this ground of the assessee that the process has to be *secret*; there is no such requirement for a process to be secret for it to be construed as Royalty.

**The fourth argument (Ground #2.1.d)** of the Appellant is that 'process' referred to in clause (iii) to Explanation 2 should be considered to be a right protected as intellectual property right. on the basis of *ejusdem generis* and *noscitur a sociis* rules of interpretation.

The Learned Counsel basically means that only *protected intellectual property* should be considered as Royalty. This viewpoint is not acceptable because such provision clearly covers protected as well as unprotected Intellectual Properties. For example, *invention* which is mentioned in the same clause (iii) can be protected or not protected. Same is the case with model, design, formula, trademark (registered/unregistered). In other words, clause (iii) to Explanation 2 to Section 9(1)(vi) describes the things, which may constitute intellectual property but at the same time it is not necessary that intellectual property must also be a protected one. Therefore, the consideration for use of the "process" in transponder, even if it is not protected, will fall within the definition of "royalty" as nowhere in the provisions it is stated that the process also should be protected one.

**The fourth argument of the Appellant (Ground #2.4)** puts forth the view that the "transfer" envisaged in clause (i) has to involve alienation and not merely a transfer of right to access. I do not agree with the Appellant's contention for a simple reading of the entire phrase in clause (i) namely "*transfer of all or any rights...*" leads to a conclusion that providing right to access i.e., right to use is also a transfer of a right and furthermore in no way can this general phrase be concluded to mean alienation or sale/purchase being involved here.

Ground #2.2: "*The AO erred in holding that the transponder in the satellite is an equipment, covered by the term 'the use or right to use any industrial, commercial or scientific equipment' as used in clause (iva) of Explanation 2, thereby making the payments Royalty*"

A satellite is a highly sophisticated piece of machinery and is typically developed and deployed by the aerospace industry majors and/or Government space organizations and hence surely it is industrial and scientific equipment. Furthermore as discussed in detail above (Ground #2.1.b) there is clearly a use of the transponder of the satellite and hence the satellite itself and this clause (iva) squarely applies to the Appellant's case leaving in

my mind no doubt that the payments to Appellant are Royalty.

**Ground #2.3:** *“The AO erred in ignoring the fact that unless the consideration received by the assessee fell within the meaning of sub-clauses i.e., cl. (i) to (iv), (iva) and (v), the consideration cannot be treated as royalty under sub-cl. (vi).”*

The fact is that clause (iii) to Explanation 2 to Section 9(1)(vi) is covered by Clause (vi) which reads *“(vi) the rendering of any services in connection with the activities referred to in sub-clauses (i) to (iv), (iva) and (v).”* The services rendered in connection with the activity being the ‘process’ referred to in clause (iii) shall also fall within clause (vi) of Explanation 2 to Section 9(1)(vi) de hors the applicability of clause (iii) of Explanation 2 to Section 9(1)(vi). Therefore, even if the claim of Learned Counsel is accepted that the Appellant is only rendering services of making available the transponders then too these services are rendered by Appellant to the telecasting companies with respect to the user of process in the transponder. Hence, I hold clause (vi) of Explanation 2 to Section 9(1)(vi) is also applicable to the instant case.

**Ground #2.4:** *“The decision of the Hon’ble Delhi High Court in Asia Satellite Telecommunications Co. Ltd. Vs. DIT (2011) 332 ITR 340 squarely covers the instant case in favour of the assessee.”*

**Ground #2.5:** The ratio of the Apex Court’s decision in *Bharat Sanchar Nigam Ltd. And Another 282 ITR 273 (SC)* holding that there is no right to use in the facilities provided by telecom companies is squarely applicable to the instant case

**Ground #2.6:** *“The decisions given in ISRO Satellite Centre 307 ITR 59, Dell International Services India Pvt. Ltd. 305 ITR 37, DCIT Vs. Panamsat International Systems Inc (2006) 103 TTJ (Del) 861, ADIT Vs. TII Team Telecom ((2011) 12 ITR 688), Channel Guide India Ltd. Vs ACIT ITA No. 1221/Mum/2006 are all on similar facts and circumstances and wherein the various Tribunals have held in favour of the Appellant”*

