Cases proposed to be discussed at the Study Circle Meeting on 2nd September 2012 by Speaker

CA Niraj Sheth

Note : The following cases are already available at ITATonline.org, interested members may download from their reference.

1 CIT v. Virendra & Co. (Bom HC)

2 CIT v. Sureshchandra Durgaprasad Khatod (Guj HC)

3 CIT v. Jai Hind CHS Ltd. (Bom HC)

4 CIT v. Gujarat Flouro Chemicals (SC)

5 ACIT v. ICICI Securities Primary Dealership Ltd. (SC)

6 General Motors India Pvt. Ltd. v. DCIT (Guj)

7 CIT v. Smif Securities Ltd. (SC)

8 Inductotherm (India) Pvt. Ltd. v. DCIT (Guj)

9 Telco Dadajee Dhackjee Ltd. v. DCIT (Mum ITAT TM)

10 NTPC Sail Power Co. Ltd. v. CIT (Del)

11 CIT v. Cello Plast (Bom)

12 In Re Castleton Investment Ltd. (AAR)

13 Kotak Mahindra Capital Co. Ltd. v. ACIT (Mum SB)

14 CIT v. Anil Kumar Bhatia (Del)

15 JCIT v. American Express Bank (Mum)

16 ICICI Home Finance Co. Ltd. v. ACIT (Bom)

17 KRA Holding & Trading Pvt. Ltd. v. DCIT (Pune)

18 CIT v. Vaibhav J. Shah (HUF) (Guj)

19 CIT v. Hans Christian Gass (Bom)

20 Nitin M. Panchamiya v. Addl. CIT (Mum)

21 CIT v. ITAT (Del)

22 KRA Holding & Trading Pvt. Ltd. v. DCIT (Pune ITAT)

23 ACIT v. Deepak S. Bheda 52 SOT 327 (Mum)

24 DY. CIT v. Rajeev Goyal 52 SOT 335 (Kol)

25 Channel Guide India Ltd. v. Asst. CIT (Mum)

26 Kellogg India Pvt. Ltd. v. ACIT (Mum)

27 BSEL Infrastructure Realty Ltd. v. ACIT 137 ITD 61 (Mum)

28 Raja Mechanical Co. P. Ltd. v. CCE 345 ITR 356 (SC)

29 Vikas Kalra v. CIT 345 ITR 557 (SC)

30 Columbia Sportswear Company v. DIT 346 ITR 161 (SC)

31 Channel Guide India Ltd. V. ACIT (unreported)

IN THE INCOME TAX APPELLATE TRIBUNAL
"L" BENCH: MUMBAI

BEFORE SHRI P.M. JAGTAP, ACCOUNTANT MEMBER
AND SHRI AMIT SHUKLA, JUDICIAL MEMBER

ITA No.1221/Mum/2006
(Assessment year: 2004-05)

M/s. Channel Guide India Limited,
A-203, Grenvile, Lokhandwala Complex,
Andheri (West),
Mumbai -400 053 ..... Appellant

Vs

Asst. Commissioner of Income-tax, Circle 4(1),
Mumbai ..... Respondent

ITA No.579/Mum/2006
(Assessment year: 2004-05)

Asst. Commissioner of Income-tax, Circle 4(1),
Mumbai ..... Appellant

Vs

M/s. Channel Guide India Limited,
A-203, Grenvile, Lokhandwala Complex,
Andheri (West),
Mumbai -400 053 ..... Respondent
PAN: **AAACB 4506 D**

Appellant–assessee by:	Shri P.J. Pardiwalla
Respondent-revenue by:	Shri Jitendra Yadav
Date of Hearing:	07.06.2012
Date of Pronouncement:	29.08.2012

O R D E R

PER P.M. JAGTAP, A.M.:

These two appeals, one filed by the assessee being ITA No.1221/M/2006 and other filed by the revenue being ITA No.579/Mum/2006, are cross appeals which are directed against the order of Ld. CIT (A) -4, Mumbai dated 14.11.2005.

2. The issue raised in ground no.1 of the assessee's appeal relates to disallowance of Transponder Service Fee of ₹ 83,03,368/- and consultancy charges of ₹ 9,34,100/- made by the AO and confirmed by the Ld. CIT (A) on account of payment made by the assessee to M/s. Shin Satellite Public Co. Ltd. without deduction of tax at source by invoking the provisions of sec.40(a)(i).

3. The assessee in the present case is a company which is engaged in the business of financing, leasing, hire purchase, production and distribution of internet media and manufacturing of towels. The return of income for the year under consideration was filed by it on 31.10.2002 declaring a loss of ₹ 1,62,08,366/-. In the said year, the video channel started by the assessee had become functional. No receipt / income from the said activity however was shown by the assessee by stating that the revenue from the said activity in the form of Advertisement was not generated in the year under consideration and such income was generated only in the subsequent year. In the course of video channel business, the assessee had entered into an agreement with M/s. Shan Satellite Public Co. Ltd. (in short SSA) for facility of satellite up-linking and Telecasting programmes and a sum of ₹ 83,03,368/- charged by the said party for such facility was claimed by the assessee as expenditure on account of broadcasting and telecasting. In addition to the said amount, a sum of ₹ 9,34,100/- was also paid by the assessee company to M/s. SSA as consultancy charges. During the course of assessment proceedings, it was noted by the AO that both these amounts were paid by the assessee to M/s. SSA in foreign exchange without deducting tax at source. In this regard, a certificate issued by the Chartered Accountant was filed by the assessee wherein it was certified that the payment made by the assessee to M/s. SSA, Thailand constituted business income of that non-resident party and since they did not have a Permanent Establishment (PE) in India, business income earned by them was not chargeable to tax in India in accordance with

Article 7 of the DTAA between India and Thailand. It was certified that no tax at source was therefore deductible by the assessee from the impugned payments made to M/s. SSA. This certificate of the Chartered Accountants filed by the assessee in support of its case that tax was not deductible at source from payment made to M/s. SSA was not found to be reliable by the AO. The assessee, therefore, made detail submissions in writing by letter dated 18.02.2005 explaining its case on this issue. In the said submissions, it was pointed out by the assessee that M/s. SSA is a company incorporated and registered in Thailand and its management and control being wholly situated in that country, it is a tax resident of Thailand. It was submitted that the taxability of the income of M/s. SSA in India therefore is governed by both the Income-tax Act as well as DTAA between Indian & Thailand and M/s. SSA has an option to rely on the provisions of Income-tax Act or that of Indo-Thailand DTAA whichever are more beneficial to it as provided in sec.90(2) of the Income-tax Act, 1961. It was submitted that the amount paid by the assessee to M/s. SSA towards broadcasting and telecasting as well as towards consultancy charges was not in the nature of 'royalty' chargeable to tax in India within the meaning of Article 12 of Indo-Thailand DTAA. The submission made by the assessee in support of this stand was as under:

> *"In the present case under review, we are neither in possession of equipment nor we have any control over the same. All the risks in relation to the equipments used in providing digital channel services are borne by SSA only. SSA is also using these equipments to provide similar services to its other customers concurrently. SSA is responsible for providing alternate transponder facilities in case the designated transponder/other equipments fails to operate. The transponders and other equipments used in rendering digital channel services are not put for our exclusive use. The maintenance and repairs of transponders and either equipments used in rendering these*

services is the responsibility of SSA and not of ours. Thus, what SSA is providing is a service for a fee using its own equipments. It is not a case of letting out of equipment. Therefore, it is submitted that payments for digital channel service's are not in the nature of payment for use of or right to use any industrial, scientific or commercial equipment and as such does not qualify as 'Royalty'." Nor the said payment can be construed as payment for provision of any industrial, commercial or scientific experience. The service for which said payment is being made does not involve imparting of any technical know-how by SSA to us. On the contrary, SSA itself would carry out the services. The phrase 'for provision c' any industrial, commercial or scientific experience' alludes to concept of technical know-how, in the cases of imparting of know-how, one of the parties agrees to impart to other his special knowledge and experience which remains un-revealed to public. In a contract for supply of know how, the know-how supplier is right required to play any part himself In application of formulae granted to licensee and the he does not guarantee the results thereof. Thus, know-how contracts differ from the contract for provision of services, in which one of the parties undertakes to use his customary skills on his calling to execute the work himself for the other party. Since in the present case, SSA is not imparting any undivulged and secret information to the company for consideration paid by the company the said payment is also not for provision of any industrial, commercial or scientific experience."

4. In the light of above submissions, it was submitted by the assessee that payment made to M/s. SSA was neither for use of any specified IPRs nor for use of equipments. It was also submitted that the said payment was not made either for any information concerning industrial, commercial or scientific experience. It was contended that the amount paid by the assessee to M/s. SSA was thus not in the

nature of royalty as defined in Article 12(3) of Indo-Thailand DTAA and the same therefore was not chargeable to tax in India. It was also pointed out that there are no specific provisions in India-Thailand DTAA dealing with taxation of income arising from technical services and in the absence thereof, the same was covered by Article 7 of Indo Thailand treaty being 'business income'. The assessee claimed that such business income, however, was not chargeable to tax in India on the basis of following submissions made before the AO

> *"The relevant provisions 01 Indo-Thailand DTAA, which has implications on the taxability of payment under review, are contained in Article 7 and Article 12 of Indo-Thailand DTAA. Article 7 deals with taxation of Business profits of an enterprise and Article 12 deals with taxation of Royalties.*
>
> *(a) Under Article 7 of Indo-Thailand DTAA, business profits of an enterprise of Thailand are liable to tax in Thailand only unless that enterprise carries on its business in India through a permanent establishment (P.E.) situated in India.*
>
> *Thus, the business profits of an enterprise of Thailand are liable to tax in India only when the business is carried on through a Permanent Establishment situated in India and such profits would be taxable only to the extent these are attributable to P.E. situated in India. Conversely stated, if there is no P.E. in India then the business profits of an enterprise of Thailand are not liable to tax in India irrespective of the fact whether under the domestic tax law (i.e. IT Act) such profits accrues / arise in India or not.*
>
> *The term Permanent Establishment is defined under Article 5 of the Indo-Thailand DTAA. It is submitted that SSA does not have any Establishment or office in India under any of the criteria,*

envisaged in Article 5 which constitutes its fixed place of business through which its business is wholly / partly carried on. Further, SSA also does not have any agent in India (whether dependent or independent) who is authorised to conclude contracts on its behalf. In the present case, we have negotiated with and executed the said digital channel agreement with SSA, Thailand only.

Thus, SSA does not have any P.E. in India and accordingly, it is submitted that, its business profits are not liable to tax in India in the absence of any P.E. in India as provided in Article 7 of Indo-Thailand 4, DTAA."

