IN THE INCOME TAX APPELLATE TRIBUNAL, 'I' BENCH MUMBAI

BEFORE: SHRI AMIT SHUKLA, JUDICIAL MEMBER
&
SHRI GAGAN GOYAL, ACCOUNTANT MEMBER

ITA No.771/Mum/2023 & 772/Mum/2023
(**Assessment Year :2014-15**)

M/s. Telefonica UK Limited 16th Floor, The Ruby 29, Senapati Bapat Marg Dadar (W) Mumbai Maharashtra-400 028	Vs.	Deputy Commissioner of Income Tax (International Taxation)-4(1)(2) Mumbai
PAN/GIR No.AAICT7347J		
(Appellant)	..	**(Respondent)**

Assessee by	Shri Hiten Chande
Revenue by	Shri S Anbuselvam
Date of Hearing	**29/08/2023**
Date of Pronouncement	**22/09/2023**

आदेश / O R D E R

PER AMIT SHUKLA (J.M):

In so far as appeals for ITA No.771/Mum/2023 & ITA No.772/Mum/2023 for A.Y.2014-15 have been passed by the assessee against final assessment order dated 25/01/2023 & 30/01/2023 respectively passed u/s.144 r.w.s. 144C(13) & 147 r.w.s.144C(13) in pursuance of directions given by the DRP dated 28/12/2022.

2. Though assessee has raised various grounds of appeal but only issue which has been challenged before us on merits is with regard to ground No.11-19 which releates to cellular roaming charges and treating the amount of Rs.7,45,72,450/- taxable under 9(1)(vi) of the Act and also as per India-UK DTAA under Article 13(3). At the outset, ld. Counsel for the assessee submitted that this issue stands covered in the case of M/s. Telefonica Depreciation Espana SA vs. CIT in ITA No.2657/BANG/2019, 180/BANG/2022& 817/BANG/2022 for the A.Yrs. 2010-11 to 2012-13.

3. The brief facts are that assessee, i.e., Telefonica UK Ltd is a company incorporated under the laws of United Kingdom of Great Britain and Northern Ireland (UK) and is a tax resident of UK. The Assessee is a non-resident telecommunication service provider, primarily engaged in the business of providing mobile and broadband services along with various other ancillary services such as text, media messaging, games, music, video and data connections in the United Kingdom.

4. Since, Vodafone Idea Limited (hereinafter referred to as "VIL), a licensed telecommunication service provider in India, did not have a license and the infrastructure to provide telecommunication services in UK, it entered into an agreement with the Assessee to provide the roaming services to its customers travelling to UK whereby customers of VIL travelling

to UK are able to make and receive calls while they are in UK, i.e., in the territory of the Assessee. In lieu of the services provided to VIL's customers, VIL is under an obligation to pay roaming charges to the Assessee. Thus, in essence, roaming charges is the income of the Assessee for providing telecom services VIL's customers while they are roaming outside India.

5. Therefore, the arrangement of VIL with the Assessee is that the Assessee will provide telecommunication services to the customers of VIL and, for rendering the services to the customers of VIL, the Assessee would receive consideration from VIL Therefore, the agreement entered into by the Assessee with VIL is a service agreement under which the telecommunication services are provided by the Assessee to the customers of VIL The network of the Assessee and related process or equipment are used by the Assessee for providing telecommunication services and, VIL has no access to the network of the Assessee and related process or equipment which are used by the Assessee to provide the services.

6. During the previous year relevant to A.Y 2014-15, the Assessee received Rs. 7,45,72,448 for providing roaming services and discount settlement in connection therewith from VIL. The aforesaid amount received by the Assessee was not offered to tax by the Assessee, since the roaming services were rendered outside India i.e., in UK therefore, according to the Assessee, the income did not accrue or arise in India. And further, according to

the Assessee, the income received by the Assessee was not chargeable to tax as Royalty or Fees for Technical Services ("FTS") under the provisions of the Act and under the provisions of India-UK Double Taxation Avoidance Agreement ("DTAA"). Accordingly, the Assessee did not file a return of income for A.Y 2014-15 as there was no income chargeable to tax in India.

7. On 31/03/2021, the Assessing Officer issued a notice u/s.148 of the Act proposing to reassess the income of Rs.7,45,72,448/- received from VIL for providing roaming services outside India. On 17/03/2022, a show cause notice was issued by the Assessing Officer requiring the Assessee to explain as to why the amount of Rs. 7,45,72,448 received should not be brought to tax as Royalty.

8. The Assessee filed a submission vide letter dated 23/03/2022 and explained to the Assessing Officer that amount of Rs. 7,45,72,448 received for providing roaming services in the UK is not chargeable to tax as Royalty or as FTS. The assessee's submission and the reasons for the roaming charges of Rs.7,45,22,448/- is not chargeable to tax as royalty or FTS on the following grounds:-

a. The agreement between the Assessee and VIL is an agreement to provide roaming facility to customers of VIL who are travelling to UK and are desirous of availing telecommunication services in the UK where VIL has no network and infrastructure to provide services to its customers travelling from India. Therefore, the network and the related process or equipment are used by the Assessee to provide

services to the customers of VIL and, VIL has no access to the process or equipment used by the Assessee Hence, the consideration received by the Assessee is not in respect of any right, property or information as provided under section 9(1X(vi) of the Act.

b. The services rendered by the Assessee does not involve transfer of any right in the process by VIL or use of any process by VIL which belongs to the Assessee. The insertion of Explanation -5 & 6 to section 9(1)(vi) of the Act only provides that the possession or control of process by the payer is not relevant and the process should not be a secret process for it to qualify as "royalty" however, the requirement of use of process by VIL or transfer of any right to any process is sine qua non to qualify as "royalty" under section 9(1)(vi) of the Act. Since the process, used for providing connectivity services, is used by the Assessee and not VIL, the amount received by the Assessee cannot be considered to have been paid in respect of right to use the process or use of process.

c. Without prejudice to the above, the amount received on account of Roaming services is not chargeable to tax in India by virtue of Article- 13 of India-UK DTAA which employs similar definition of "royalty" as found in Explanation - 2 to section 9(1)(vi) of the Act and, the Explanation 5 & 6 to section 9(1)(vi) which broadens the scope of "royalty" is not incorporated therein as there is no amendment made to the DTAA. Therefore, the provisions of Article- 13 of the DTAA are more beneficial to the Assessee and by virtue of section 90(2) of the Act, the income earned by the Assessee on account of roaming charges is not chargeable to tax in India.

d. In support of the contention put before the Assessing Officer, the Assessee relied on the orders of the Tribunal in case of **Bharti Airtel Ltd. vs. ITO (178 TTJ 708) (Delhi Tribunal), Interroute Communications Limited v DDIT**

[2016] 68 taxmann.com 160 (Mumbai - Tribunal) and M/s WNS North America Inc. (2012) (ITA No 8621/Mum/2010) (Mumbai Tribunal) wherein the Tribunal has decided similar issue and has held that IUC/leased line charges cannot be brought to tax as "royalty" under the Act as well as the DTAA.

9. The Assessing Officer in his draft assessment order rejected assessee's contention. In sum and substance his reasons are elaborated hereunder:-

a. Interconnect Agreement is a complex procedure involving several activities. It involves the NTO/TUL sharing information with the RTO/VIL (Resident Telecom Operator) concerning the working of, or the use of the process employed in the telecom network of NTO/TUL to allow the transit of telecom traffic generated by RTO/VIL. Further Explanation 6 to Section 9(1)(vi) clarifies the meaning of the term process as under

> *"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 or not."*

b. In the instant case the assessee does not have any possession or control over the "process" belonging to the NTO and no part of the telecom network of the NTO is located in India. However, what is relevant is that the NTO have transferred some rights in the "process" to the assessee for the purpose of transmission of telecommunication traffic. These rights allow assessee to access and use the process running over the telecom network of the NTO and hence the payments made by assessee constitutes Royalty, In this context reference is made to Explanation 5 to Section 9(1)(vi) which was introduced in the Finance Act 2012.

c. Thus, after explanation 5 to section 9(1)(vi) it is not necessary that payer should have direct control or physical possession over the right, property or information.

d. In order to explain the stand of one of the parties to the agreement that its intention was always not to construe the "process" as secret "process", Explanation 6 has been appended with retrospective effect.

e. The considerations paid for use or right to use of process was already chargeable to tax as royalty. The Indian Courts over a period of time have interpreted the meaning of process in such a way which was contrary to the intention of the Indian Govt. when it entered into DTAA These explanations are only clarificatory in nature explaining the position of one of the parties to the DTAA about the construction of the meaning of expression "process" The scope of the expression "process" employed in the definition of royalty u/s 9(1)(vi) of the Act has not been enlarged by insertion of Explanations 5 & 6.

f. The Hon'ble Madras High Court has dealt with a situation where payments were made toward interconnect charges/dedicated connectivity. The facts of the present case and facts before the Hon'ble Madras High Court in the case of Verizon Communication are identical. Both the issue are related to payments as a consideration for use or right to use of a process leading interconnection of voice/data.

g. In view of the above discussion and the decision of the Hon'ble Bangalore ITAT in the case of Vodafone South Ltd. and Hon'ble Madras High Court in the case of Verizon Communications Singapore Pte Ltd which are directly on the point, it has been considered that consideration paid by the assessee as Communication/IUC charges for alleged inter connect service falls within the ambit of process royalty and element of income was involved.

h. The Assessing Officer has also relied on the orders of the Tribunal in case of New Skies Satellite N.V. (126 TTJ 1) (Delhi Tribunal), Vodafone South Ltd. (53 taxmann.com 441) (Bangalore Tribunal) and Garcemac Corporation vs. ADIT (42 SOT 550) (Delhi Tribunal) to come to the conclusion that amount received by the Assessee is in the nature of "process" and the same is chargeable to tax under the Act and the DTAA.

10. Accordingly, the Assessing Officer held that the amount received by Assessee of Rs. 7,45,72,448 is covered within the scope of "process" and taxable as royalty under the Act as well as India-UK DTAA.

11. The Assessee challenged the draft assessment order by filing objections before the Dispute Resolution Panel ("DRP") on 29 April 2022. After considering the submissions of the Assessee, the DRP passed an order dated 28 December 2022 and like the Assessing Officer, DRP relied on the Judgment of Madras High Court in case of **Verizon Communications Singapore Pte. Ltd. (361 ITR 575)** and held that the amount received for rendering roaming services is chargeable to tax as Royalty under the Act and the DTAA. As clarified above, the Assessing Officer in the draft assessment order had also held that the amount of Rs. 7,45,72,448 is chargeable to tax as FTS and the DRP has not approved the order of the Assessing Officer with respect to FTS and directed the Assessing Officer to tax the same as Royalty.

12. The Assessing Officer passed the final assessment order dated 25 January 2023 in conformity with the directions of the

DRP and taxed the roaming charges as Royalty under the Act as well as DTAA.

13. Thereafter, the Assessing Officer passed another final assessment order dated 30/01/2023 without withdrawing the earlier final assessment order 25 January 2023 and the only difference was that in the order dated 30/01/2023, the Assessing Officer had mentioned the section 147 r.w.s. 144C(13) of the Act as opposed to section 144 r.ws. 144C(13) of the Act mentioned in the assessment order dated 25 January 2013.

14. First of all, we find that assessee has filed two appeals i.e. ITA No.771/Mum/2023 challenging the final assessment order dated 25/01/2023 passed u/s. 144 r.ws. 144C(13) and ITA No 772/Mum/2023 challenging the final assessment order dated 30/01/2023 passed u/s. 147 r.w.s 144C(13). Before us ld. DR clarified that the first final assessment order dated 25/01/2023 should be considered as a valid order for the purpose of adjudication and second final assessment orders dated 30/01/2023 should be ignored. Accordingly, we hold that the appeal filed against the final assessment order dated 30/01/2023 has become purely academic and same is dismissed.

15. Before us, assessee has raised various grounds challenging the taxing of roaming charges as “royalty” u/s. 9(1)(vi) of the Income Tax Act and under Article-13 of India-UK DTAA by the Assessing Officer. Since, ld. DRP has only held that it is taxable as royalty and not as FTS, therefore, our finding will be confined

whether the amount of Rs.7,45,22,448/- received by the assessee for Indian roaming charges is taxable under the "royalty" or not?. As discussed above, assessee has received the amount for rendering roaming services for which no access was given to VIL. VIL network is in process of the equipment used by the assessee for providing roaming services. The arrangement of assessee in VIL was that assessee will provide telecommunication services to the customers of VIL on behalf of VIL when they travel to UK where VIL does not have any network or infrastructure to provide services to its customers. Thus, the arrangement for rendering of services and there is no right given by the Assessee to VIL or there is any right as mentioned in *Explanation-2* to section 9(1)(vi) of the Act or any kind of use by VIL of any process / equipment within the meaning of same Section. There is nothing on record which can suggest VIL has right to use or has used the process/equipment owned by the Assessee. Albeit, Assessee is using own process/equipment and network to render roaming services to the customers of VIL in UK. The meaning of royalty has provided in *Explanation 2 Sub-clause (i)* is that there should be transfer of all or any rights including the granting of licence in respect of ……"process"… Thus, there has to be transfer of some kind of right in the "process". Explanation 6 provides clarification 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; The Explanation 6 has to be read with sub-clause (i) to Explanation 2 wherein the legislature has clarified that process also will include transmission by satellite or by various medium. It cannot be read *dehors* that some kind of right has to be transferred or given. The word "process" enshrined in Explanation-2 to section 9(1)vi) of the Act would mean a process which is an item of intellectual property. The words which surround the word 'process' in clauses (i) to (iii) of Explanation 2 to section 9(1)(vi) refer to various species of intellectual properties such as patent, invention, model, design, formula, trade mark etc. Therefore, applying the rule of *ejusdem generis or noscitur a sociis*, the word "process" must also refer to a specie of intellectual property. The expression 'similar property' used at the end of the list further fortifies the position that the terms 'patent, invention, model, design, secret formula or process or trade mark are to be understood as belonging to the same class of properties viz. intellectual property and, there must be exclusivity with respect to the intellectual property for which the royalty is paid by the Assessee. In the instant case, the process employed for rendering roaming services is not at all exclusively held by the Assessee or VIL and, it is a standard process employed by all the telecom operators around the world including VIL in India. In fact, VIL already possesses the process used for providing roaming services and uses the same to provide services to its customers in India.

16. The contention of the department has been that assessee has given right to use the process or has allowed the VIL to use the process in respect of connectivity services. However, nowhere it has been elaborated by the ld. AO how the right to use process has been allowed by the assessee to VIL. It is a call connectivity services which has a standard process employed by various telecom operators around the world. In fact, VIL already possessed the process used for providing roaming services and used the same to provide services to customers in India, however, since VIL could not provide services to its customers who travelled to UK and it does not have any facility or infrastructure in UK and for this, even the arrangement with the assessee was made to provide services to its customers whenever they travel to UK. Thus, it cannot be held that the amount paid by VIL to the assessee falls within the scope and meaning of 'royalty' u/s.9(1)(vi).

17. This view has been upheld by the Tribunal in assessee's group Telefonica Depreciation Espana SA supra in the following manner:-

5.2.9 By insertion of Explanation 5 & 6, meaning of word 'Process' has been widened. As per these explanations, the word 'Process' need not be secret and situs of control & possession of right, property or information has been rendered to be irrelevant. However, in our opinion, all these changes in the Act, do not affect the definition of Royalty as per DTAA The word employed in DTAA is use or right to use in contradistinction to, transfer of all or any rights" or use of in the domestic law. As per Explanation 5 & 6 the word process' includes and shall be deemed to 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. However, the Explanation does not do away with the requirement of successful exclusivity of such right in respect of such process being with the person claiming royalty for granting its usage to a third party

18. The ld. AO and ld. DRP have held that the provisions of Explanation - 5 & 6 is Clarificatory in nature and therefore, they are to be read in to the DTAA executed between India and UK. In this regard, the lower authorities have relied on the Judgment of Madras High Court case of Verizon (supra), the order of Bangalore Tribunal in case of Vodafone South (supra). The judgment of Madras High Court has been considered by the Delhi High Court in case of DIT New Skies Satellite B.V. (382 ITR 114) and, the High Court has held that Madras High Court has not given any reason for reading the amendment to the Act into the provisions of the DTAA. The relevant portion of the Judgment is reproduced as under:-

31. In a judgment by the Madras High Court in Verizon Communications Singapore Pte Ltd. v. ITO, International Taxation [2014] 361 ITR 575/224 Taxman 237 (Mag)/[2013] 39 taxmann.com 70, the Court held the Explanations to be applicable to not only the domestic definition but also carried them to influence the meaning of royalty under Article 12 Notably, in both cases, the clarificatory nature of the amendment was not questioned, but was instead applied squarely to assessment years predating the amendment. ***The crucial difference between the judgments however lies in the application of the amendments to the DTAA. While TV Today Network Ltd.'s case (supra) recognizes that the question will have to be decided and the submission argued, Verizon Communications Singapure Pte. Ltd's case (supra) cites no reason for the extension of the amendments to the DTAA***

After considering the Judgment in case of Verizon (supra), Delhi High Court in case of New Skies (supra) has held that the amendments made under the provisions of the Act cannot be automatically read in to the DTAA executed by India with other countries unless the DTAA itself is amended incorporating such amendments. Therefore, in the absence of an amendment to the DTAA, the amendments made under the Act has no effect at all on the taxability of income under the DTAA. The relevant portion of Judgment is extracted as under:-

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

19. Similar view has been taken by the Hon'ble Jurisdictional High Court in the case of **CIT Vs. Raliance Infocomm Ltd. in ITA No.1395 of 2016** wherein the Hon'ble High Court have relied upon the judgment of Hon'ble Delhi High Court in the case of New Skies Satellite on identical question. Later on, Hon'ble Supreme Court in the case of **Engineering Analysis Centre of Excellence (P) Ltd. vs. CIT reported in 432 ITR 471** dealing with similar question. The ITAT, Bangalore Bench in the case of group concern had also dealt with the Explanation 5 & 6 to

Section 9(1)(vi) and held that this definition cannot be read in to the DTAA which were in the nature and scope and held that it does not fall within the definition of Royalty as contained in Article 13(3) of India-Spain DTAA which is also applicable to India-UK DTAA. The Tribunal has also relied heavily upon the judgment of Hon'ble Karnataka High Court in the case of Vodafone Idea Ltd. vs. DDIT which has reversed the judgment of Vodafone South passed by the Bangalore Tribunal which has been relied upon by the ld. AO. Thus, following the same reasoning, we hold that the amount received by the assessee from VIL in the form of roaming charges is not taxable. Accordingly, the same is delayed. In the result, on this ground, appeal of the assessee is treated as allowed.

20. The other grounds raised by the assessee had not been argued and therefore, the same are treated as not pressed.

21. In the result, appeal filed by the assessee in ITA No.771/Mum/2023 is partly allowed and appeal filed by the assessee in ITA No.772/Mum/2023 is dismissed as held above.

Order pronounced on 22nd September, 2023.

Sd/-	**Sd/-**
(GAGAN GOYAL)	**(AMIT SHUKLA)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Mumbai; Dated 22/09/2023

KARUNA, *sr.ps*

Copy of the Order forwarded to :

1. **The Appellant**
2. **The Respondent.**
3. **CIT**
4. **DR, ITAT, Mumbai**
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BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai