IN THE INCOME TAX APPELLATE TRIBUNAL,
DELHI BENCH: 'D' NEW DELHI

BEFORE SHRI SAKTIJIT DEY, VICE-PRESIDENT
AND
SHRI NAVEEN CHANDRA, ACCOUNTANT MEMBER

ITA No.7891/Del/2019
Assessment Year: 2014-15

M/s. Bharti Airtel Limited, Bharti Crescent 1, Nelson Mandela Road, Vasant Kunj, Phase II, New Delhi	**Vs.**	Assistant Commissioner of Income-tax, Circle 4(2), New Delhi
PAN :AAACB2894G		
(Appellant)		**(Respondent)**

With

ITA No.8044/Del/2019
Assessment Year: 2014-15

Income Tax Officer, Ward-1(2)(2), International Taxation, New Delhi	**Vs.**	M/s. Bharti Airtel Limited, 1, Bharti Crescent, Nelson Mandela Road, Vasant Kunj, Phase II, New Delhi
		PAN :AAACB2894G
(Appellant)		**(Respondent)**

Assessee by	Sh. Anil Bhalla, CA
Department by	Sh. Vijay B. Vasanta, CIT(DR)

Date of hearing	24.09.2024
Date of pronouncement	09.10.2024

ORDER

PER SAKTIJIT DEY, VICE-PRESIDENT

Captioned cross appeals arise out of order dated 31.07.2019 of learned Commissioner of Income Tax (Appeals)-42, New Delhi, pertaining to assessment year 2014-15.

ITA No. 7891/Del/2019 (Assessee's Appeal)

2. In the memorandum of appeal, assessee had originally raised two grounds alongwith their sub-grounds. Subsequently, vide letter dated 5th June, 2024, the assessee has furnished amended grounds substituting ground no. 2 and ground no. 2.1 originally raised in the memorandum of appeal.

3. Be that as it may, in ground no. 1, the issue relates to taxability of bandwidth charges remitted by the assessee to foreign telecom service providers as royalty income under section 9(1)(vi) of the Income-tax Act, 1961 (in short 'the Act').

4. Briefly the facts are, the assessee is a resident corporate entity providing mobile telecom services in India. Upon receiving certain information towards non-compliance with Tax Deducted at Source (TDS) provisions, proceedings under section 201 of the Act were initiated against the assessee. In course of such proceedings, the Assessing Officer noticed that the assessee had remitted substantial amount of revenue towards communication charges, cellular roaming charges, bandwidth charges, Annual Maintenance Charges (AMC), Fee for Technical Services (FTS), royalty, training,

participation fee, purchase of software etc. without deduction of tax at source or has deducted TDS at lesser rate.

5. Insofar as bandwidth charges remitted to certain Foreign Telecom Service Providers, the Assessing Officer observed that while remitting such amounts to the Foreign Telecom Services Providers, the assessee has failed to deduct tax at source. Therefore, a show-cause notice was issued to the assessee, as to why the tax and interest thereon under section 201(1)/201(1A) should not be levied. In response to show-cause notice, it was submitted by the assessee that the bandwidth charges are payable to foreign companies in respect of "voice and data traffic between different geographical locations on their standard network". It was submitted that remittances were for standard services which do not fall within the definition of "Technical Services" either under the domestic law or under the relevant Double Taxation Avoidance Agreements (DTAAs) with the contracting countries, where the foreign telecom services providers are located. It was further submitted by the assessee that the receipts are to be treated as business income at the hands of such foreign entities and in absence of their Permanent Establishment (PE) in India, the

receipts cannot be made taxable under the relevant provisions of the DTAAs.

6. The Assessing Officer, however, did not accept the submissions of the assessee. Referring to the definition of royalty under Section 9(1)(vi) read with its Explanation, the Assessing Officer held that the payments made are in the nature of royalty as they are basically for the use or right to use of equipment or process. In this context, he relied upon certain judicial precedents. Thus, ultimately, he held that the remittances made by the assessee, being in the nature of royalty under section 9(1)(vi) of the Act, the assessee was required to deduct tax at source at the rate of 20%. The assessee having failed to do so, the Assessing Officer not only raised demands under section 201(1), but also levied interest under section 201(1A) of the Act.