5. The submissions made on behalf of the assessee on this issue as above were not found acceptable by the AO. According to him, the payment made by the assessee to M/s. SSA was in the nature of fees for consultancy charges and therefore the submissions made by the assessee to make out a case that the same was not in the nature of royalty were totally irrelevant. He held that even the Indo-Thailand DTAA heavily relied upon by the assessee in support of its stand did not contain in provision grating any immunity to the assessee from its legal obligation to deduct tax at source in respect of payments made outside India to M/s. SSA. He, therefore, held that there was failure on the part of the assessee to deduct tax at source from the payment made to M/s. SSA and the provisions of sec.40(a)(i) were clearly attracted. Accordingly, invoking the said provisions, he disallowed the total payment of ₹ 92,37,468/- made by the assessee on account of broadcasting and telecasting as well as consultancy charges in the assessment completed u/s.143(3) vide an order dated 19.02.2005.

6. Against the order passed by the AO u/s.143(3), an appeal was preferred by the assessee before the Ld. CIT (A) disputing therein *inter alia* the disallowance made by the AO on account of payment made to

M/s. SSA by invoking the provisions of sec.40(a)(i). During the course of Appellate proceedings before the Ld. CIT (A), a detailed written submission was filed by the assessee in support of its claim that the payment made to M/s. SSA towards transponder service fee and consultancy charges was not chargeable to tax in India in the hands of the M/s. SSA and there was thus no requirement of deduction of tax at source from the said payment and no question of disallowance u/s.40(a)(i). The said submission as summarised on page no.11 of the impugned order of the Ld. CIT (A) was as under:

Provisions of Indo-Tha1and DTAA applies in the present case of SSA and in order to ascertain t} obligation of appellant to deduct tax at source u/s. 195, provisions of DTAA are relevant;

Payments to SSA of ₹ 83,03,368 for digital channel services and of ₹ 9,34,100 for consultancy services are not in the nature of royalties under the provisions of Indo-Thailand DTAA;

These payments are also not in the nature of 'fees for technical services' under section 9(1)(vii) pf the ITA. In any case, since Indo-Thailand DTAA does not provide for specific article dealing with taxation of fees for technical services, the taxability of such payments would be governed by Article 7 read with Article 5 of DTAA, like any other business income;

These payments, being in the nature of business income, the taxability thereof in India would be governed under Article 7 read with Article 5 of the Indo-Thailand DTAA. Since SSA does not have any permanent establishment in India to which aforesaid payments are attributable, these payments are not chargeable to tax in India;

Since these payments made by the appellant to SSA are chargeable to tax in India in the hands of SSA as per the Indo-Thailand DTAA, the appellant is not under the obligation to deduct tax at source u/s. 195 of ITA;

Accordingly, there is no failure / default of appellant in deduction of tax at source on payments made outside India to a foreign company. Consequently, S. 40(a)(i) does not apply and no disallowance of, foresaid payments / expenses is warranted under section40(a)(i) of ITA."

7. The Ld. CIT (A) did not find merit in the submission made on behalf of the assessee. According to him, the absence of any provision in the Indo Thailand DTAA dealing with feasibility of fees for technical services would not necessarily push the payment in the nature of fees for technical services within article 7 dealing with the taxation of business income as claimed by the assessee. He held that there could be several types of payments which need not come into the parameters of 'business income' in the DTAA and if there are no separate provisions contained in DTAA dealing with such payments, the same have to be considered as per the normal provisions of the Income-tax Act, 1961. He accordingly proceeded to examine the taxability of payment made by the assessee to M/s. SSA as per the domestic law. In this regard, he held that it was only because M/s. SSA had the specific technology during the relevant period that the assessee company entered into an agreement with it for utilising the said technology to enable up-linking and down-linking of broadcasting over a particular area. He held that the assessee company thus had availed the highly sophisticated technical services which were not available at that point of time in India from M/s. SSA and the payment made for availing such services was chargeable to tax in India u/s.9(1)(vii) r.w. Explanation 2 thereto. He held that the assessee thus was liable to deduct tax at source from the said

payment and having failed to do so, the disallowance was rightly made by the AO by invoking the provisions of sec.40(a)(i). The Ld. CIT (A) then referred to the definition of 'royalty' given in Article 12(3) of the DTAA between India and Thailand and noted that as per clause (b) of the said Article, payment of any kind received as a consideration for use or right to use industrial, commercial or scientific equipment constituted royalty. He held that the assessee company could uplink or downlink the signals of its programmes for broadcast only by using the scientific equipment owned by the M/s. SSA and the amount paid for such use was alternatively chargeable to tax India as royalty as per article 12 of the Indo Thailand DTAA. He held that the assessee therefore was liable to deduct tax at source from the payment made to M/s. SSA which was chargeable to tax in India as fees for technical services or alternatively as royalty and the assessee having failed to comply with the said requirement, the amount paid by the assessee to M/s. SSA was rightly disallowed by the AO by invoking the provisions of sec.40(a)(i).

8. The Ld. Counsel for the assessee submitted that while making the disallowance on account of payment made by the assessee to M/s. SSA, the said payment was held as in the nature of fees for consultancy services by the AO liable to tax in India in the hands of the M/s. SSA. He submitted that the Ld. CIT (A) while confirming the disallowance made u/s.40(a)(i) upheld the decision of the AO in treating impugned payment as fees and consultancy charges and also held the same to be in the nature of royalty alternatively. He submitted that the issue relating to the nature of payment made to the assessee to M/s. SSA has already examined by the Tribunal in the case of recipient and on such examination, it has been held by the Tribunal vide its order dated 11th March, 2011 passed in ITA Nos. 2598, 2599, 2600 & 2601/Del/2004 that the same was not in the nature of the royalty. He placed on record a copy of the said order of the Tribunal and invited our attention to the observations recorded by

the Tribunal on page no.14 to contend that the amount in question was also held to be not in the nature for fees for technical services by the Tribunal by implication. He contended that the Indo Thailand Treaty which is applicable did not contain any provision dealing with fees for technical services and in the absence of such specific provision, the amount in question, even if it is to be held as fees for technical services, would be governed by Article 7 which deals with business profit. In support of this contention, he relied on the decision of Hon'ble Delhi High Court in the case of Tekniskil (Sendirian) Berhad vs. CIT 88 Taxman 439. He also relied on the decision of Special Bench of ITAT in the case of Siemens Aktiengesellschaft vs. ITO 22 ITD 87 in support of his contention that availed payment for "fees for technical services" is not separately dealt with in DTAA, the same has to be taken as 'business profit' under Article 7.

9. The Ld. Counsel for the assessee submitted that the amount paid by the assessee to M/s. SSA is not in the nature of fees for technical services as per sec.9(1)(vii) as held by Hon'ble Delhi High Court in 88 Taxman 439 which has been followed by the Tribunal. Regarding the amendment made by the Finance Act, 2012, the Ld. Counsel for the assessee relied on the decision of the Tribunal in ITA No.3326/M/2006 in the case of B4U International Holdings Ltd. wherein it has been held that the said amendment cannot be applied unless there a corresponding amendment made in the relevant treaty. He submitted that the definition of royalty given in the relevant treaty has not been amended and in the absence of such amendment made in the treaty corresponding to the amendment made in the relevant provisions by the Finance Act, 2012, the amendment made in the domestic law cannot be relied upon and the assessee can rely on provisions of the treaty being more favourable to him.

10. The Ld. Counsel for the assessee submitted that the Ld. CIT (A) has held the amount in question as royalty on the basis that the same was paid for use of equipment. He contended that a similar issue has been considered by Hon'ble Delhi High Court in the case of Asia Satellite and the decision has been rendered in favour of the assessee and against the revenue on this aspect (page no.69 Para 74). He contended that in any case it is a case of disallowance u/s.40(a)(i) and once it is established that the non-deduction of tax at source was for bona fide reason, no such disallowance can be made as held by Hon'ble Bombay High Court in the case of CIT vs. Kotak Mahindra Finance Ltd. (ITA No.3111 of 2009 dt. 21.10.2011).

11. The Ld. DR submitted that the assessee in the present case is an Indian resident engaged in operating a TV channel in India. He invited our attention to the copy of Service Channel Agreement, dated 25.12.2000 entered into with M/s. SSA under which the impugned amount was paid by the assessee to M/s. SSA. He took us through the relevant clauses of the said agreement and submitted that going by the nature of services or benefit availed by the assessee under the said agreement, it is sufficient to show that the assessee was in control of the equipment of M/s. SSA used i.e. Transponder. He specifically emphasised the general procedure prescribed for monitoring the performance of up-linking and down-linking and submitted that the benefit or services availed by the assessee in this respect was not possible without the control of 'Transponder' being with the assessee.

12. As regards the decision of Hon'ble Delhi High Court in the case of Asia Satellite (supra) relied upon by the Ld. Counsel for the assessee, the Ld. DR submitted that the facts involved in the said case were entirely different from the facts involved in the present case inasmuch as the assessee in the present case has been found to be in control of the equipment. As regards the amendments made by the

Finance Act, 2012, he submitted that the expression 'process' used in sec.9(1)(vi) was not defined in the Income-tax Act, 1961 and therefore the definition of the said expression now given by inserting Explanation 6 by the Finance Act, 2012 is retrospective being clarificatory in nature. He contended that prior to the said amendment, DTAA and domestic law were silent on the aspect of 'process' which was not defined. He submitted that it is relevant to note in this context that the operational control over transponder owned by M/s. SSA was very much with the assessee in the present case.

13. The Ld. DR submitted that in the case of Asia Satellite (supra), the assessee was non-resident in India while the assessee in the present case is an Indian resident. He contended that this distinction assumes vital significance keeping in view clause (iva) of Explanation 2 to sec.9(1)(vi) which has been inserted w.e.f. 01.04.2002. He contended that the said provision is applicable in the present case whereas it was not applicable in the case of Asia Satellite (supra). He invited our attention to Para 44 of the decision of Asia Satellite (supra) and submitted that the provisions of sec.9(1)(vic) was considered therein which is applicable to payment made by a non-resident to non-resident. He contended that the payment in the present case has been made by a resident to non-resident and, therefore sec.9(1)(vib) is applicable. The Ld. DR submitted that the domestic law is very clear on this point in view of Explanation 2(iva) r.w. Explanation 5 to sec.9(1)(vi).

14. As regards applicability of sec.9(1)(vii) to treat the impugned payment as fees for technical services, the Ld. DR relied on the relevant observations of the AO recorded in the assessment order. As regards the decision rendered by the Tribunal in the case of M/s. SSA holding the amount as not in the nature of royalty which has been relied upon by the Ld. Counsel for the assessee, the Ld. DR submitted

that the Tribunal in the said decision has relied on the decision of Asia Satellite which is distinguishable. He submitted that even the law on this issue has changed subsequently. As regards the contention of the Ld. Counsel for the assessee that in the absence of any clause in Indo Thailand DTAA dealing with fess for technical services, the same is to be treated as business profit, the Ld. DR contended that there is no such proposition specifically propounded in any of the decisions cited by the Ld. Counsel for assessee. As regards the decision of the Tribunal in the case of B4U (supra) relied upon by the Ld. Counsel for the assessee, the Ld. DR submitted that the elaborate submissions now being made from the side of revenue were not made before the Tribunal in that case.

15. As regards the absence of FTS Clause in Indo Thailand DTAA, the Ld. DR submitted that the amount of FTS in such case gets covered under Article 22 of the Treaty as other income. In support of this contention, he relied on the decision of Authority for Advance Ruling in the case of XYZ(AAR Nos.886 to 911, 913 to 924, 927, 929 & 930 of 2010 dt. 19.03.2012)

16. In the rejoinder, the Ld. Counsel for the assessee submitted that in the case of Asia Satellite (supra), it was held by the Tribunal that transponder is not an equipment and although the Department disputed this finding by way of question no.4 raised in the appeal before the Hon'ble Delhi High Court, the said appeal of the department has been dismissed by the Hon'ble Delhi High Court. He submitted that what is to be decided first is whether the payment in question is royalty or not keeping in view the nature of amount paid and whether the payee is resident or non-resident is not relevant in this context. He submitted that this aspect will become relevant only when the nature of amount is held to be royalty. He further submitted that there are as many as 25 transponders available on the satellite which are utilised by SSA for providing

services to different clients. As regards the contention raised by Ld. DR relying on Explanation 6 to sec.9(1)(vi) inserted by the Finance Act, 2012 with retrospective effect dealing with use of process, he contended that the Department has to take a firm stand whether it is a case of use or process or equipment. He submitted that as held by Ld. CIT (A), it is a case of use of equipment and not the use of process. As regards the reliance placed by the Ld. DR on Article 22 dealing with other income, he submitted that the said article deals with items of income not expressly dealt with any other articles. He contended that the amount in question paid by the assessee to SSA was business income going by the nature of business of SSA and since such income was expressly dealt with in Article 7, the residuary Article 22 cannot be applied. As regards the decision of AAR in the case of XYZ (supra) cited by the Ld. DR, he pointed out that the AAR in the said case has simply relied on its earlier decision rendered in the case of Lanka Hydraulic Institute Limited. (AAR No.874 of 2010 dated 16.05.2011) He pointed out from Para 5 of the order passed by the AAR in the case of Lanka Hydraulic Institute Limited that the entire consideration paid in the said case was held to be in the nature of royalty covered under Article 12 and therefore the question of considering scope of Article 22 was not involved in the said case at all. As regards the amendments made by Finance Act, 2012 with retrospective effect and relied upon by the Ld. DR, he contended that the said amendments cannot be regarded as clarificatory especially when the original provisions were considered and interpreted by the Courts. He submitted that these original provisions existed in the statue right from the year 1976 when there was no satellite, optic fibre or transponders. Relying on the decision of Special Bench of the Tribunal in the case of Siemens Aktiengesellschaft vs. ITO (supra), he contended that subsequent amendment in domestic law is to be incorporated in treaty by some means. He contended that the issue involved in the present case is relating to artificial disallowance made u/s.40(a)(i) which in any case cannot be sustained on the basis of retrospective amendment.

17. We have considered the rival submissions and also perused the relevant material on record including the relevant provisions of law and decisions citied by both the sides at par. It is observed that the amount in question paid by the assessee to SSA was disallowed by the AO u/s.40(a)(i) for non-deduction of tax by the assessee holding that the same was in the nature of fees for consultancy services chargeable to tax in India on which TDS was liable to be deducted. The Ld. CIT (A) upheld this action of the AO relying mainly on Explanation 2 to sec.9(1)(vii). Alternatively, he also held the said amount to be royalty within the meaning of Article 12(3) of the Indo-Thailand Treaty holding that it was paid for use or right to use industrial, commercial or scientific equipment. For this conclusion, he also relied on clause (iva) of Explanation 2 to sec.9(1)(vi).

18. In so far as the nature of the amount in question being royalty is concerned, it is observed that this aspect has been examined by the Tribunal in the case of SSA vide its order dated 11th March, 2011 and it has been held that the amount received by SSA is not royalty under sec.9(1)(vi). The Tribunal has also held that the said amount is not in the nature of fees for consultancy services u/s.9(1)(vii). The relevant observations of the Tribunal recorded in this context in paragraph No.9 are extracted below:

> *"9. The Hon'ble High Court of Delhi in the above referred case of Asia Satellite Telecommunication Co. Ltd. In ITA Nos. 131 to 134/2003, has held that receipts earned from providing data transmission services through provision of space segment capacity on satellites does not constitute royalty within the meaning of Sec.: 9(1)(vi) of the Act. In doing so, the Hon'ble High Court has conclusively held that while providing transmission services to its customers, the control of the satellite or the transponder always remains with the satellite operator and the customers are merely given access to the transponder capacity.*

Accordingly, since the customer does not utilize the process or equipment involved in its operations, the charges paid to the satellite operators are not covered within the meaning of royalty as provided under Explanation 2 to sec. 9(1)(vi) and therefore, the same cannot be treated as royalty. In this case, the revenue also raised the question regarding applicability of sec. 9(1)(vii) for the first time before the Tribunal. Although, this ground was admitted, it was not decided as the receipt was held to be assessable under sec. 9(1)(vi) of the Act by the Tribunal. No argument was advanced by the learned counsel for the revenue before the Hon'ble High Court in this matter. Therefore, the submission of the revenue regarding applicability of see. 9(1)(vii) was not accepted. The result of the decision of the Hon'ble High Court is that the receipt received by the assessee is not taxable either under Sec. 9(1)(vi) or sec. 9(1)(vii) of the Act."

19. As held by the Tribunal, the amount received by SSA thus is not taxable in India either u/s.9(1)(vi) or sec.9(1)(vii) of the Act. In this regard the contention raised by the Ld. DR before us is that the Tribunal while deciding the case of SSA has relied heavily on the decision of the Delhi High Court in the case of Asia Satellite (supra). He has contended that the facts involved in the case of Asia Satellite, however, were different from the facts involved in the case of SSA. It is, however, observed that the Tribunal in its decision rendered in the case of SSA (supra), has specifically noted that the revenue authorities themselves had taken a stand in the case of SSA that the facts involved therein were similar to that of Asia Satellite and accordingly followed the decision of the Tribunal in the case of Asia Satellite which was in favour of the revenue. Further the Tribunal in the case of SSA also perused the facts narrated by the Hon'ble Delhi High Court in the case of Asia Satellite, relevant clauses of the agreement and process involved in the rendering of services and held in paragraph No.7 of its order that the facts involved in the case of Asia Satellite were identical

to the case of SSA. Keeping in view these findings recorded by the revenue authorities as well as by the Tribunal in the case of SSA, we find it difficult to agree with the contention of the Ld. DR that the facts involved in the said case are different from the facts involved in the case of Asia Satellite.

20. The Ld. DR has also submitted that in the case of Asia Satellite (supra) payment was made by a non-resident to a non-resident whereas payee in the present case is a Indian resident. However, as rightly contended by the Ld. Counsel for the assessee,this aspect of the matter will be relevant only when the amount in question paid by the assessee to the SSA is found to be in the nature of royalty. In this regard, the Ld. DR has contended that the said amount is in the nature of royalty as per clause (iva) of Explanation 2 to sec.9(1)(vi) inserted in the statute w.e.f. 1.4.2002 which is applicable in the present case involving assessment year 2002-03 while the same was not applicable in the case of Asia Satellite involving assessment year 1988-89. The said provisions of clause (iva) of Explanation 2 to sec.9(1)(vi) are reproduced hereunder:

> *"... the use or right to use any industrial, commercial or scientific equipment but not including the amounts referred to in section 44BB."*

21. As already held in the various judicial pronouncements, the use or right to use any industrial, commercial or scientific equipment as envisaged in clause (iva) of Explanation 2 to sec.9(1)(vi) contemplates full control and possession of the user over the equipment. In this regard, it is relevant to refer to the following observations / findings recorded by the Hon'ble Delhi High Court in Para no.65 to 68 of the order passed in the case of Asia Satellite:

"65. It needs to be emphasized that a satellite is not a mere carrier, nor is the transponder something which is distinct and separable from the satellite as such. It was explained that the transponder is in fact an inseverable part of the satellite and cannot function without the continuous support of various systems and components of the satellite, including in particular:

(a) Electrical Power Generation by solar arrays and Storage Battery of the satellite, which is common to and supports multiple transponders on board the satellite.

(b) Common input antenna for receiving signals from the customers' ground stations, which are shared by multiple transponders.

(c) Common output antenna for retransmitting signals back to the footprint area on earth, which are shared by multiple transponders.

(d) Satellite positioning system, including position adjusting thrusters and the fuel storage and supply system therefore in the satellite. It is this positioning system which ensures that the location and the angle of the satellite is such that it receives input signals properly and retransmits the same to the exact desired footprint area.

(e) Temperature control system in the satellite, i.e., heaters to ensure that the electronic components do not cease to operate in conditions of extreme cold, when the satellite is in the "shadow".

(f) Telemetry, tracking and control system for the purpose of ensuring that all the above mentioned systems are monitored and their operations duly controlled and appropriate adjustments made, as and when required.

66. It was also not disputed that each transponder requires continuous and sustained support of each of the above-mentioned systems of the satellite without which it simply cannot function. 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. On the contrary, the transponder is incapable of functioning on its own. In fact, the Tribunal has itself demonstrated so in the order as is clear from the following:

A bare perusal of this meaning reveals that equipment is an instrument or tool which is capable of doing some job independently or with the help of other tools. A part of a equipment incapable of performing any activity in itself cannot be termed as an equipment. We take an example of scissors which has two blades. This scissor is n equipment but when one blade is separated from the other blade, it ceases to be an equipment. In other words, the blade in isolation cannot be termed as an equipment. Reverting to the facts of the present case, we find that the transponder is not an equipment in itself On other words, it is not capable of performing any activity when divorced from the satellite. It was fairly conceded by the Ld. AR that the transponder in itself without other parts of satellite is not capable of performing any function. Rightly so because satellite is not plotted at a fixed place. It rotates in the same direction and speed as the earth. If it had been fixed

at a particular place or the speed or direction had been different from that of earth, it could not have produced the desired results. Transponder is part of satellite, which is fixed in the satellite and is neither moving in itself nor assisting the satellite to and the transponder, namely, a part of it, playing howsoever important role, cannot be termed as equipment."

67. Even after stating so, the Tribunal did not take the aforesaid view to its logical conclusion, viz., the process carried on in the transponder in receiving signals and retransmitting the same, is an inseparable part of the process of the satellite and that process is utilized only by the appellant who is in control thereof. Whether it is done with or without amplification of the signal would not make any difference, in such a scenario.

68. We are inclined to agree with the argument of the learned Senior counsel for the appellant that in the present case, control of the satellite or the transponder always remains with the appellant. We may also observe at this stage that the terms "lease of transponder capacity", "lessor", "lessee" and "rental" used in the agreement would not be the determinative factors. It is the substance of the agreement which is to be seen. When we go through the various clauses of the said agreement, it becomes clear that the control always remained with the appellant and the appellant had merely given access to a broadband available with the transponder, to particular customers."

22. Keeping in view the above observations / findings recorded by the Hon'ble Delhi High Court in the case of Asia Satellite involving similar facts and circumstances, it cannot be said that the amount paid by the assessee to SSA is for the use or right to use any industrial, commercial or scientific equipment as envisaged in clause

(iva) of Explanation 2 to sec.9(1((vi) inserted w.e.f. 1.4.2002 in the absence of control & possession of the of the user over the equipment. The Ld. DR in this regard has relied on Explanation 5 to sec.9(1)(vi) inserted by the Finance Act, 2012 with retrospective effect from 1.6.1976 widening / clarifying the scope of clause (iva) of Explanation 2 to sec.9(1)(vi). We shall deal with this aspect later on at the appropriate stage while dealing with other amendments made by the Finance Act, 2012 with retrospective effect from 1.6.1976 that have also been relied upon by the Ld. DR.

23. At the time of hearing before us, the Ld. DR has raised an altogether new contention that there being no clause in the Indo-Thailand Treaty dealing with fees for technical services, the amount in question paid by the assessee to SSA is covered by the residuary Article 22 of the Treaty and the same is chargeable to tax in India as other income. We find it difficult to accept this contention of Ld. DR. M/s. SSA to whom the payment in question was made by the assessee is a licensee of certain satellite owned by Government of Thailand and it is in the business of providing TV Channels facility of broadcasting their programmes through the transponders located in the said satellite. For the said facility, M/s. SSA recovers service charges from TV Channels like the amount in question recovered from the assessee. Keeping in view this nature of business of M/s. SSA, the amount paid by the assessee certainly constitutes business income of M/s. SSA and when the same is not in the nature of royalty or fees for technical services, it is covered by article 7 of the Indo-Thailand Treaty dealing with business income. There is thus no need to take a recourse to Article 22 of the treaty which covers only the items of income which are not covered expressly by any other article of the Treaty.

24. As already observed, the Ld. DR in support of revenue's contention on the issue under consideration has relied on explanation 5 to sec.9(1)(vi) which, according to him, clarifies the scope of clause

(iva) of Explanation 2 to sec.9(1)(vi) dealing with use or right to use any industrial, commercial or scientific equipment. He has also relied on Explanation 6 to sec.9(1)(vi) which, according to him, clarifies the expression "process" used in clause (i) (ii) & (iii) of Explanation 2 to sec.9(1)(vi). The provisions of both these Explanations 5 & 6 have been inserted in the statute by the Finance Act, 2012 with retrospective effect from 1.6.1976. The Ld. Counsel for the assessee has vehemently opposed the stand taken by the Ld. DR by raising the various contentions which have already been narrated by us. He has also relied on the decision of co-ordinate Bench of this Tribunal in the case of B4U (supra) as well as that of Special Bench of this Tribunal in the case of Siemens Aktiengesellschaft (supra) to contend that subsequent amendments made in the domestic law need to be incorporated in the treaty.

25. In our opinion, the issue involved in the present case however, is relating to disallowance made u/s.40(a)(i) for non-deduction of tax-at-source from the payment made by the assessee to SSA and as held by Ahmedabad Bench of this Tribunal in the case of Sterling Abrasives Ltd. by its order dated 23.12.2010 cited by the Ld. Counsel for the assessee, the assessee cannot be held to be liable to deduct tax at source relying on the subsequent amendments made in the Act with retrospective effect. In the said case, Explanation to sec.9(2) was inserted by the Finance Act, 2007 with retrospective effect from 1.6.1976 and it was held by the Tribunal that it was impossible for the assessee to deduct tax in the financial year 2003-04 when as per the relevant legal position prevalent in the financial year 2003-04, the obligation to deduct tax was not on the assessee. The Tribunal based its decision on a legal Maxim *lex non cogit ad impossiblia* meaning thereby that the law cannot possibly compel a person to do something which is impossible to perform and relied on the decision of Hon'ble Supreme Court in the case of Krishna Swamy S. PD and Another vs.

Union of India and others 281 ITR 305 wherein the said legal Maxim was accepted by the Hon'ble apex court.

26. In view of the above discussion, we are of the view that the amount in question paid by the assessee to SSA was not taxable in India in the hands of SSA either u/s.9(1)(vi) or 9(1)(vii) as per the legal position prevalent at the relevant time and the assessee therefore was not liable to deduct tax at source from the said amount paid to M/s. SSA and there was no question of disallowing the said amount by invoking the provisions of sec.40(a)(i). In that view of the matter, we delete the disallowance made by the AO u/s.40(a)(i) and confirmed by Ld. CIT (A) and allow ground no.1 of the assessee's appeal.

27. Ground no.2 of the assessee's appeal and the solitary ground raised in the revenue's appeal involve a common issue relating to assessee's claim for depreciation on vehicles given on lease.

28. In the assessment for AY 1998-99, the claim of the assessee for depreciation at higher rate of 40% on vehicles given on lease was restricted by the AO to 25% on the ground that necessary evidence of leasing and license had not been made available. In the year under consideration, the AO disallowed the entire claim of the assessee for deprecation amounting to ₹ 28,48,095/- on the ground that there was failure on the part of the assessee to support and substantiate its claim that it was in fact the owner of the vehicles. On appeal, the Ld. CIT (A) allowed the deprecation on vehicles given on lease to the assessee but only at the normal rate relying on his appellate order in assessee's own case for the AY 1998-99.

29. We have heard the arguments of both the sides on this issue and also perused the relevant material on the record. It is observed that a similar issue had come up for consideration before the Tribunal in assessee's case for AY 1998-99 and vide its order dated October 1,

2003 passed in ITA No.3001/Mum/2002, the Tribunal restored the same to the file of the AO to decide the same afresh after giving the assessee an opportunity to produce all the evidence to support and substantiate its claim for higher rate of depreciation on the vehicles given on lease. Before us, the Ld. Representatives of both the sides have submitted that this issue therefore may be restored to the file of the AO with the same direction as given in AY 1998-99. The Ld. Counsel for the assessee has submitted that the AO may also be directed to take into consideration the decision of Hon'ble Bombay High court in the case of CIT vs. Kotak Mahindra Finance Ltd. 265 ITR 119 which is directly on the point in issue. Accordingly, we set aside the impugned order of the Ld. CIT (A) on this issue and restore the matter to the file of the AO with a direction to decide the same afresh after affording the assessee an opportunity to produce the relevant evidence to support and substantiate its case and after taking into consideration the decision of Hon'ble Bombay High Court in the case of Kotak Mahindra Finance Ltd. (supra). Ground no.2 of the assessee's appeal and solitary ground raised in the revenue's appeal are accordingly allowed for statistical purpose.

30. The issue raised in ground no.3 of the assessee's appeal relates to disallowance of ₹ 9,14,920/- made by the AO and confirmed by the Ld. CIT (A) on account of bad debts written off.

31. In the assessment, the assessee's claim for bad debts written off was disallowed by the AO on the ground that the assessee had failed to prove that the relevant debts had actually become bad and that the amounts of such debts had been taken into account as credit in the books of account. On appeal, the Ld. CIT (A) confirmed the said disallowance holding that any claim of bad debt could be considered only when it was established by the assessee that the said debts had become bad in the relevant year.

32. We have heard the arguments of both the sides and also perused the relevant material on record. It is observed that a similar issue had come up for consideration before the Tribunal in assessee's case for AY 1998-99 and the claim of the assessee for bad debts has been allowed by the Tribunal vide Para 8 of its order dated October 1, 2003 (supra) for the following reasons:

> *"8. We have heard the rival submissions and perused the material available on record. It is undisputed that the amounts in question have been actually written off by the assessee in its books of account. In the course of' assessment, the assessee replied that after default in payment of three installments the assessee had a right to proceed with recovery proceedings and to avoid legal proceedings a policy was adopted to pursue the debtor for payment. The assessee has recovered some of the amounts in subsequent years, which have been offered for taxation and have been assessed (there is a reference of amount of ₹ 9,24,418 in AY 1999-2000 in this behalf). As far as the prima facie view about considering the bad debt is concerned, the assessee, as a business policy, has considered default in three installment payments as fit for recovery proceedings and on this basis and other factors the claim of bad debt was made and actually written off in the books.. According to us, it is a. proper write off of claim as bad debt. Our view is supported by Girish Bhagwat Prasad's case and Tribunal judgments cited supra. Regarding the contention of learned DR that the Gujarat High Court has allowed the claim on the basis that genuineness of assessee's claim was not in doubt, in assessee's case also none has doubted the genuineness of loan transaction. Besides, subsequent recovery has been taxed by the department. In light of these facts, it cannot be*

said that the genuineness of the transactions has been doubted, it is merely the allowability of the claim, which is questioned by the lower authorities. Under these circumstances, we are of the view that the claim of bad debt made by the assessee is allowable. This ground of the assessee is allowed."

33. Respectfully following the order of the Tribunal in assessee's case for AY 1998-99 on a similar issue as well as the decision of Hon'ble Supreme court in the case of TRF Ltd. 323 ITR 397, we delete the disallowance made by the AO and confirmed by Ld. CIT (A) on account of assessee's claim for bad debts and allow ground no.3 of the assessee's appeal.

34. In the result, the appeal of the assessee is treated as allowed as indicated above and the appeal of the revenue is treated as allowed for statistical purpose.

Order pronounced in the open court on this day of 29th August, 2012

Sd/-	**Sd/-**
(**AMIT SHUKLA**)	(**P.M. JAGTAP**)
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai, Date**: 29th August, 2012**

Copy to:-

1) The Appellant.
2) The Respondent.
3) The CIT (A)-IV, Mumbai.
4) The CIT-4, Mumbai.
5) The D.R. "L" Bench, Mumbai.
6) Copy to Guard File

By Order

/ / True Copy / /

Asstt. Registrar
I.T.A.T., Mumbai

*Chavan