DEPUTY COMMISSIONER OF INCOME TAX (INTERNATIONAL TAXATION) vs. RELIANCE JIO INFOCOMM LTD.

BOMBAY TRIBUNAL

M. BALAGANESH, AM & RAVISH SOOD, JM.

ITA No. 936/Mum/2017

May 10, 2019

(2019) 56 CCH 0127 MumTrib

Legislation Referred to

Section 248, 9(1)(vii)

Case pertains to

Asst. Year 2016-17

Cases Referred to

CIT Vs. Bharti Cellular Ltd. (2010) 193 taxman 97 (SC)
Commissioner of Income-tax (IT)-4 Vs. M/s Reliance Infocomm Ltd. (ITA No, 1395 of 2016, dated 05.02.2019)
DIT Vs. New Skies Satellite BV (2016) 382 ITR 114 (Del)
CIT Vs. Aktiongesellschaft (2009) 310 ITR 320 (Del)

Counsel appeared:

Nishant Samaiya, D.R for the Appellant.: Sunil Moti Lala & Bhavya Sundesha, A.Rs for the Respondent

RAVISH SOOD, JM.

1. The present appeal filed by the revenue is directed against the order passed by the CIT(A)-57, Mumbai, dated 21.10.2016 that was passed by him while disposing off the appeal filed by the assessee under Sec. 248 of the Income Tax Act,1961 (for short 'I-T Act'). The revenue assailing the order of the CIT(A) has raised before us the following grounds of appeal:

> *"1. Whether on the f acts and in the circumstances of the case and in law, the Ld. CIT(A) erred in holding that an amount paid by Reliance Jio Infocomm Ltd. ('RJIL' or 'the Assessee') to Reliance Jio Infocomm Pte Ltd., ('RJPIL'), Singapore for availing bandwidth services was not liable to tax in India, as Royalty as per the provisions of the Income-tax Act, 1961 ('the Act') and the India - Singapore Double Taxation Agreement ('DTAA')?*
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> *2. Whether on the f acts and in the circumstances of the case and in law, the Ld.CIT (A) erred in concluding that the payments made by the assessee to RJIPL for provision of bandwidth services will be in the nature of business prof its and cannot be classified as Royalty either under the Act or the India-Singapore DTAA ?*
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> *3. The Appellant prays that the - order of the CIT(A) be set aside on the above ground(s) and of the Assessing Officer be restored.*

4. The Appellant craves leave to amend or alter any ground or add a new ground which may be necessary."

2. Briefly stated, the assessee is a company incorporated in India and is engaged in the business of rolling out telecom services in India. In order to avail bandwith services the assessee had entered into a "bandwith services" agreement (for short "agreement") dated 01.06.2015 with Reliance Jio Infocomm Pte. Ltd. (for short "RJIPL") i.e a company incorporated and a tax resident of Singapore. RJIPL was holding a facility based operator license in Singapore which enabled it to establish, install, maintain, operate and provide telecommunication services in Singapore and also provide bandwith services to the service recipients across the globe. As per the terms of the aforesaid 'agreement' dated 01.06.2015, the assessee remained under an obligation to withhold tax, if any, on the payments which were to be made to RJIPL for provision of bandwith services. In pursuance of the aforesaid terms, the assessee which had remitted USD 13,45,500 to RJIPL for provision of bandwith services had deposited taxes of INR Rs. 95,14,725/- on 07.08.2015 @ 11.11% [i.e rate of 10% under Article 12 of the DTAA duly grossed upon in terms of Sec.195A] in terms of Sec.195 of the I-T Act. However, the assessee thereafter holding a conviction that it was not obligated to deduct tax at source under Sec.195 from the aforesaid payment made to RJIPL carried the matter by way of an appeal before the CIT(A) under Sec. 248 of the I-T Act, therein claiming that no tax was required to be deducted on the aforesaid amount paid to RJIPL.

3. The assessee in the course of the appellate proceedings submitted before the CIT(A) that the amount remitted by it to RJIPL for provision of bandwith services was the latters business income. It was averred by the assessee that as RJIPL did not have any business connection or a Permanent Establishment (for short 'PE') in India, therefore, as per Article 7 of the India-Singapore DTAA the amount remitted by the assessee to RJIPL could not have been brought to tax in India. In sum and substance, it was the contention of the assessee that as the payments made to RJIPL towards bandwith services was the latters business profits, therefore, the same in the absence of its PE or a business connection in India could not be taxed in India as per Article 7 of the India-Singapore DTAA. Insofar the nature of the bandwith services rendered by RJIPL to the assessee was concerned, it was submitted that as the provision of the said services were fully automatic and did not involve any human intervention, therefore, the same did not fall within the realm of 'fees for technical services' (for short 'FTS') as defined under Sec.9(1)(vii) of the I-T Act. In fact, it was the contention of the assessee that as the remittance towards bandwith services was a simpliciter payment of a 'fee' for use of a standard facility that was provided to all those willing to pay for it, therefore, the same could not be held as fees received for rendering of technical services. In support of his aforesaid contention reliance was placed by the assessee on the judgement of the Hon'ble Supreme Court in the case of CIT Vs. Bharti Cellular Ltd. (2010) 193 taxman 97 (SC). Alternatively, it was the contention of the assessee that as rendering of the bandwith services by RJIPL to the assessee did not "make available" any technical knowledge or experience to the assessee, thus the same on the said count also could not be brought within the sweep of the definition of FTS under Article 12 of the India- Singapore DTAA. Apart there from, it was submitted that the payment made by the assessee to RJIPL could also not be construed as "royalty" under the I-T Act, as well as under the India-Singapore DTAA. In order to buttress his aforesaid claim, it was submitted by the assessee that neither RJIPL had in any way transferred all or any rights in respect of any "process" to the assessee, nor was the assessee making use of any such "process". In sum and substance, it was the claim of the assessee that it was merely receiving standard bandwith services from RJIPL. It was the contention of the assessee that as the amount paid to RJIPL was neither towards use of (or obtaining right to use) industrial, commercial or scientific equipment nor towards use of (or obtaining right to use) any process, therefore, the same could not be brought within the definition of the term "royalty" as envisaged in the I-T Act. Apart there from, it was submitted by the assessee that the consideration received by RJIPL also did not qualify as royalty as per its narrow definition under the India-Singapore DTAA. It was submitted by the assessee that for a payment to qualify as "royalty" under the India-Singapore DTAA, it was indispensably required that the consideration paid for the process, if any, was for a "secret process" i.e the IPR in the process was owned/registered in the name of the payee. It was thus submitted by the assessee that as it had made the payment to RJIPL for availing bandwith services which were standard telecom services and not for making any use of a "process", whether secret or not, therefore, the same clearly fell beyond the realm of the definition of "royalty" both under the I-T Act and the India- Singapore tax treaty.

4. The CIT(A) after deliberating on the contentions advanced by the assessee observed that RJIPL did neither have any business connection or a PE in India. Accordingly, it was observed by him that in the absence of any business connection or PE in India the income earned by the said foreign entity under the 'agreement' for provision of bandwith services would not be liable to tax in India. Insofar the contentions advanced by the assessee that the payments made to RJIPL were for availing standard telecom services and not by way of FTS were concerned, the same did find favour with the appellate authority. In fact, the CIT(A) after deliberating on the terms of the 'agreement' observed that as the assessee was only availing standard bandwith services which did not require any human intervention, therefore, the same could not be regarded as 'technical services', and thus the payment made by the assessee for the same could not be characterised as FTS under Sec.9(1)(vii) of the I-T Act. Insofar the definition of FTS envisaged in India-Singapore DTAA was concerned, the CIT(A) taking cognizance of Article 12(3) of the tax treaty observed that as RJIPL by providing bandwith services did not "make available" any technical knowledge, experience, skill, knowhow or process to the assessee which was simply availing the said standard facility, thus the same could also not be construed as FTS under the India-Singapore tax treaty.

5. It was further observed by the CIT(A) that the assessee had only received an access to service and not any access to any equipment that was deployed by RJIPL for providing the bandwith services. Apart there from, it was observed by the CIT(A) that the assessee also did not have any access to any process which helped in providing such bandwith services. In fact, it was noticed by him that all infrastructure and process required for provision of bandwith services was always used and had remained under the control of RJIPL and was never given either to the assessee or to any person availing such services. Further, it was observed by the CIT(A) that as the process involved to provide the bandwith services was not "secret" i.e the Intellectual Property Rights (for short "IPR") in the process was not owned/registered in the name of RJIPL, but was a standard commercial process followed by the industry players, thus the same could not be classified as a "secret process" as was required under the India-Singapore DTAA for the same to qualify as "royalty. The CIT(A) taking cognizance of the definition of "royalty" under the India-Singapore DTAA, observed that as the amount paid by the assessee to RJIPL was neither towards use of (or for obtaining right to use) industrial, commercial, scientific equipment, nor towards use of (or for obtaining right to use) any process, therefore, the payments made by the assessee for availing bandwith services could not be held as "royalty" either under the I-T Act or the tax treaty. In the backdrop of his aforesaid observations the CIT(A) concluded that the payments made by the assessee to RJIPL for provision of bandwith services were in the nature of "business profits" and could not be classified as FTS or royalty either under the I-T Act or India-Singapore DTAA. On the basis of his aforesaid deliberations, it was further observed by him that as RJIPL did not have any business connection or a PE in India, therefore, the business profits could not be taxed in India. In the backdrop of his aforesaid observations the CIT(A) finding favour with the claim of the assessee that no tax was deductible on the payment/credit made to RJIPL, allowed the appeal.

6. Aggrieved, the revenue has assailed the order of the CIT(A) in appeal before us. The ld. Authorized Representative (for short 'A.R') for the assessee adverted to the facts of the case and took us through the relevant observations of the CIT(A) in context of the issue under consideration. The ld. A.R took us through the "Grounds of appeal" raised by the revenue before us and submitted that the order of CIT(A) has been assailed before us only to the extent he had concluded that the payment made by the assessee to RJIPL for providing bandwith services were in the nature of "business profits" and could not be classified as "royalty" either under the I-T Act or the India-Singapore DTAA. In sum and substance, it was the contention of the ld. A.R that the revenue has accepted the observations of the CIT(A) that the payment made by the assessee to RJIPL could not be held as FTS. Insofar the issue as to whether the CIT(A) was right in law and facts of the case in concluding that the amount remitted by the assessee to RJIPL was not to be held "royalty" was concerned, the ld. A.R took us through the definition of 'royalty' as envisaged in Explanation 2 to Sec.9(1)(vi) of the I-T Act. It was averred by the ld. A.R that as the consideration was not paid by the assessee for the use or right to use any industrial, commercial or scientific equipment of RJIPL, thus the same was not covered by the definition of "royalty" as defined in clause (iva) to Explanation 2 of Sec.9(1)(vi) of the I-T Act. Apart there from, the ld. A.R in order to buttress his claim that the payment made by the assessee for the bandwith services also did not fell within the realm of the definition of the term 'royalty' under Article 12(3) of the India-Singapore DTAA, took us through the same. In fact, the ld. A.R in

order to fortify his aforesaid contention submitted that unlike the definition of term "royalty" as used in India-Hungary DTAA wherein "transmission by satellite, cable, optic fibre or similar technology..." was specifically included within the definition of "royalty" under Article 12(3) of the said tax treaty, no such mention was available in the definition of the same as envisaged in the India-Singapore Tax Treaty. It was further submitted by the ld. A.R that though the legislature in all its wisdom had vide the Finance Act, 2012 with retrospective effect from 01.06.1976 incorporated "Explanation 6" to Sec. 9(1)(vi) of the I-T Act, which therein clarifies 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, however, no such mention was available in the narrow meaning of the term "royalty" in the India- Singapore tax treaty. In sum and substance, it was the contention of the ld. A.R that now when the definition of 'royalty' as envisaged in Article 12(3) of the India-Singapore tax treaty does not provide for inclusion of transmission by satellite, cable, optic fibre or by any other similar technology within the realm of the definition of "royalty", therefore, the consideration received by RJIPL from the assessee for rendering of the bandwith services could not be characterised as royalty in its hands.

7. Per contra, the ld. Departmental Representative (for short 'D.R') submitted that the CIT(A) while disposing off the appeal had failed to consider the definition of the term 'royalty' in the backdrop of Explanation 5 and Explanation 6 of Sec.9(1)(vi). In sum and substance, it was the contention of the ld. D.R that as the Explanation 5 and Explanation 6 of Sec. 9(1)(vi) were declaratory in nature and had only clarified the intent of the legislature, therefore, the consideration paid by the assessee to RJIPL was clearly covered by the definition of 'royalty'. Apart there from, it was averred by the ld. D.R that even if it was to be assumed that RJIPL had provided standard telecom services to the assessee, even then the same as per Explanation 2 to Sec.9(1)(vi) and also Article 12 of the India-Singapore DTAA would qualify as a payment of royalty by the assessee company. The ld. D.R further adverting to the business model of RJIPL submitted that the latter in order to facilitate the provision of bandwith services had established international connectivity points through the network of sea-cables across the globe. It was submitted by the ld. A.R that for providing such international connectivity points industrial, commercial or scientific equipment in the form of sea cable network system(optic fibre telecommunication network) and other sophisticated scientific apparatus was deployed and used in Indian Sea and Indian territory called 'landing points systems'. It was submitted by the ld. D.R that as RJIPL would require association of domestic companies in order to work as an intermediary for interconnecting offshore sea cable network and associated infrastructure/equipment systems in India, therefore, it could safely be concluded that it had a fixed place of business in India. In the backdrop of his aforesaid contention, it was submitted by the ld. D.R. that the observations of the CIT(A) that all infrastructure and process required for providing of bandwith services was always used under the control of RJIPL and the same was never given to the assessee or to any other person availing such services, was found to be incorrect. Apart there from, it was the contention of the ld. D.R that as the assessee company had the "right to use" and had used "the process" during the course of bandwith network transmission/receiving bandwith services, therefore, as per Article 12 of the DTAA and Explanation 5 and Explanation 6 of Sec. 9(1)(vi) of the I-T Act, the payment made by the assessee to RJIPL for availing such bandwith services was clearly in the nature of royalty. Further, the ld. D.R also did put up an effort to distinguish the case laws relied upon by the assessee in the course of hearing of the appeal.

8. We have heard the authorized representatives for both the parties, perused the orders of the lower authorities and the material available on record and the judicial pronouncements relied upon by them. We find that our indulgence in the present appeal has been sought by the revenue to adjudicate as to whether the CIT(A) is correct in concluding that the amount paid by the assessee for availing bandwith services to RJIPL did not constitute "royalty" and was its "business profits". Admittedly, as the revenue has not assailed the observations of the CIT(A) that the payments made by the assessee to RJIPL cannot be held as FTS, therefore, we confine ourselves to the issue to the extent the same has been assailed by the revenue before us. As is discernible from the record, the assessee pursuant to the terms of the 'agreement' had only received standard facilities i.e bandwith services from RJIPL. In fact, as observed by the CIT(A), the assessee only had an access to services and did not have any access to any equipment deployed by RJIPL for providing the bandwith services. Apart there from, the assessee also did

not have any access to any process which helped in providing of such bandwith services by RJIPL. As a matter of fact, all infrastructure and process required for provision of bandwith services was always used and under the control of RJIPL, and the same was never given either to the assessee or to any other person availing the said services. We are persuaded to subscribe to the observations of the CIT(A) that as the process involved to provide the bandwith services was not a "secret" i.e IPR in the process was not owned/registered in the name of RJIPL, but was a standard commercial process that was followed by the industry players, therefore, the same could not be classified as a "secret process" which would have been required for charactering the aforesaid payment made by the assessee to RJIPL as "royalty" under the India-Singapore DTAA. We are further in agreement with the view taken by the CIT(A) that as the amount paid by the assessee to RJIPL was neither towards use of (or for obtaining right to use) Industrial, commercial or scientific equipment, nor towards use of (or for obtaining right to use) any secret formula or process, therefore, the same could not be classified as payment of "royalty" by the assessee. Insofar the ld. D.R had tried to press into service Explanation 6 to Sec. 9(1)(vi), in order to drive home his contention that the payment made by the assessee to RJIPL for availing the bandwith services would fall within the sweep of 'royalty' is concerned, we are unable to persuade ourselves to accept the same. In our considered view, the amendment in Sec. 9(1)(vi) will not have any bearing on the definition of 'royalty' as contemplated in the India-Singapore DTAA. Our aforesaid view is fortified by the order of the Hon'ble High Court of Bombay in the case of The Commissioner of Income-tax (IT)-4 Vs. M/s Reliance Infocomm Ltd. (ITA No, 1395 of 2016, dated 05.02.2019). The Hon'ble High Court in its aforesaid judgment had after referring to the judgments of the Hon'ble High Court of Delhi in the case of DIT Vs. New Skies Satellite BV (2016) 382 ITR 114 (Del) and CIT Vs. Aktiongesellschaft (2009) 310 ITR 320 (Del), had after deliberating on the amendment made available on the statute by the Explanation 6 to Sec. 9(1)(vi), observed that mere amendment in the I-T Act would not override the provisions of DTAA treaties. In the backdrop of our aforesaid observations, we shall now further deliberate on the definition of 'royalty' as contemplated in the India-Singapore tax treaty. In our considered view there is substantial force in the contention advanced by the ld. A.R that though the term "royalty" as used in Article 12 of India-Hungary DTAA takes within its sweep "...transmission by satellite, cable, optic fibre or similar technology", however, the definition of 'royalty' in the India-Singapore tax treaty with which we are concerned has a narrow meaning. In fact, we find that despite the fact that the India-Singapore tax treaty was amended by Notification No. SO 935(E), dated 23.03.2017, however, the definition of 'royalty' therein envisaged had not been tinkered with and remains as such. We thus in terms of our aforesaid observations are of the considered view that the amount received by RJIPL from the assessee for providing standard bandwith services could not be characterised as 'royalty' as per the India-Singapore DTAA, and as rightly observed by the CIT(A), was in fact the "business profits" of RJIPL. Insofar the taxability of the aforesaid "business profits" is concerned, we find that as RJIPL did not have any business connection or a PE in India, therefore, the same as per Article 7 of the India-Singapore DTAA could not have been brought to tax in India.

9. The order of the CIT(A) that amount received by RJIPL from the assessee for providing standard bandwith services was its 'business profits', which in the absence of its business connection or PE in India could not be brought to tax in India is upheld in terms of our aforesaid observations and the appeal of the revenue is dismissed.

10. The appeal of the revenue is dismissed in terms of our aforesaid observations.

Order pronounced in the open court on 10.05.2019

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Customized Notes