With regards to the BSNL decision (supra) it can be seen that the judgment was about whether the transaction can be held to be transaction of sale. Transfer of right to use the goods is to be considered to be transaction of sale when the above conditions laid down are fulfilled. The test laid down by Hon'ble Supreme Court in BSNL’s case cannot be applied to the present case as in the present case we are not considering the transactions which are considered to be for the transfer of right to use the goods for which it is very much necessary that there must be goods available for delivery. Therefore, these observations of Hon'ble Supreme Court are not relevant for deciding the present case. This is also the case with *Dell International Services* (supra). Furthermore, the *ISRO case* (supra) of the AAR deals with different facts and circumstances as well as it relates to *navigational transponders* which are essentially passive compared to communication transponders in the instant case (reference to para 7.4 of the *ISRO (supra)* decision)

Now coming to the recent *Asia Satellite Telecommunications* judgment of the Hon’ble Delhi High Court; unfortunately the AO did not have the wisdom of this judgment at the



time of writing his order. However, I still hold that the AO's order was correct as the Delhi High Court's judgment did not refer at all to the *New Skies Satellite (supra)* detailed 155 page judgment in its discussions, especially given that *New Skies* decision was the outcome of a Special Bench constituted to hear conflicting views in *PanamSat* case (*supra*) and *Asia Satellite Delhi Tribunal (85 ITD 478)* decisions. Hence, the Asia Satellite Tribunal decision was discussed in great detail in the Special Bench judgment which seems to have been completely overlooked. Furthermore, I am of the view that the facts and circumstances of the *Asia Satellite case (supra)* are distinguishable from the instant case. The other Tribunal decisions are non-jurisdictional and in any case the *New Skies (supra)* Special Bench overrules them. Hence I follow the *New Skies Satellite (supra)* judgment and uphold the order of the AO

Hence, I overall dismiss Ground #2 of the Appellant and hold that the AO has correctly concluded that clauses (i), (iii), (iva) and (vi) of Explanation 2 to S.9(1)(vi) will apply to the instant case and the payments made to Appellant by its Indian customers is in the nature of Royalty payments.

**3. "The AO erred in holding that the appellant's services are taxable as 'Fees for Technical Services.'"**

The Appellant's reliance on SkyCell is incorrect; a satellite uplink/downlink cannot be construed as a "standard facility". If that were the case, all facilities can be construed as "standard" and FTS could not be levied. The Madras High Court in a specific set of facts and circumstances ruled that a **cellular network** is a standard facility and the judgments scope cannot be enlarged by the Appellant for its own purpose.

With respect to the **make available** clause elucidated in the MOU of the India-USA DTAA as well as the *DIT Vs. Guy Carpenter & Co. Ltd. ((2012) 81 CCH 42 (Del HC))*, *CIT & ITO Vs. De Beers India Minerals (P.) Ltd. (2012) 72 DTR (Kar) 82*, *Raymond Limited Vs. Deputy Commissioner of Income Tax (86 ITD 791)* decisions of the Hon'ble Courts and Tribunals, I hold that the those cases were in distinguishable facts and circumstances and in the instant case it clearly is that the transponder service is **made available** for the telecast operator to independently use. Hence it clearly is a making available of services and hence FTS. It cannot be equated to the output of survey report (or) non-resident reinsurance brokerage services etc. which is what the above decisions refer to.

**4. "The AO erred in ignoring the fact that the income is earned from a source outside India, which is not taxable under the exception clause present in Section 9(1)(vii)(b) and 9(1)(vi)(b) and ought to have followed the decisions given in Lufthansa Cargo India P Ltd. Vs. DCIT 91 TTJ 133 (Del) and Aktiengesellschaft Kuhnle Kopp & Kausch 262 ITR 513 (Mad)."**

It is hard to accept the contention of the Learned Counsel of the assessee when very clearly the *source* of the income is from India – whether it be the initial uplink of Indian TV content

or whether it be the income from cable operators who collect from Indian viewers and pay the TV Channels for their content. Hence, I find this exception clause cannot be invoked in the instant case. The Madras High Court case is clearly distinguishable on facts itself and in any case the recent Delhi High Court decision in *CIT vs. Havells India Ltd. (ITA No.55 & 57 of 2012 dated 21<sup>st</sup> May, 2012)* wherein the exception clause was elaborately discussed and the Madras High Court decision referred to by the assessee was found to be incorrect and the Delhi High Court held in favour of the Revenue. Thus, I dismiss this ground of the Appellant.

**5. “The AO erred in ignoring the wealth of international jurisprudence relating to characterization of payments for lease of transponder of satellite as business profits of the satellite company and not Royalty. More specifically, the AO ignored the authoritative book “Prof.Klaus Vogel on Double Taxation Conventions” (Article 12, pages 765-809, Volume II), the official Report of the Technical Advisory Group (TAG) of OECD on “Tax Treaty Characterization Issues Arising for E-Commerce” (1<sup>st</sup> February 2001) and the updated OECD Model Commentary which in Paragraph 9.1 specifically states that payments made for the use of transponder transmitting capacity will not amount to Royalty as they are not payments for the use of, or right to use, a secret process since the satellite technology is not transferred to the customer”**

Firstly, we would like to point out that in *CIT v P.V.A.L. Kulandagan Chettiar (2004) 137 Taxman 460 (SC)*, the relevant observations are as follows:

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

Hence, while it might be useful to follow international jurisprudence in certain cases, India is not always bound by the same; this is very much reiterated by the **official Reservation to Paragraph 9.1** that Government of India has recorded in the recently updated OECD Model Commentary.

Furthermore, the Learned Counsel submitted Paras 32 to 35 of the **OECD TAG Report on “Tax Treaty Characterization Issues Arising for E-Commerce” (1<sup>st</sup> February 2001)** which discusses under what circumstances computer hardware, namely, equipment should be said to have been made available for use to a customer. The aforesaid OECD TAG has brought the following tests the fulfillment of all or some of which would render the transaction to be used for equipment.

- a) *The customer is in physical possession of the property.*
- b) *The customer controls the property.*
- c) *The customer has a significant economic or possessory interest in the property.*

- d) The provider does not bear any risk of substantially diminished receipts or substantially increased expenditures if there is non-performance under the contract.*
- e) The provider does not use the property concurrently to provide significant services to entities unrelated to the service recipient.*
- f) The total payment does not substantially exceed the rental value of the equipment for the contract period.*

The aforesaid TAG Report is not of relevance here as a perusal of para 28 reveals that these tests have been laid down only in respect of computer hardware. It cannot be made applicable to the transponder capacity for which it is difficult to assume a situation wherein the customer will be in the physical possession of the property.

Further reference was made to the commentary on Double Taxation Conventions of Professor Klaus Vogel (para 43, page 787, Article 12, Volume II) the relevant extract is submitted by Learned Counsel as follows:

*“aa) Whenever the term royalties relates to payments in respect of proprietary rights, processes, or equipment, application of Article 12 requires the payment to be made for the ‘use’ or the right to use, the assets in question.*

*A distinction must be made between letting the licensed asset for use on the one hand and transferring its substance by alienation (regarding the deviation of US MC, see infra m. no. 63). The decisive difference in this connection is the degree of change in the attribution of the asset from licensor to licensee. On the other hand, another distinction to be made is letting the proprietary right, experience, etc., on the one hand and use of it by the licensor himself. e.g. within the framework of an advisory activity. Within the range from ‘services via ‘letting’ to ‘alienation’, outright alienation is the one clear cut extreme, viz, outright transfer of the asset involved (right, etc.) to the payer of the royalty. The other, just as clear cut extreme is the exercise by the payee of activities in the service of the payer, activities for which the payee uses his own proprietary rights, know-how, etc., while not letting or transferring them to the payer (for more details regarding the distinction between licensing and the provision of services, see infra m.nos. 54ff, in connection with the various subjects of licences). Neither extreme comes under Art. 12, all that does is the central category, viz. ‘letting’*

.....

*Industrial, commercial, or scientific equipment:*

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

Firstly, I believe that all these observations are relating to *leasing* and not *consideration paid for use of process* which is the instant case here.

Secondly, it is pointed out that in the decision of *Authority for Advancing Ruling (AAR) P.No.30 of 1999 In re:* in which an Indian company (“XT”) accessed the central processing unit of its parent company (“Y”) through a Consolidated Data Network (CDN) in Hong Kong and the AAR held that payments received by Indian company was in the nature of Royalty and made the following observations after analyzing the aforesaid commentary by Prof.Klaus Vogel:

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

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

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

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

*The answer to the questions was given as under:-*

*33. The answer to the above question has to be determined with reference to the facts and circumstances of this case mentioned above. We are moving increasingly towards a digital age. With increasing globalization, both labour and capital have become more mobile and markets more integrated and business being conducted across borders on a day-to-day basis. It is well-known that globally, enterprises are becoming completely networked, more so in the field of software, ‘Y’, in the present case, is a service-provider which, inter alia, allows the ‘XT’ to use its bandwidth as also its networking-infrastructure for the consideration spelt out in the agreement. In the instant case, though workers are less mobile than the capital and technology, the access to it has been made possible through the CPU & CDN. From the facilities provided by the applicant to the Indian company, which are in the nature of online, analytical data processing, it would be quite clear that the payment has been received as ‘consideration for use of, or the right to use. . . design or model, plan, secret formula or process. . .’ within the meaning of the term ‘royalties’ in article 12(3)(a).”*

**Finally, the very recent retrospective amendments specifically Explanation 5 and Explanation 6 of Finance Bill 2012 passed on 1<sup>st</sup> July 2012 w.r.e.f 1-4-1976** which read as below clearly put the entire issue to rest.

*“Explanation 5.—For the removal of doubts, it is hereby clarified that the royalty includes and has always included consideration in respect of any right, property or information, whether or not—*

*(a) the possession or control of such right, property or information is with the payer;*

*(b) such right, property or information is used directly by the payer;*

*(c) the location of such right, property or information is in India.*

*Explanation 6.—For the removal of doubts, it is hereby clarified that the expression ‘process’ includes and shall be deemed to have always included transmission by satellite (including up-linking, amplification, conversion for down-linking of any signal), cable, optic fibre or by any other similar technology, whether or not such process is secret”*

**Thus there can be no doubt whatsoever, after these retrospective amendments, that satellite transponder usage payments are in the nature of Royalty.** To the question of whether these

amendments are not reflected in the DTAA, I respectfully submit the Supreme Court decision in *Gramophone Co. of India Ltd Vs V B Pandey (AIR 1984 SC 667)* wherein it was held as follows:

*“National Courts cannot say yes if Parliament has said no to a principle of international law. National Courts will endorse international law but not if it conflicts with national law. National courts being organs of the National State and not organs of international law must perforce apply national law if international law conflicts with it. But the Courts are under an obligation within legitimate limits, to so interpret the Municipal Statute as to avoid conformation with the comity of Nations or the well established principles of International law. But if conflict is inevitable, the latter must yield.”*

Hence, in light of the conflict brought about by the retrospective amendments of Finance Bill 2012, the India-USA Treaty has to give way to the Indian Income Tax Act

**In conclusion, I dismiss all the grounds of Appeal by the Appellant and uphold the order of the AO that payments made to the Appellant by Indian telecasting companies are in the nature of Royalty and Fees for Technical Services under the Act as well as the India-USA DTAA**

Sd/-

COMMISSIONER OF INCOME-TAX (APPEALS)-III, CHENNAI

Copy to:-

1. VTC USA c/o M/s SAPR Advocates, Chennai (Appellant)
2. The C.I.T., City IV, Chennai
3. DDIT, Intl Taxation 1(1), Chennai

**K.R.Ramamani**  
**Memorial Taxation**  
**Moot Court Competition**

**Annexure D**

VSC, USA c/o M/s SAPR Advocates  
Assessment Year 2008-2009.

**Grounds of Appeal before the CIT(A)**

1. The Dy. Director of Income-tax, International Taxation, Chennai (AO) erred in concluding that the Appellant's income from providing transponder capacity on its satellite to Indian telecast operators (or TV Channels) was in the nature of Royalty as well as Fees for Technical Services and therefore said income of the Appellant was taxable as per the provisions of Section 9 of the Indian Income Tax Act, 1961 and Article 12 of the India-USA DTAA.

1.1 The AO erred in holding that the income of the appellant is deemed to have accrued or arisen in India.

1.2 The AO erred in ignoring the fact that the Appellant does not have an office in India, no operations of the Appellant are carried out in India and the Appellant's satellite is not stationed over Indian airspace. The signals were merely received from in India and broadcasted over a wide footprint region including India.

1.3 The AO erred in ignoring the decision of the Hon'ble High Court of Bombay in *CIT Vs. Siemens Aktiengesellschaft (2009) 310 ITR 320*.

2. The AO erred in holding that the payments are taxable in India as they constitute Royalty as per Explanation 2 to Sec.9(1)(vi).

**2.1 The AO erred in holding that the use of transponder in a satellite amounts to a "process" as used in clauses (i) and (iii) of Explan 2 to Sec. 9(1)(vi).**

2.1.a The AO ought to have appreciated that the payment represents consideration for the **use of a service and not for the use of any process.**

2.1.b The AO failed to understand that the **user of the satellite** was the Appellant (who had the real control of the satellite) and not the Appellant's customers who made the payments to the Appellant for merely sending and receiving signals to/from the Appellant's satellites. Hence it is illogical for the AO to characterize the payments by Appellant's customers as Royalty.

2.1.c Alternatively, assuming that it constitutes use of a process by the Appellant's customers, the AO ought to have considered the requirements of both; clause (iii) of Explanation 2 to S.9(1)(vi), especially in the context of absence of comma after phrase *secret formula or process* in Article 12(3)(a) of the India-USA DTAA, that the process for which payment is made should necessarily be a *secret process*

2.1.d Furthermore the *process*, if any, has to be *protected process* keeping in mind the rules of interpretation namely *ejusdem generis and noscitur socii*

2.1.e The AO erred in ignoring the fact that the “*transfer of all or any rights*” found in clause (i) of Expln 2 to Sec. 9(1)(vi) envisages that there is a transfer of “right in respect of property” i.e., alienation and does not apply to the instant case where the Appellant merely provides access to uplink/downlink to and from its satellite transponder.

2.2 The AO erred in holding that the transponder in the satellite is an equipment, covered by the term “*the use or right to use any industrial, commercial or scientific equipment*” as used in clause (iva) of Explanation 2, thereby making the payments Royalty.

2.2.a The AO ought to have appreciated that appellant has not given control i.e., use of any ‘equipment’ (satellite) but has only given an access to uplink/downlink the signals.

2.2.b The AO ought to have appreciated that there is a difference between rendering of service of a person using his/her own equipment and the grant of right to use the equipment to the recipient of service.

2.2.c The AO ought to have appreciated that word “use” in relation to equipment under Expln. 2(iva) to s. 9(1)(vi) of the Act cannot be equated with availing the benefit of an equipment.

2.2.d The AO ought to have appreciated the fact that the Appellant’s customers are not *using* the equipment of the appellant, nor are they given a *right to use it*

2.3 The AO erred in ignoring the fact that **unless the consideration received by the assessee fell within the meaning of sub-clauses i.e., cl. (i) to (iv), (iva) and (v), the consideration cannot be treated as royalty under sub-cl. (vi).**

2.3.a The AO ought to have appreciated that if a view is taken that services covered by cl. (vi) are independent of cls. (i) to (iv) of the Explanation and hence, covered by types of services is correct, then, the same would render all other provisions of the Act including s. 9(1)(vi) obsolete.

2.4 The decision of the Hon’ble Delhi High Court in *Asia Satellite Telecommunications Co. Ltd. Vs. DIT (2011) 332 ITR 340* squarely covers the instant case in favour of the assessee.

2.5 The ratio of the Apex Court’s decision in *Bharat Sanchar Nigam Ltd. And Another 282 ITR 273 (SC)* holding that there is no *right to use* in the facilities provided by telecom companies is squarely applicable to the instant case

2.6 The decisions given in *ISRO Satellite Centre 307 ITR 59, Dell International Services India Pvt. Ltd. 305 ITR 37, DCIT Vs. Panamsat International Systems Inc (2006) 103 TTJ (Del) 861, ADIT Vs. TH Team Telecom ((2011) 12 ITR 688), Channel Guide India Ltd. Vs*

*ACIT ITA No. 1221/Mum/2006, ITO Vs. Raj Television Net Works Ltd in ITA Nos. 1827 and 1828/Mds/1998* are all on similar facts and circumstances and wherein the various Tribunals have held in favour of the Appellant

3. The AO erred in holding that the appellant's services are taxable as 'Fees for Technical Services.'

3.1 The AO ought to have appreciated that the payments are for use of a standard facility provided to all those willing to pay for it and ought to have followed the decision of the Hon'ble Madras High Court in *Skycell Communications Ltd Vs DCIT (2001) 251 ITR 53 (Mad)*.

3.2. Without prejudice to the above, the AO ought to have **appreciated that a mere rendering of service cannot be considered as making available FTS** and that under Article. 12(4)(b) of the India US DTAA, there has to be a transfer of technical knowledge, skill, process etc., to the recipient which enables the recipient to apply the technology independently thenceforth for the service to be considered made available and hence FTS.

3.3 The AO ought to have appreciated that the payment would be regarded as fees for technical services only if the twin test of rendering services and making technical knowledge available at the same time is satisfied as laid down by the Karnataka High Court in the case of *CIT & ITO Vs. De Beers India Minerals (P.) Ltd. (72 DTR (Kar.) 82)*

3.4 The AO erred in ignoring the provisions of **the Memorandum of Understanding (MOU) which is part of the India-USA DTAA** and which provides detailed discussion and examples of the "make available" clause and its interpretation.

3.5 The AO erred in ignoring the judgments given in *Skycell Communications 251 ITR 53, B4U International Holdings Ltd. Vs. DCIT (18 ITR (Trib.)62 (Mumbai), DIT Vs. Guy Carpenter & Co. Ltd. ((2012) 81 CCH 42 (Del HC)) , Raymond Limited Vs. Deputy Commissioner of Income Tax (86 ITD 791)* etc. all of which cover the issue in favour of the assessee.

4. The AO erred in ignoring the fact that the income is earned from a source outside India, which is not taxable under the exception clause present in Section 9(1)(vii)(b) and 9(1)(vi)(b) and ought to have followed the decisions given in *Lufthansa Cargo India P Ltd. Vs. DCIT 91 TTJ 133 (Del)* and *Aktiengesellschaft Kuhnle Kopp & Kausch 262 ITR 513 (Mad)*.

5. The AO erred in ignoring the wealth of **international jurisprudence** relating to characterization of payments for lease of transponder of satellite as business profits of the satellite company and not Royalty. More specifically, the AO ignored the authoritative book "**Prof.Klaus Vogel on Double Taxation Conventions**" (Article 12, pages 765-809, Volume II), the official **Report of the Technical Advisory Group (TAG) of OECD on "Tax Treaty Characterization Issues Arising for E-Commerce"** (1<sup>st</sup> February 2001) and the **updated OECD Model Commentary** which in Paragraph 9.1 specifically states that payments made for



**3<sup>rd</sup> K.R.RAMAMANI MEMORIAL TAXATION MOOT COURT COMPETITION**

the use of transponder transmitting capacity will not amount to Royalty as they are not payments for the use of, or right to use, a secret process since the satellite technology is not transferred to the customer.

6. The appellant seeks leave to add to, amend or withdraw any of the aforesaid grounds of appeal.

Chennai  
For VSC USA, c/o M/s SAPR Advocates  
Dated: 12.02.2010  
Authorised Signatory  
M/s SAPR Advocates  
Assessment Year 2008-09

**Statement of Facts**

The appellant seeks leave to substantiate the above ground at the time of hearing.

Chennai  
For VSC, USA c/o M/s SAPR Advocates  
Date: 12.02.2010  
Authorised Signatory



**K.R. Ramamani**  
**Memorial Taxation**  
**Moot Court Competition**

**Annexure E**

**INCOME-TAX DEPARTMENT**

1. Name of the Assessee: VSC, USA c/o M/s SAPR Advocates, Chennai
2. Address: No.105-A, Dr.Radhakrishnan Salai, Chennai
3. P.A.N. / G.I.R. No.: RRRNG 1234 M
4. District / Ward / Circle No.: Dy. Director of Income-tax 1(1), International Taxation, Chennai
5. Status: Company
6. Assessment Year: 2008-2009.
7. Whether resident / resident but not ordinarily resident / non-resident: Non Resident
8. Method of accounting: Mercantile
9. Date of order: 31.12.2009
10. Section and sub-section under which the assessment is made: 143(3)

**ASSESSMENT ORDER**

The return of income declaring NIL income was filed on 30.09.07. The return was processed under section 143(1) of the Income-tax Act, 1961 (“the Act”). Thereafter, the case was selected for scrutiny by issuing notices under section 142(1) and 143(2) of the Act.

During the assessment proceedings, the Chartered Accountant, of the assessee Mr. Aziz Alam, attended on behalf of the assessee and furnished the various details called for.

The assessee is a corporation incorporated in USA and does not have a Permanent Establishment in India as per the India-USA DTAA. The assessee files its returns through M/s. SAPR Advocates, a law firm situated in Chennai.

The assessee leases its satellite’s transponder to Indian telecast operators (basically, TV channels) which uplink their content from India and the transponder of the assessee receives, amplifies and downlinks over a ‘foot print area’ (i.e., broadcast area) which includes India thereby enabling the cable operators amongst others to receive and view the TV channels. The assessee in short allows the use of its satellite transponder for this uplink/downlink facility but believes that the payments made to it for said use of its transponders is its business profits not taxable in India and hence offers NIL income to tax in India.

At the outset I note that Explanation to Section 9 substituted with retrospective effect from 1-4-1976 makes it clear that whether or not the assessee has a PE here in India it is taxable in India for the Royalty or FTS income. The said Explanation reads as follows:

*“Explanation.—For the removal of doubts, it is hereby declared that for the purposes of this section, income of a non-resident shall be deemed to accrue or arise in India under clause (v) or clause (vi) or clause (vii) of sub-section (1) and shall be included in the total income of the non-resident, whether or not,—*

- (i) *the non-resident has a residence or place of business or business connection in India; or*
- (ii) *the non-resident has rendered services in India”*

So, let us proceed to analyze Section 9(1)(vi), 9(1)(vii) and the corresponding Article 12 and 13 in the India-USA DTAA.

**With regards to Royalty:** Clauses (i), (iii), (iva) and clause (vi) of Explanation 2 to Section 9(1)(vi) would squarely apply to the assessee’s case:

“””

*Explanation 2.—For the purposes of this clause, "royalty" means consideration (including any lump sum consideration but excluding any consideration which would be the income of the recipient chargeable under the head "Capital gains") for—*

- (i) *the transfer of all or any rights (including the granting of a licence) in respect of a patent, invention, model, design, secret formula or process or trade mark or similar property ;***
- (ii) the imparting of any information concerning the working of, or the use of, a patent, invention, model, design, secret formula or process or trade mark or similar property ;*
- (iii) *the use of any patent, invention, model, design, secret formula or process or trade mark or similar property ;***
- (iv) the imparting of any information concerning technical, industrial, commercial or scientific knowledge, experience or skill ;*
- (iva) *the use or right to use any industrial, commercial or scientific equipment but not including the amounts referred to in section 44BB;***
- (v) the transfer of all or any rights (including the granting of a licence) in respect of any copyright, literary, artistic or scientific work including films or video tapes for use in connection with television or tapes for use in connection with radio broadcasting, but not including consideration for the sale, distribution or exhibition of cinematographic films ;*
- (vi) *the rendering of any services in connection with the activities referred to in sub-clauses (i) to (iv), (iva) and (v) ”””***

**The use of a transponder of the satellite to uplink , amplify and then downlink is clearly a ‘process’ (i.e., series of steps executed).** The wording of the Explanation 2(iii) does not require a *secret process* but is applicable to any *process*.

Furthermore, to constitute “royalty”, it is not necessary that the instruments through which the “process” is carried on should be in the control or possession of the payer. The context and factual situation has to be kept in mind to determine that whether the process was “used” by the payer. In the case of satellites physical control and possession of the process can neither be with the satellite companies nor with the telecasting companies. **The fact that the telecasting companies are enabled to telecast their programmes by uplinking and downlinking the same with the help of that process shows that they have “use” of the same.** Time of telecast and the nature of programme, all depends upon the telecasting companies and, thus, they are using that process.

Furthermore, **clause (iva) of Explanation 2** is even more direct in that it refers *to use or right to use any industrial, commercial or scientific equipment* and a satellite falls under any of these equipment categories and the uplink and downlink process is done by using said satellite’s transponders. Hence, this subsection squarely makes the payments in the nature of Royalty putting to rest any question about the same. Clause (vi) of Explanation 2 also lends support in as much as any services such as the transponder receiving, amplifying and broadcasting will also fall under the Royalty net.

We further note that the all the above points have been extensively dealt with in the decision of the ITAT Special Bench in *New Skies Satellites N.V. vs. ADIT (International Taxation) (319 ITR 269, ITAT Delhi SB)* whose decisions I rely on.

Similarly, **Article 12(3)(a) and 12(3)(b) of the India-USA DTAA** would squarely apply:

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

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

The DTAA provisions are similar to the Act and hence the same reasoning ought to apply that there is a process which is used here and the payments are made for the use (or) right to use of industrial, commercial or scientific equipment. Hence even under the India-USA DTAA, the payments are clearly Royalty payments and hence taxable in India

**With regards to Fees for Technical Services:**

The Indian Income Tax Act, 1961 defines Fees for Technical Services in Section 9(1)(vii) as

*“”Explanation 2.—For the purposes of this clause, "fees for technical services" means any consideration (including any lump sum consideration) for the rendering of any managerial, technical or consultancy services (including the provision of services of technical or other personnel) but does not include consideration for any construction, assembly, mining or like project undertaken by the recipient or consideration which would be income of the recipient chargeable under the head "Salaries" “”*

The assessee's services surely can be termed technical as it provides the transponder to receive, amplify and then broadcast the signals of the TV channels. Hence the income is for technical services rendered by the assessee and hence taxable in India u/S.9(1)(vii)

Under Article 12(4) of the India-USA DTAA, FTS is defined as follows:

*“”4. For purposes of this Article, "fees for included services" means payments of any kind to any person in consideration for the rendering of any technical or consultancy services (including through the provision of services of technical or other personnel) if such services:*  
*(a) are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 3 is received; or*  
*(b) make available technical knowledge, experience, skill, know-how, or processes, or consist of the development and transfer of a technical plan or technical design.””*

Again, the definition in the DTAA is similar to that of the Act and hence the same reasoning applies.

It would also be prudent to point out at this juncture that the assessee operates a satellite whose primary income (of ~75% according to information gathered from the assessee) is from Indian sourced TV channel content and whose primary viewership (of ~65% according to information gathered from the assessee) is also the Indian public. Hence a major portion of money that the assessee makes is sourced from India either by content or by viewership but the assessee believes NO income accrues or arises in India. This reasoning defies logic and it cannot be that so much income is sourced from India but no tax paid in India on mere technicalities.

In view of all the above, the income of the assessee from telecast operators in India is clearly in the nature of Royalty as well as Fees for Technical Services as defined u/S 9(1)(vi) & 9(1)(vii) of the Income Tax Act as well as provisions of Article 13 of the India-USA DTAA. The total income of the assessee company is thus computed as under:

**Computation of Total Income:**

**3<sup>rd</sup> K.R.RAMAMANI MEMORIAL TAXATION MOOT COURT COMPETITION**

Income as per the return of income filed:	NIL
Add: Income from transponder leasing to Indian telecast operators/TV channels	7,41,26,375
<b>TOTAL INCOME</b>	<b>7,41,26,375</b>

Assessed under 143(3) of the Act. Charge interest under section 234A, 234B and 234C as applicable. Issue Demand Notice / Challan accordingly.

Penalty proceedings u/s 271(1)(c) will be initiated separately.

Copy to assessee  
Deputy Director of Income-tax, 1-1  
International Taxation, Chennai