7. The assessee contested the aforesaid decision of the Assessing Officer by filing appeals before learned first appellate authority. While deciding the appeals, learned first appellate authority held that the remittances towards bandwidth charges cannot be regarded as FTS since the services provided are in the nature of standard services. However, he observed that remittances would

fall within the ambit of 'equipment royalty' or 'process royalty' in terms of section 9(1)(vi) read with Explanation 5 and 6. At the same time, he held that the issue, whether the remittances are in the nature of royalty, has to be examined on the touchstone of provisions of relevant DTAAs. Referring to a decision of the Hon'ble Delhi High Court in case of New Skies Satellite BV [68 taxmann.com 8] [2016], learned first appellate authority observed that amendment made to the domestic law cannot automatically be made applicable to the treaty without making corresponding changes in the DTAAs. Thus, after examining the relevant provisions in respective DTAAs, learned first appellate authority held that the remittances made to foreign telecom service providers cannot be treated as royalty in cases where such foreign telecom service providers are located in countries with whom India has signed DTAAs. However, he held that the remittances can be treated as royalty in cases where payments were made to foreign telecom service providers located in countries with whom India has not signed any agreement. Accordingly, he disposed of the issue by granting partial relief to the assessee.

8. Before us, the assessee has submitted that even in respect of remittances made to entities located in non-treaty countries bandwidth charges cannot be treated as royalty in terms of section 9(1)(vi) read with its explanations. In this context, he relied upon a decision of Hon'ble Delhi High Court in case of CIT Vs. Telstra Singapore Pte. Ltd., [2024] 165 taxmann.com 85 (Delhi).

9. Learned Departmental Representative strongly relied upon the observations of the Assessing Officer and learned first appellate authority. Drawing our attention to Explanation 5 and 6 to section 9(1)(vi) of the Act, he submitted, as per the provisions, bandwidth charges clearly fall within the definition of royalty.

10. We have considered rival submissions and perused the materials on record. Having examined the relevant facts and nature of payments made, we find that the issue stands conclusively decided in favour of the assessee by the decision of the Hon'ble Jurisdictional High Court in case of CIT Vs. Telstra Singapore Pte. Ltd. While seized with an identical issue relating to taxability of bandwidth charges as royalty income, the Hon'ble Jurisdictional court had occasion to interpret the provisions contained under section 9(1)(vi) of the Act and, more specifically, what is meant by

secret formula/process etc. as used in Explanation 2, 5 and 6 under section 9(1)(vi) of the Act. After a detailed analysis, the Hon'ble Court finally came to the conclusion that bandwidth charges cannot be treated as royalty for use or right to use of an equipment, secret formula or process. The Hon'ble Court held that the amendment made to domestic law, cannot automatically be imported to the treaty provisions without making corresponding changes in them. In this context, the following observations of the Hon'ble Delhi High Court would be of much relevance:

> *"102. As would be evident from the above, the Court in New Skies Satellite while expressing serious doubt' as to whether the amendments could either be viewed as being clarificatory, ultimately desisted from rendering a conclusive answer to that question, since it ultimately came to hold that the amendments would have no impact on the provisions of the DTAA. The Court's conclusion in this behalf was based on it having found in law that Parliament could not be said to be empowered to amend a provision of a treaty. It was significantly observed that an act of Parliament can neither supply nor alter the boundaries of the definition under Article 12. It was also found that the Explanations could not be countenanced to be clarificatory, since they were introduced principally to overcome the basis of a verdict rendered by the Court, namely Asia Satellite and which had held that both —secret formula‖ and —process‖ were to be read in conjunction. It is this which appears to have weighed upon the Court to observe that the Explanations appear to have been introduced primarily to overcome binding judicial decisions. We, on an overall analysis of all of the above, find no justification to either*

draw a different line or doubt the correctness of the decisions handed down in Asia Satellite and New Skies.

103. We find ourselves unconvinced with the submissions addressed on this score by the appellants for the following additional reason. The amendments in Section 9 which were alluded to came to be introduced by virtue of Finance Act, 2012 with retrospective effect from 01 June 2012. It is pertinent to recall that the DTAA between Singapore and India, and with which we are concerned, originally came into force on 27 May 1994. The 3rd Protocol to that Convention came to be signed on 30 December 2016 and which entered into force on 27 February 2017. The MLI Convention came to be signed by the two nations on 07 June 2017 and was ratified on 21 December 2018 and 25 June 2019 respectively. However, and even though Section 9 in its amended form had come to exist on the statute book, no corresponding amendments were introduced in Article 12. In fact the category of activities which are spoken of in Explanation 6 were also not included in the Hong Kong, Romania, Latvia, Malaysia and Sri Lanka Treaties which came to be enforced thereafter. A provision seeking to encompass subjects covered by Explanation 6 is however found in the DTAA pertaining to the United Mexican States. These facts further fortify the view that we have taken in respect of the Section 9 amendments.

104. On an overall conspectus of the above, we have no hesitation in holding that the issues which were sought to be canvassed on these set of appeals stand conclusively answered and settled by this Court in Asia Satellite and New Skies Satellite. Any doubt that could have been possibly harboured with respect to the amendments introduced in Section 9 stand laid to rest by virtue of the binding declaration of the law by the Supreme Court in Engineering Analysis. We also find ourselves unable to either discern a distinction that could be legitimately acknowledged to exist or draw a wedge between ―satellite‖ and ―telecom‖ cases as was suggested at the behest of the appellants. We note that the assessments in these cases

was based on the decision of the Madras High Court in Verizon and the Special Bench of the Tribunal in New Skies Satellite. The latter decision no longer holds the field having been set aside by our Court in appeal. Insofar as Verizon as an individual assessee is concerned, the issue came to be answered in its favour at least by this Court in Verizone Communications. Although the appellants would contend that the said decision came to be rendered on the basis of a concession made by the appellant there, as we read that order, we find that the Court appeared to be convinced that the issue in any case stood settled in light of the judgment of the Court in New Skies Satellite and which had by then been affirmed by the Supreme Court in Engineering Analysis.

105. That only leaves us to deal with the decision of the Madras High Court in Verizon and which constituted the sheet anchor for the appellants. The said decision firstly proceeds on the premise that the definition of royalty under the DTAA as well as the Act are pari materia. However, this premise clearly appears to be incorrect as is borne out from the preceding discussion. The Madras High Court then proceeded to rest its judgment principally on Section 9 and the Explanations forming part of that statutory provision. The issue of the extent to which that provision would be applicable as well as the degree to which it could influence Article 12 of the DTAA, however, does not appear to have been critically evaluated. The tenor of that decision appears to suggest that it proceeded on the basis that Section 9 undoubtedly applied. With due respect, and for reasons aforenoted, we find ourselves unable to agree with or affirm the position as struck in Verizon.

106. We are also of the firm opinion that even if one were to assume that Explanations 2 and 6 to Section 9 of the Act applied, the position would remain unaltered. This since there was no transfer or conferment of a right in respect of a patent, invention or process. Customers and those availing of the services provided by Telstra were not accorded a right over the technology possessed or

infrastructure by it. The underlying technology and infrastructure remained under the direct and exclusive control of Telstra. Parties availing of Telstra's services were not provided a corresponding general or effective control over any intellectual property or equipment. The agreements merely enabled them to avail of the services offered by it. Similarly, the expressions "use" or "right to use" as they appear in clauses (iii) and (iva) of Explanation 2 would have to be understood in light of the principles that we have enunciated hereinabove. A person who is provided mobile communication services or access to the internet does not stand vested with a right over a patent, invention or process. The consideration that the service recipient pays also cannot possibly be recognised as being intended to acquire a right in respect of a patent, invention, process or equipment. The word —process‖ being liable to be construed ejusdem generis is lent added credence by clause (iii) employing the expression "or similar property" which follows. It thus clearly appears to be intended to extend to a host of intellectual properties. This we observe only as an aside since the question raised in these appeals stands conclusively answered in any case in light of our conclusions rendered in the context of the extent of the applicability of Section 9 of the Act and the scope of Article 12 of the DTAA as explained in the preceding parts of this judgment."

11. It is clearly discernible from the observations of the Hon'ble Jurisdictional High Court in paragraph 106 reproduced above; while interpreting the provisions of Explanations 2 and 6 to section 9(1)(vi) of the Act, the Hon'ble Court has held that availing of services provided by the telecom service providers had not accorded a right over the technology possessed or infrastructure by it. The Hon'ble Court has further observed that the customer has not been

provided a corresponding general or effective control over any intellectual property or equipment. Hon'ble Court has observed, the consideration that the service recipient pays also cannot possibly be recognized as being intended to acquire a right in respect of a patent, invention, process or equipment. Thus, the ratio laid down by the Hon'ble Jurisdictional High Court as noted above will not only apply to the payees located in treaty countries but also to payees located in non-treaty countries. Thus, in the ultimate analysis, we hold that the bandwidth charges remitted by the assessee to the service providers cannot be treated as royalty either under the treaty provisions or under section 9(1)(vi) of the Act. Therefore, the assessee was not required to deduct tax at source. Grounds are allowed.

12. In ground no. 2, the assessee has challenged taxability of annual maintenance charges (AMC) paid to certain foreign companies as FTS requiring deduction of tax at source.

13. Briefly the facts are, in course of proceedings under section 201 of the Act, the Assessing Officer noticed that the assessee has remitted certain amounts to foreign entities towards AMC without deducting tax at source or has deducted at a lesser rate than the

rate as applicable. Therefore, the Assessing Officer called upon the assessee to explain, why the deficit TDS should not be recovered by way of raising demand under section 201(1)/201(1A) of the Act. In response to the show-cause notice, the assessee furnished its reply stating that since the payments are not taxable at the hands of the recipients in India, there was no requirement of deduction of tax at source. The Assessing Officer, however, was not convinced with the submissions of the assessee and proceeded to hold that the payments made by the assessee, being in the nature of FTS, the assessee was required to deduct tax at source. Accordingly, he raised demands under section 201(1)/201(1A) of the Act. The assessee contested the decision of the Assessing Officer by filing appeals before learned first appellate authority.

14. While deciding the issue, learned first appellate authority, at the outset, negated assessee's contention regarding non-fulfillment of 'make available' condition for treating the receipts as FTS. Though, in principle, he accepted assessee's contention that as per the Protocol to India – Isreal and India – Sweden DTAAs, the Most Favoured Nation (MFN) clause would get invoked and more restrictive definition of FTS as per the treaties entered between

India and some other OECD countries would apply. Hence, the 'make available' condition provided in treaties between Indian and other OECD countries would apply. After examining the scope of AMC, learned first appellate authority observed that the AMC, per se, is predominantly in the nature of repair/replacement of defective parts. He further observed that the AMC contract nowhere provides for step-by-step training of assesee's resources to resolve the defects. Thus, he held that 'make available' condition would not get satisfied.

15. However, he held that such payments can still be regarded as FTS, if they are ancillary and subsidiary services to the application and enjoyment of the right, property or information for which royalty has been received. Therefore, he directed the Assessing Officer to examine the issue qua the payment made to M/s. Gilat Satellite Network Ltd. As far as payment made to the Swedish entity, learned first appellate authority, after verifying the agreement, held that the service provider was required to provide support services along with sale of software licence. Therefore, the payments made were towards ancillary and subsidiary services to the application and enjoyment of the right, property or information

for which royalty was received. Accordingly, he upheld the action of the Assessing Officer.

16. Contesting the aforesaid decision of learned first appellate authority, the assessee is before us. Detailed submissions have been advanced by learned counsel in course of hearing, both, orally and in writing. Sum and substance of the submissions made are, the entire services were provided overseas and they are only in the nature of repair and replacement of parts in certain equipments. Therefore, there is no element of technical services involved to treat it as FTS.

17. Learned Departmental Representative, on the other hand, submitted that before the departmental authorities, the assessee, in essence, has accepted that the services provided by the service providers are technical in nature. He submitted, the only contention of the assessee before the departmental authorities was non-fulfillment of 'make available' condition by applying the MFN clause. He submitted, in view of the change in legal position regarding applicability of MFN clause, the contention of the assessee advanced before the departmental authorities is no more acceptable. He submitted, at this stage, the assessee cannot

change its stand with regard to the nature of service as he has already accepted it to be technical service.

18. In rejoinder, learned counsel for the assessee submitted that there is no estoppel against the assessee in taking the stand that the services rendered are of non-technical nature. In support, he relied on certain judicial precedents.

19. We have considered rival submissions and perused the materials on record. We have also applied our mind to the judicial precedents cited before us. Undisputedly, the assessee has made remittances to certain foreign entities located in Isreal and Sweden for providing AMC. As could be seen from the submissions made by the assessee before the Assessing Officer in response to the show-cause notice, submission made by the assessee was only to the effect that in terms of the Protocol to India – Israel and India – Sweden DTAA, the 'make available' condition has to be applied and in terms of such 'make available' condition, the payments made cannot be treated as FTS. While the Assessing Officer has held that in absence of any express 'make available' condition in India – Israel and India – Sweden, such restrictive clause can automatically be applied, the first appellate authority has relied

upon certain judicial precedents to accept assessee's contention. It is further relevant to observe that before the departmental authorities, the assessee has never made any substantive argument disputing the nature of service as technical service. In fact, the assessee has taken a stand that since the Assessing Officer has treated the services as technical in nature, therefore, it is incumbent upon him to establish that the make available condition is satisfied. Therefore, to some extent, there was a tacit acceptance by the assessee before the departmental authorities that the services are of technical nature. Though, learned first appellate authority has held that one need not go to examine the applicability of make available condition as payment made would qualify as FTS, being payment made towards services for ancillary and subsidiary to royalty, however, in our view, such finding of learned CIT(A) is without properly examining the nature of services.

20. It will be apt to observe, because of assessee's single dimensional stand taken before the departmental authorities that due to non-fulfillment of make available condition, the payments do not qualify as FTS, the basic issue, whether the services rendered fall within the ambit of technical, managerial or

consultancy services, have not at all been examined in the context of facts on record.

21. Before us, because of the subsequent change in legal position regarding applicability of MFN clause, the assessee has fairly given up its claim of applicability of MFN clause and the 'make available' condition. For the first time before this forum, the assessee has taken a stand that the services rendered do not qualify as technical services. This stand having been taken for the first time before us, have not been examined either by the Assessing Officer or by learned CIT(A). The nature of services rendered by the service providers, whether are of technical nature, has to be decided based on examination of specific facts relating to the services rendered. In our view, because of assessee's singular stand relating to non-fulfillment of make available condition, the preliminary issue regarding the nature of services have not been examined at any stage earlier. Therefore, we are inclined to restore this issue to the file of the Assessing Officer to factually verify assessee's claim that the services rendered do not fall withing the ambit of technical, managerial or consultancy services. While deciding the issue, the

assessee must be provided reasonable opportunity of being heard. Ground is allowed for statistical purposes.

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22. Ground nos. 1 and 6 are general in nature, hence, do not require adjudication.

23. In view of our decision qua ground nos. 1 and 3 in assessee's appeal, ground nos. 2, 3 and 5, having become infructuous, do not require specific adjudication, hence are dismissed.

24. In ground no. 4, the Revenue has raised the issue of deletion of demand raised on account of non-deduction of tax on payment of agency fees.

25. Briefly the facts are, the assessee has paid agency fee to Deutsche Bank AG, London Branch and Royal Bank of Scotland PLC, UK. While explaining the nature of such fee, the assessee submitted that it was paid to facility agents, who are supposed to collect funds from the borrower for further transfer to ultimate beneficiary. It was submitted that payment made is towards administrative services. It was submitted that since the payment made is taxable as business income at the hands of the recipient, in absence of a PE, it is not taxable in India requiring the assessee

to deduct tax. The Assessing Officer, however, did not accept the contentions of the assessee and held that the assessee was liable to deduct tax at source on such fee. While deciding assessee's appeal on the issue, learned first appellate authority held that since the Indian branch of the payee has not played any role in the transaction of arranging loan or reimbursement of interest etc., no part of the receipt towards agency fee can be attributed to the Indian Branches. Therefore, there was no liability on the assessee to deduct tax at source.

26. We have considered rival submissions and perused the materials on record. As could be seen from the observations of learned first appellate authority, he has given a clear factual finding that the payee banks though have branches in India, however, the Indian Branches had not played any role either arranging loan or reimbursement of loan. He has given a finding that the Assessing Officer has not recorded any factual finding regarding the role played by the Indian Branches. In the context of the aforesaid factual position, he held that since Indian Branches have not played any role of facility agent, no part of the agency fee can be attributed to the Indian Branches, even if they are held as PE. The

Revenue has failed to bring any material before us to controvert the aforesaid factual position brought on record by learned first appellate authority. In view of the aforesaid, we do not find any valid reason to interfere with the decision of learned first appellate authority. Ground is dismissed.

27. In the result, appeal is dismissed.

28. To sum up, assessee's appeal is partly allowed, whereas Revenue's appeal is dismissed.

Order pronounced in the open court on 9th October, 2024

Sd/-	***Sd/-***
(NAVEEN CHANDRA)	**(SAKTIJIT DEY)**
ACCOUNTANT MEMBER	**VICE-PRESIDENT**

Dated: 9th October, 2024.
RK/-
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi