[2019] 111 taxmann.com 371 (Mumbai - Trib.)/[2020] 77 ITR(T) 578 (Mumbai - Trib.)[15-11-2019]

INTERNATIONAL TAXATION: When a domestic tax jurisdiction is allowed to amend settled position with respect to a treaty provision by amendment in domestic law, ambulatory or dynamic interpretation is to be discarded if such approach would patronise and legitimise a unilateral treaty override

INTERNATIONAL TAXATION: Amendments in Act cannot be read into treaty provisions without amending treaty itself and, thus, meaning of term 'process' as defined in Explanation to section 9(1)(vii) of Act is for limited purpose of section 9(1)(vii) itself and cannot be read into DTAA

INTERNATIONAL TAXATION: Payments made by assessee to Singapore AE for providing operations and maintenance services in respect of bandwidth services infrastructure, would not be in nature of fees for technical services

[2019] 111 taxmann.com 371 (Mumbai - Trib.)

IN THE ITAT MUMBAI BENCH 'I'

Assistant Commissioner of Income-tax, (IT)-4(1)(1), Mumbai

v.

Reliance Jio Infocomm Ltd.*

PRAMOD KUMAR, VICE PRESIDENT
AND RAVISH SOOD, JUDICIAL MEMBER
IT APPEAL NOS. 6331 TO 6334 (MUM.) OF 2018
[ASSESSMENT YEAR 2018-19]
NOVEMBER 15, 2019

I. Section 9 of the Income-tax Act, 1961, read with article 13, of the India-Singapore, Double Taxation Avoidance Agreement - Income - Deemed to accrue or arise in India (General) - Assessment year 2018-19 - Whether when a domestic tax jurisdiction is allowed to amend settled position with respect to a treaty provision by amendment in domestic law to nullify domestic judicial rulings, it cannot be treated as performance of treaties in goods faith, i.e., in effect, it amounts to a unilateral treaty override which is contrary to scheme of Article 26 of Vienna

Convention on Law of Treaties - Held, yes - Whether in case of such amendment, while adopting ambulatory interpretation, additional test that is required to be put is whether amendment in domestic law ends up unsettling a conclusion arrived at under pre-domestic law amendment position, i.e., reversing judicial rulings in favour of residence jurisdiction, and if answer is in positive, ambulatory or dynamic interpretation is to be discarded because such approach would patronise and legitimise a unilateral treaty override and outcome of ambulatory interpretation in such a case will be incompatible with fundamental principles of treaty interpretation under Vienna Convention - Held, yes [Paras 21 and 22] [In favour of assessee]

II. Section 9 of the Income-tax Act, 1961, read with article 13, of the India-Singapore, Double Taxation Avoidance Agreement - Income - Deemed to accrue or arise in India (General principles) - Assessment year 2018-19 - Expression 'process' finds mention in Indo-Singapore DTAA but it is not specifically defined in treaty itself - Explanation 6 to section 9(1)(vii) was inserted vide Finance Act, 2012 with retrospective effect from 1-6-1976 for expedient tax administration in view of conflicting views expressed by different Courts - Revenue contended that in absence of any specific definition in Indo-Singapore tax treaty, domestic law meaning of expression 'process' must prevail and going by domestic law meaning under Explanation 6 to section 9(1)(vii), any 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, is covered by definition of 'royalty' under article 13(3)(a) of Indo-Singapore tax treaty - It was further contended that, since bandwidth services, on facts of assessee's case, were transmitted by satellite, cable, optic fibre or other similar technology, payment for bandwidth services would constitute 'royalty' for purpose of article 13(3)(a) - However, Commissioner (Appeals) held that amendments in Act cannot be read into treaty provisions without amending treaty itself and, thus, meaning of term 'process' as defined in Act is for limited purpose of section 9(1)(vii) and cannot be read into DTAA - He, thus, held that payments made by assessee to Singapore AE for provision of bandwidth services would be in nature of business profits and could not be classified as Fees for Technical services or Royalty either under Act or India-Singpaore DTAA and further, in absence of Singapore AE's business connection or a PE in India, business profits would not be taxable in India - Whether conclusion arrived at by Commissioner (Appeals) was to be approved - Held, yes [Paras 21 and 22][In favour of assessee]

III. Section 9 of the Income-tax Act, 1961 read with Article 13 of the India-Singapore Double Taxation Avoidance Agreement - Income - Deemed to accrue or arise in India (Royalties/Fees for technical services - Make available) - Assessment year 2018-19 - Whether payments made by assessee to Singapore AE for providing operations and maintenance services in respect of bandwidth services infrastructure, such as cable landing stations and equipment used to avail

bandwidth services, would not be in nature of fees for technical services as there was no transfer of technology involved in technical services extended by Singapore company and, thus, 'make available' clause was not satisfied - Held, yes [Para 28][In favour of assessee]

Interpretation of Statutes: Rule of static interpretation; rule of ambulatory or dynamic interpretation

FACTS-I

- The assessee, an Indian company, has, under a bandwidth services agreement with a Singapore based entity RJ-S, paid it US $ 15,91,520. The assessee initially deducted the tax at source at the rate of 10 per cent, under the provisions of Article 12 of Indo-Singapore tax treaty, and grossed up the same under section 195A.

- The assessee, subsequently, filed an appeal under section 248 praying for a declaration to the effect that the assessee was not legally liable to withhold the tax from this payment. It was submitted by the assessee that RJ-S, being fiscally domiciled in India, was eligible to the benefits of India Singapore tax treaty; that the income of RJ-S on account of bandwidth services so provided was purely in the nature of its business income; and that in terms of the requirements of Article 7 of Indo Singapore tax treaty, such an income cannot be taxed in India. The assessee filed a copy of the tax residency certificate of RJ-S as issued by the Inland Revenue Service of Singapore, a declaration to the effect that RJ-S does not have a permanent establishment (PE) in India, a copy of the agreement entered into by the assessee with RJ-S, and made elaborate submissions to the effect that these payments could not be brought to tax in India, either in terms of the provisions of the Income Tax Act, 1961 or even in terms of the provisions of Indo Singapore tax treaty.

- Upholding the plea of the assessee, Commissioner (Appeals) observed, inter alia, as follows:

    - The Appellant had only received an access to service and not any access to any equipment of RJ-S deployed by it for provision of such services nor any access to any process which helped in providing such Bandwidth Services. All infrastructure and process required for provision of Bandwidth Services was always used and under the control of RJ-S and same was never given by RJ-S to the Appellant or to any person who are availing the Bandwidth Services from RJ-S.

    - Further, if the process involved to provide the service is not 'secret' i.e. the IPR in the process was not owned/registered in a specific owner's name but was a standard commercial process followed by the industry players, then the same could not be classified as secret process as required under the India-Singapore DTAA for the payments to constitute Royalty.

    - Furthermore, the amendments in the Act cannot be read into treaty provisions without amending the treaty itself. The amendments made by the Finance Act, 2012 in *Explanation* to section 9(1)(*vii*) providing the term 'process' is for limited purpose of

section 9(1)(*vii*) and cannot be read into the DTAA.

- The amounts paid by the Appellant to RJ-S is 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.

- The payments made by the Appellant to RJ-S for provision of Bandwidth Services would be in the nature of business profits and could not be classified as Fees for Technical Services or Royalty either under the Act or the India-Singapore DTAA. Further, in absence of RJ-S's business connection or a PE in India, the business profits was not be taxable in India.

■ On the revenue's appeal before the Tribunal:

HELD-I

■ A Co-ordinate Bench of this Tribunal, while dealing with the same issue in assessee's own case for the assessment year 2016-17 in *Dy. CIT* v. *Reliance Jio Infocomm Ltd.* [2019] 108 taxmann.com 325 (Mum. - Trib) has, observed that :

- The amendment in section 9(1)(*vi*) will not have any bearing on the definition of 'royalty' as contemplated in the India-Singapore DTAA. Different High Courts had after deliberating on the amendment made available on the statute by the *Explanation 6* to section 9(1)(*vi*), observed that mere amendment in the I-T Act would not override the provisions of DTAA treaties.

- The definition of 'royalty' in the India-Singapore tax treaty has a narrow meaning. In fact, 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. Thus, the amount received by RJ-S from the assessee for providing standard bandwidth services could not be characterised as 'royalty' as per the India-Singapore DTAA, and as rightly observed by the Commissioner (Appeals), was in fact the 'business profits' of RJ-S. Insofar the taxability of the aforesaid 'business profits' is concerned, as RJ-S did not have any business connection or a PE in India, the same as per Article 7 of the India-Singapore DTAA could not have been brought to tax in India.

■ A fallacy lies in the proposition of the revenue that the expression 'process' is a treaty term for which article 3(2) can be invoked. Of course, even without article 3(2), when meanings of an expression, whether a treaty term or not, are to be explored, all sources of meanings, including in the domestic law, will be relevant but then, in such a situation, the binding force of article 3(2) will be missing in the sense that it will not be necessary to establish, before adopting a meaning other than the domestic law meaning, that it's the compulsion of context requiring that the domestic law meaning is to be discarded.

■ It is important to note that the provisions of Article 3(2) come into play for domestic law

meaning of 'any term not defined' in the tax treaty. To invoke the provisions of Article 3(2), the first thing to be seen is whether the undefined expression can be said to be a treaty term. The expression 'term' is defined as 'a word or phrase used to describe a thing or to express a concept, especially in a particular kind of language or branch of study'. A 'term' is thus a word that has meaning and refers to objects, ideas, events or a state of affair. A term is thus, in addition to being a word, some kind of a point of reference, whereas a word is only a constituent of language. As a corollary to these discussions, Article 3(2) will come into play only in respect of the undefined treaty terms, which are in the nature of reference points and which have some peculiar significance as a term employed in the treaty, and not all the undefined words and expressions used in a treaty. To put a question it is to be seen, does the expression 'process', in its own right, has any relevance for the tax treaties or can 'process' to be said to be a term employed in tax treaties? The answer is in negative. If at all the expression 'process' has any relevance, it is in defining a treaty term i.e. 'royalty'. To look for statutory definitions of each word employed in a definition of the treaty term, and then construct the definition of treaty term as an assembly of the statutory definitions of all these words taken together will be too hyper technical an approach, and, in any case, beyond the mandate of article 3(2). That does not appeal. It is even more inappropriate because 'process' is judicially explained but the statutory definition is being invoked, under article 3(2), to dislodge the judicial interpretation. Quite clearly, therefore, but for the binding force of article 3(2), this statutory definition does not come to the rescue of Assessing Officer's case, and it is this binding force of article 3(2) which does not come into play in explaining the word 'process' used in definition of a treaty term i.e. royalty. Of course, 'royalty' is a treaty term but since it is well defined term in the treaty, its domestic law meaning is not relevant for treaty purposes. The expression 'process' is defined in the domestic law but this definition is in the limited context of explaining the term 'royalty' under the domestic law, it cannot be borrowed in the treaty for understanding connotations of 'royalty' under the treaty. It cannot be open to pick up a part of the definition of royalty under the domestic law and supply the same to an undefined expression in the definition of royalty under the treaty. The expression 'process' is not a treaty term *per se*, or a reference point, used in the treaty, rather it is an expression or word used in defining the treaty term 'royalty'. The expression 'process' is used in the treaty in that limited context and it does not have an independent existence. The definition of 'royalty' under the domestic law, as it stands now, is more exhaustive inasmuch as the expression 'process' used in the definition is further elaborated upon in *Explanation 6* to section 9(1)(*vi*) which does not, in any case, provide a universal rule as it is in the context of this particular sub-section dealing with the 'income by way of royalty'. The definition of expression 'process' is thus not a standalone definition which can be imported in treaty under article 3(2). [Para 12]

- The domestic law meaning under article 3(2) is relevant only when the treaty term itself is undefined, as noted by Delhi High Court in the case of *DIT* v. *New Skies Satellite BV* [2016] 68 taxmann.com 8/238 Taxman 577/382 ITR 114. When the expression 'royalty' is a defined expression under the applicable tax treaty, there cannot be any occasion to invoke article 3(2) for further dissecting the issue and explore the domestic law meaning of each expression used in this definition for coming at the conclusions about connotations of royalty. It cannot, therefore, be open to invoke article 3(2) to import domestic law meaning, even partly, when

the treaty term has received a definition under the treaty. It is for this reason that *Explanation 6* to section 9(1)(*vi*) has no role, under article 3(2) of the treaty, in explaining the expression 'process', in the context of defining royalty under the Indo-Singaporean tax treaty. This statutory provision, under the domestic law, is relevant only when the definition of royalty under section 9(1)(*vi*) is subject matter of consideration, as it specifically states that said definition is 'for the purpose of this clause[i.e., section 9(i)(v)]'. [Para 13]

- Even if one proceeds on the basis that 'process' can be treated as an undefined treaty term, which, it is not, and that *Explanation 6* to section 9(1)(*vi*) can have a role in assigning domestic law meaning to the expression 'process', the next fundamental question, however, that is whether, on the facts and in the circumstances of this case, assignment of the domestic law meaning under article 3(2), to an undefined treaty term, is to be done by way of static interpretation or by way of dynamic or ambulatory interpretation. In plain words, the meaning to be assigned to the undefined treaty terms should be given in the light of the law as it stood at the point of time when treaty was entered into or the law as it stands at the point of time when related taxes are levied. If the static interpretation is to be given, it does not come to the rescue of the revenue's case. The expression 'process' was not, at the point of time relevant to static interpretation, not statutorily defined, and if the judicial interpretation of term 'process', without the aid of *Explanation 6* to section 9(1)(vi), is to be taken into account, it does not support the case of the revenue either. There is no dispute on this fundamental position. It is also elementary that when Courts lay down the law, or when a judicial interpretation is given, it is not from prospective effect, and it relates back to the point of time when law was legislated. Effectively, therefore, judicial ruling, without taking into account *Explanation 6* to section 9(1)(*vi*) will hold the field, and undisputedly these rulings do not help the case of the revenue. [Para 14]

- 'Royalty' is a neatly defined expression in the current Indo-Singapore tax treaty that one is concerned with, the expression 'laws in force', which was subject matter of focus of judicial analysis in the *CIT* v. *Siemens Aktiongesellschaft* [2009] 310 ITR 320/177 Taxman 81 (Bom.), does not find place in the Indo-Singapore tax treaty. That is, however, not really true of all the tax treaties currently in force. [Para 16]

- It is sufficient to take note of the fact that the provisions of Article 3(2) of Indo-Singapore tax treaty are differently worded vis-à-vis the old Indo-German tax treaty that jurisdictional High Court were dealing with in Siemens Aktiongesellschaft's case *(supra)* and the crucial words 'laws in force' on which so much emphasis was placed in judicial analysis by jurisdictional High Court do not find place in this treaty. Strictly speaking, therefore, the judicial sanction for the theory of ambulatory interpretation, for the purpose of article 3(2), does not, therefore, necessarily extend to Indo-Singaporean tax treaty. [Para 17]

- Of course, even without the words 'meaning which it has under the laws of that State from time to time in force', one could still justify the ambulatory interpretation in the normal course of interpretation - though without the binding force of judicial precedents, but then, for the reasons set out now, there is a strong conceptual basis for not adopting the ambulatory interpretation on peculiar facts of this case. [Para 18]

- While it is indeed true, as held by jurisdictional High Court in the case of *Siemens Aktiongesellschaft's*, that 'the rule of referential incorporation or incorporation cannot be applied when a treaty (DTAA) between two sovereign nations' is dealt with because 'it is open to a sovereign legislature to amend its laws', Their Lordships have put in a word of caution by suggesting an element of 'reasonableness' in construing the treaty superiority vis-à-vis the domestic law by observing that 'a DTAA entered into by the Government in exercise of the powers conferred by section 90(1) while considering section 90(2) has to be reasonably construed'. In the *Siemen's* decision *(supra)* itself, while quoting, with approval, Supreme Court of Canada's decision in the case of *Her Majesty The Queen* v. *Melford Developments Inc.* 82 DTC 6281, it was observed that 'the ratio of that judgment would mean that by an unilateral amendment it is not possible for one nation which is party to an agreement to tax income which otherwise was not subject to tax'. Quite clearly, therefore, whatever be the approach adopted, for the purpose of article 3(2) i.e. static or ambulatory, a unilateral treaty override, howsoever subtle, is not really permissible. [Para 19]

- It is important to bear in mind the fact that the insertion of *Explanation 6* to section 9(1)(*vii*) was admittedly to nullify certain judicial rulings, which gave an interpretation, unfavourable to the tax administration, to the expression 'process'. The Memorandum to the Finance Bill 2012 specifically stated that "Considering the conflicting decisions of various courts in respect of income in nature of royalty and to restate the legislative intent, it is further proposed to amend" ……. …… "section 9(1)(vi) to clarify that the term '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".

- In appreciation of the nature of development, from the treaty perspective, in case it is to be held that the retrospective amendments defining the expression 'process' would be equally applicable for definition of 'royalties' under the tax treaty. Thus viewed, situation could be like this. There are judicial rulings which decide something in favour of the residence jurisdiction, and the source jurisdiction is not happy with that outcome, and it's a coincidence, coincidence if it is, that the source jurisdiction changes the domestic law in a way that, once that amended domestic law is applied in the context of article 3(2), a different outcome to the same treaty provision, which favours the source jurisdiction, is possible. In effect, thus, what was not taxable in the source jurisdiction in pre-domestic law amendment situation becomes taxable in source jurisdiction post domestic law amendment.

- Undoubtedly, legislation is a sovereign function and it is indeed open to any jurisdiction to amend, even retrospectively, its domestic laws to bring new incomes to taxability in the source jurisdiction, but so far as the source jurisdiction taxability under the treaty provisions is concerned, legal amendments so as to influence the taxability even under the treaty situation, by the source jurisdictions unilaterally, are impermissible. That is a classic case of a subtle unilateral treaty override. While, in India, the expression 'treaty override' is often loosely used for the situations where the provisions of tax treaty prevails over any inconsistent provisions of domestic law, this approach seems to be at variance with the international practices wherein

connotations of 'treaty override' refer to a situation in which domestic legislation of a treaty partner jurisdiction overrules the provisions of a single treaty or all treaties hitherto having had effect in that jurisdiction. That will be the end result of a domestic law amendment of an undefined treaty term, in departure from the current position, and import such amended meaning of that term, under article 3(2), in the treaty situations as well. Such an approach, on the first principles, is unsound inasmuch as it is well settled in law that the treaty partners ought to observe their treaties, including their tax treaties, in good faith. Article 26 of Vienna Convention on Law of Treaties provides that, '*Pacta sunt servanda*: Every treaty in force is binding on the parties to it and must be performed by them in good faith'. What it implies is that whatever be the provisions of the treaties, these provisions are to be given effect in good faith. Therefore, no matter how desirable or expedient it may be from the perspective of the tax administration, when a tax jurisdiction is allowed to amend the settled position with respect to a treaty provision, by an amendment in the domestic law and admittedly to nullify the judicial rulings, it cannot be treated as performance of treaties in good faith. That is, in effect, a unilateral treaty over-ride which is contrary to the scheme of Article 26 of Vienna Convention on Law of Treaties. As observed by Delhi High Court, in the case of *New Skies Satellite BV* (*supra*), 'the Vienna Convention on the Law of Treaties, 1969 (VCLT) is universally accepted as authoritatively laying down the principles governing the law of treaties'.

- Even though India is not a signatory to the Vienna Convention, the Supreme Court has referred to the same time and again and, in the case of *Ram Jethmalani* v. *Union of India* [2011] 13 taxmann.com 189/202 Taxman 115(SC) and observed that 'it contains many principles of customary international law' and the rules set out therein provides 'a broad guideline as to what could be an appropriate manner of interpreting a treaty in the Indian context also'. Therefore, the additional test that is required to be put, while adopting the ambulatory interpretation in such a situation, is whether the amendment is domestic law ends up unsettling a conclusion arrived at under the pre-domestic law amendment position, i.e., reversing the judicial rulings in favour of the residence jurisdiction, and, if the answer is in the positive, the ambulatory interpretation is to be discarded because that approach would patronise, and legitimise, a unilateral treaty override, and the outcome of ambulatory interpretation in such a case will be incompatible with the fundamental principles of treaty interpretation under the Vienna Convention. The approach is justified on the first principles on the ground that when two approaches are possible for incorporation of domestic law provisions in the tax treaties and one of these approaches is compatible with Article 26 of the VCLT while the other is incompatible with the same, the approach compatible with the VCLT provisions is to be adopted. [Para 21]

- In view of these discussions, there is no legally sustainable merits in the grievances raised. The arguments raised do not lead to a different conclusion either. Concurring with the coordinate bench decisions, therefore, the conclusions arrived at by the Commissioner (Appeals) is to be approved. These observations regarding ambulatory or dynamic approach being inappropriate in the context of article 3(2) is confined to the peculiar facts discussed above, and, are not, therefore, of general application. [Para 22]

FACTS-II

- The assessee made payments for operations and maintenance services in respect of bandwidth services infrastructure, such as cable landing stations and equipment used to avail the bandwidth services. These payments were made by the assessee to its Singapore affiliate RJ-S.
- The short case of the assessee was that under Indo-Singapore tax treaty, an amount paid as fees for technical services can be taxed in the source jurisdiction only when it satisfies the 'make available' condition i.e. when the recipient of services is enabled to apply technology contained therein, and that since the assessee's case was a case of repairs and maintenance *simplictor*, there could not be any occasion of transfer of technology in the course of rendition of these maintenance services.
- On appeal, the Commissioner (Appeals) upheld the assessee's plea, and observed as follows:
    - The O&M services includes routine and regular upkeep of the infrastructure such as maintenance of the Cable Landing Station, equipment used by RJ-S to provide the bandwidth services. These kind of routine O&M is required to ensure smooth and uninterrupted provision of the bandwidth services by RJ-S to the Appellant.
    - In the Agreement, it was mentioned that the Service Charges were remuneration for provision of Bandwidth Services by RJ-S. The obligation and liability for operation and maintenance was that of RJ-S.
    - The O&M services being routine services, the payment made for the same would not constitute FTS as per *Explanation 2* to section 9(l)(vii).
    - The payments/credits under the Agreement by the Appellant to RJ-S for the O&M services also could not be regarded as FTS under Article 12 of the India-Singapore DTAA since the O&M services did not make available technical knowledge, experience, skill, know-how or processes, which enables the Appellant to apply the technology contained therein.
    - No technology was made available by RJ-S to the appellant in the course of providing the O&M services. As mentioned in the Agreement, the obligation and liability for operation and maintenance is that of RJ-S. The appellant was only interested in availing the bandwidth services and is not concerned or obliged in any manner with the infrastructure deployed by RJ-S. Thus, in view of the facts of the case, the provision of O&M services by RJ-S to the appellant could not be regarded as Fees for Technical Services under the Indo-Singapore DTAA as there was no transfer of technical knowledge, experience, skill, know-how, or processes from RJ-S to the appellant.
    - The payments made by the appellant to RJ-S for rendition of O&M services would be in the nature of business profits and could not be classified as Fees for Technical Services either under the Act or the India-Singapore DTAA. Further, in absence of RJ-S's business connection or a PE in India, the business profits will not be taxable in

India.

- On the assessee's appeal to the Tribunal:

HELD-II

- There is no dispute with the factual position that the RJ-S did not have any permanent establishment in India, and with the legal principle laid down in the applicable tax treaty that, in the absence of the PE of RJ-S, its business profits could not be taxed in India. The taxability under the source state under Article 7 of the applicable tax treaty, therefore, clearly fails. So far as taxability under Article 12, i.e. with respect to 'Royalties and fees for technical services' is concerned, Article 12(4) provides that, the term 'fees for technical services' as used in this Article means payments of any kind to any person in consideration for services of a managerial, technical or consultancy nature (including the provision of such services through technical or other personnel) if such services : (a) are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 3 is received ; or (b) make available technical knowledge, experience, skill, know-how or processes, which enables the person acquiring the services to apply the technology contained therein; or (c) consist of the development and transfer of a technical plan or technical design, but excludes any service that does not enable the person acquiring the service to apply the technology contained therein."

- So far as 12(4)(a) is concerned, that comes into play only when the services are incidental to enjoyment of right, property or information held to be in the nature of "royalty". The payments made to RJ-S for availing bandwidth services are not in the nature of royalty. Once the taxability of payment for the main services as 'royalty' is ruled out, article 12(4)(a) ceases to be applicable for this short reason alone. As regards the scope of article 12(4)(b) is concerned, it can indeed be invoked for the payments for fees of technical services but, even it is a condition precedent that the services should enable the person acquiring the services to apply technology contained therein, but then it is nobody's case that services rendered by RJ-S were such that the assessee was enabled to apply technology contained therein. The services were simply maintenance services which did not involve any transfer of technology. In response to specific question, the revenue could not enlighten about what was the nature of technology transferred under these arrangements. The amounts received by RJ-S could not, therefore, be taxed as fees for technical services either.

- Unless there is a transfer of technology involved in technical services extended by Singapore company, the 'make available' clause is not satisfied and, accordingly, the consideration for such services cannot be taxed under Article 12(4)(*b*) of India-Singapore tax treaty. As regards the taxability under article 12(4)(c), it is nobody's case that there is any development and transfer of a technical plan or technical design, and, therefore, this provision does no come into play either. Once it is concluded that the payment for these services is not taxable as fees for technical services under article 12(4), it is immaterial whether it could be taxable under section 9(1)(*vii*) for the simple reason that this being a treaty situation, the provisions of the

Income Tax Act, 1961, could come into play only when favourable to the assessee. [Para 28]

CASE REVIEW-I

Dy. CIT v. *Reliance Jio Infocomm Ltd.* [2019] 108 taxmann.com 325 (Mum - Trib) (para 22) *followed*.

CIT v. *Siemens Aktiongesellschaft* [2009] 310 ITR 320/177 Taxman 81 (Bom.) (para 17) *distinguished*.

CASE REVIEW-II

DIT v. *Guy Carpenter & Co. Ltd.* [2012] 346 ITR 504/207 Taxman 121/20 taxmann.com 807 (Delhi) (para 28) and *CIT* v. *De Beers India (P.) Ltd.* [2012] 346 ITR 467/208 Taxman 406/21 taxmann.com 214 (Kar.) (para 28) *followed*.

CASES REFERRED TO

CIT v. *Vatika Township (P.) Ltd.* [2014] 367 ITR 466/227 Taxman 121/49 taxmann.com 249 (SC) (para 2), *Dy. CIT* v. *Reliance Jio Infocomm Ltd.* [2019] 108 taxmann.com 325 (Mum. - Trib) (para 7), *CIT* v. *Siemens Aktiongesellschaft* [2009] 310 ITR 320/177 Taxman 81 (Bom.) (para 10) (Bom), *Her Majesty The Queen* v. *Melford Developments Inc.* 82 DTC 6281 (para 10), *DIT* v. *New Skies Satellite BV* [2016] 68 taxmann.com 8/238 Taxman 577/382 ITR (Delhi) (para 21), *Ram Jethmalani* v. *Union of India* [2011] 339 ITR 107/200 Taxman 171/12 taxmann.com 27 (SC), *DIT* v. *Guy Carpenter & Co. Ltd.* [2012] 20 taxmann.com 807/207 Taxman 121/346 ITR 504 (Delhi) (para 28) and *CIT* v. *De Beers India (P.) Ltd.* [2012] 346 ITR 467/208 Taxman 406/21 taxmann.com 214 (Kar.) (para 28).

Avaneesh Tiwari *for the Appellant.* **Sunil M. Lala** *for the Respondent.*

ORDER

Pramod Kumar, Vice President. - By way of these four appeals, the Assessing Officer has challenged the correctness of the orders, all dated 10th August 2018, passed by the CIT(A)-57, Mumbai, upholding the appeals, filed by the assessee under section 248 of the Income Tax Act, 1961 (hereinafter referred to as 'the Act'), in the matter of tax withholding liability under section 195 of the Act, from certain remittances made by the assessee during the previous year relevant to the assessment year 2018-19.

2. All the appeals have common grievances and these grievances arise out of materially similar facts of the case. The main argument in support of this plea, as evident from rather verbose grounds of appeal, is that the Explanation 5 and 6 to Section 9(1)(vi) must hold the field, in the context of interpretation of Article 12 of *India Singapore Double Taxation Avoidance Agreement*[1994] 209 ITR (Statute) 1] (Indo Singapore tax treaty, in short) so far connotations of undefined expressions therein are concerned. Although the reference is all along made for Explanation 5 and Explanation 6, the way argument is advanced the emphasis is only on

Explanation 6. It is in this context that reliance is placed on article 3(2) of the Indo Singapore tax treaty and a reference is made to Hon'ble Supreme Court's judgment in the case of *CIT* v. *Vatika Township Pvt Ltd* [2014] 367 ITR 466/227 Taxman 121/49 taxmann.com 249 (SC)].

3. Ground nos. 1 to 4, which we will take up together, raise the following grievances:

> **1. Whether on the facts and circumstances of the case and in law, Ld. CIT(A) has erred in holding that tax was not required to be deducted at source on the payment made by the assessee to Reliance Jio Infocomm Pte Limited, Singapore (RJIPL) for availing bandwidth services as it did not amount to income of the payee by way of royalty u/s 9(1)(vi) of the IT Act, 1961 read with Article 12 of India-Singapore DTAA?**
>
> **2. Whether on the facts and circumstances of the case and in law, Ld. CIT(A) has erred in not taking into account that in absence of a definition of the terms 'use of or right to use' and 'process' in Article 12 of the India-Singapore DTAA in relation to royalty, Article 3(2) of the said DTAA allows for taking recourse to the meaning contained in the domestic law of the State applying the Treaty (that is, India)?**
>
> **3. Whether on the facts and circumstances of the case and in law, Ld. CIT(A) has erred in not considering Explanation 5 and 6 to section 9(1)(vi) of the Act in relation to payment made by the assessee to RJIPL Singapore for bandwidth services in light of direct mandate provided by Article 3(2) of the India-Singapore DTAA?**
>
> **4. Whether on the facts and circumstances of the case and in law, Ld. CIT(A) has erred in not considering Explanation 5 and 6 to section 9(1)(vi) of the Act as being declaratory and clarificatory amendments explaining the law as existing from 01.06.1976 onwards as they satisfy the conditions laid down by a Constitution Bench of Hon'ble Supreme Court in the case of Commissioner of Income Tax (Central)-1, New Delhi vs Vatika Township Pvt Ltd (Civil Appeal No. 8750 of 2014 arising out of SLP (C) No. 540 of 2009 for being as such?**

3.1 Grievance of the assessee, in substance, is that the learned CIT(A) erred in holding that the assessee did not have tax withholding obligation in respect of payments of 'bandwidth services' to Reliance Jio Infocomm Pte Ltd, Singapore.

4. The issue in appeal lies in a rather narrow compass of material facts. The assessee before us is an Indian company and it has, under a bandwidth services agreement with a Singapore based entity i.e. Reliance Jio Infocomm Pte Ltd (RJ-S, in short), paid US $ 15,91,520. While the assessee initially deducted the tax at source @10%, under the provisions of Article 12 of Indo Singapore tax treaty, and grossed up the same under section 195A, the assessee subsequently filed an appeal under section 248 praying for a declaration to the effect that the assessee was not legally liable to withhold the tax, as detailed above, from this payment. It was submitted by the assessee that RJ-S, being fiscally domiciled in India, is eligible to the benefits of India Singapore tax treaty, that the income of RJ-S, on account of bandwidth services so provided, is purely in the nature of its business income, and that, in terms of the requirements of Article 7 of Indo Singapore tax treaty, such an income cannot be taxed in India. The assessee filed a copy of the tax residency certificate of RJ-S, as issued by the Inland Revenue Service of Singapore, a declaration to the

effect that RJ-S does not have a permanent establishment (PE) in India, a copy of the agreement entered into by the assessee with RJ-S, and made elaborate submissions to the effect that these payments cannot be brought to tax in India, either in terms of the provisions of the Income Tax Act, 1961 or even in terms of the provisions of Indo Singapore tax treaty. Upholding the plea of the assessee, learned CIT(A) observed, inter alia, as follows:

> **The Appellant has also made submissions that the payments to RJIPL for Bandwidth Services should not be considered as Royalty under the Act as well as under the India - Singapore DTAA. It is noted that based on the terms of the Agreements pointed out by the Appellant and as confirmed in the detailed submissions filed before me, the Appellant has only received an access to service and not any access to any equipment of RJIPL deployed by it for provision of such services nor any access to any process which help in providing such Bandwidth Services. All infrastructure and process required for provision of Bandwidth Services was always used and under the control of RJIPL and same was never given by RJIPL to the Appellant or to any person who are availing the Bandwidth Services from RJIPL. Further, relying on the various decisions of the Indian courts as cited by the Appellant, I am of the view that if the process involved to provide the service is not "secret" i.e. the IPR in the process is not owned/registered in a specific owner's name but is a standard commercial process followed by the industry players, then the same cannot be classified as secret process as required under the India-Singapore DTAA for the payments to constitute Royalty. I am also of the view that amendments in the Act cannot be read into treaty provisions without amending the treaty itself. Therefore, the arguments cited by the Appellant would still hold good under the India - Singapore DTAA even pursuant to the amendments made by the Finance Act 2012 and the meaning of the term process as defined in the Act is for limited purpose of section 9(1)(vi) and cannot be read into the DTAA.**
>
> **Further, based on terms of the Agreements pointed out by the Appellant and as confirmed in the detailed submissions filed before me, the Appellant merely receives services from RJIPL which is a standard telecom service and is not in any way concerned or obliged whether directly or indirectly n relation to the equipment deployed by RJIPL for provision of the Bandwidth Services. The Appellant neither uses nor has any right to use any of the equipments deployed by RJIPL. Any equipment deployed by RJIPL may be used by it for providing Bandwidth Services to various other persons and not only to the Appellant. This necessitates that possession and control over any equipment remains with KJIPL only.**
>
> **Thus, based on these facts as also considering the definition of "Royalty" under the India-Singapore DTAA which is narrower in scope compared to the definition under the Act, it can be concluded that the amounts paid by the Appellant to RJIPL is 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.**
>
> **In light of the above discussion, I hold that the payments made by the Appellant to RJIPL for provision of Bandwidth Services will be in the nature of business profits and**

cannot be classified as Fees for Technical Services or Royalty either under the Act or the India-Singapore DTAA. Further, in absence of RJPL's business connection or a PE in India, the business profits will not be taxable in India.

5. The Assessing Officer is aggrieved by the relief so granted by the learned CIT(A) and is in appeal before us.

6. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of the applicable legal position.

7. A coordinate bench of this Tribunal, while dealing with the same issue in assessee's own case for the assessment year 2016-17 and in the judgment *Dy. CIT* v. *Reliance Jio Infocomm Ltd.* [2019] 108 taxmann.com 325 (Mum. - Trib), has, speaking through one of us (i.e. the Judicial Member), observed, *inter alia,* as follows:

..... 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 bandwidth 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 bandwidth 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 bandwidth services. Apart there from, the assessee also did not have any access to any process which helped in providing of such bandwidth services by RJIPL. As a matter of fact, all infrastructure and process required for provision of bandwidth 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 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 bandwidth 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 bandwidth 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 bandwidth services. Apart there from, the assessee also did not have any access to any process which helped in providing of

such bandwidth services by RJIPL. As a matter of fact, all infrastructure and process required for provision of bandwidth 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 bandwidth 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 bandwidth 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 *CIT* v. *Reliance Infocomm Ltd.* (IT Appeal 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 v. New Skies Satellite BV [2016] 382 ITR 114/238 Taxman 577/68 taxmann.com 8 and CIT v. Siemens Aktiongesellschaft [2009] 310 ITR 320 (Bom)] 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 bandwidth 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 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 bandwidth 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 *CIT* v. *Reliance Infocomm Ltd.* (IT Appeal 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* v. *New Skies Satellite BV* [2016] 382 ITR 114/238 Taxman 577/68 taxmann.com 8 and *CIT* v. *Siemens Aktiongesellschaft*[2009] 310 ITR 320/177 Taxman 8/(Bom.) 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 bandwidth 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

8. Learned Departmental Representative's armoury is, however, not exhausted.

9. Learned Departmental Representatives basic stand is that the specific issues raised in the grounds of appeal, which go to the root of matter and conclusively uphold the stand of the Assessing Officer, are not dealt with in the judicial precedents relied upon. As we have noted

earlier as well, and as evident from the specific grounds of appeal, the specific plea taken in this appeal is that the Explanation 5 and 6 to Section 9(1)(vi) must hold the field, in the context of interpretation of Article 12 of the Indo Singapore tax treaty so far connotations of undefined expressions therein are concerned, in view of the specific provisions of article 3(2) of Indo Singapore tax treaty itself and in the light of, as the grounds of appeal point out, Hon'ble Supreme Court's judgment in the case of *Vatika Township Pvt Ltd* (*supra*).

10. It is only in exceptional cases that there is an occasion to deviate from the decisions of the coordinate benches, but that does not mean that in the covered cases all doors are shut on the parties. When a coordinate bench judgment does not appeal to another coordinate bench, or when the coordinate bench discovers that the judicial precedent is rendered *per incurium*, it could indeed be open to the coordinate bench to refer the matter for the consideration of a larger bench, or, in a fit case, hold that the judicial precedent, for the specific reasons set out, is not a binding judicial precedent. Let us also not lose sight of the fact that, as pointed out by the learned Departmental Representative, there is a direct decision of Hon'ble jurisdictional High Court in the case of *CIT* v. *Siemens Aktiongesellschaft* [2009] 310 ITR 320/177 Taxman 81 (Bom), upholding ambulatory approach to domestic law meaning of undefined terms under article 3(2), and, if the same approach is adopted in the present case for certain expressions appearing in the definition in the royalty, the plea of the revenue, at least on the face of it, does not seem to be totally devoid of legally sustainable merits. In any event, even though the decision relied upon refers to the aforesaid decision, it does not at all deal with the interplay of domestic law definitions, under article 3(2), with undefined treaty expressions. Of course, that is only one of the aspects of the matter and there are many other nuances of the matter which need to be taken note of, analysed and taken a conscious call on. Let us, in this backdrop, neatly identify and then deal with the core issue, as being raised before us now, and that core issue is the interpretation to be assigned to the expression "process" for the purpose of Article 12(3)(a) which provides that "**The term "royalties" as used in this Article means payments of any kind received as a consideration for the use of, or the right to use: (a) any copyright of a literary, artistic or scientific work, including cinematograph film or films or tapes used for radio or television broadcasting, any patent, trade mark, design or model, plan, secret formula or process** *(Emphasis, by underlining, supplied by us now)***, or for information concerning industrial, commercial or scientific experience, including gains derived from the alienation of any such right, property or information**". The expression "**process**", which finds mention in this treaty provision, is not defined in the treaty itself. Learned Departmental Representative's contention is that in the light of article 3(2) of the treaty, which states that "**(a)s regards the application of the Agreement by a Contracting State, any term not defined therein shall, unless the context otherwise requires, have, the meaning which it has under the law of that State concerning the taxes to which the Agreement applies**", the domestic law meaning of the expression "process", which is set out in Explanation 6 to Section 9(1)(vii), must hold the filed. Explanation 6 to Section 9(1)(vii), which was inserted vide the Finance Act 2012 with retrospective effect from 1st June 1976, provides that "**(f)or the removal of doubts, it is hereby clarified that the expression "process" includes and shall be deemed to have always included transmission by satellite (including up-linking, amplification, conversion for down-linking of any signal), cable, optic fibre or by any other similar technology, whether or not such process is secret"**. In plain words, going by the

complex web of this line of argument, thus, in the absence of any specific definition of "process" in the Indo Singapore tax treaty, the domestic law meaning of this expression must law prevail under article 3(2), and, going by the domestic law meaning under Explanation 6 to Section 9(1)(vii), any transmission by satellite (including (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, is covered by the definition of "royalty' under article 13(3)(a) of the Indo Singapore tax treaty, and since the bandwidth services, on the facts of this case, are transmitted by satellite, cable, optic fibre or other similar technology, the bandwidth services constitutes 'royalty' for the purpose of article 13(3)(a). As for the reference to Vatika Township decision *(supra)*, it is contended, as stated in so many words in the fourth ground of appeal, the insertion of Explanation 5 and 6, though by the virtue of Finance Act 2012, is only a "declaratory and clarificatory amendment explaining the law as existing from 01.06.1976". A lot of emphasis has been placed on the interplay of article 3(2) with domestic law meaning of a term used in, but not defined in, the Indo Singapore tax treaty. The thrust of learned Departmental Representative's argument is that in such a situation, i.e. when a term used in a treaty is not defined in the treaty, domestic law meaning of the term must prevail. The expression "process", on the basis of this argument and on the strength of article 3(2) of treaty itself, is claimed to cover "**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"** as is the case of bandwidth services provided by RJ-S**.** It is also pointed out that the adoption of domestic law meaning for treaty purposes, as it is mandated by the treaty itself vide article 3(2), remains unaffected by the provisions of Section 90(2). The question of treaty superiority, under the provisions of the Indian Income Tax Act 1961, comes into play only when the domestic law meaning is not assigned by the treaty itself.

11. There is a fundamental fallacy, in our humble understanding, in this argument, and the fallacy lies in the proposition that the expression "process" is a treaty term for which article 3(2) can be invoked. Of course, even without article 3(2), when meanings of an expression, whether a treaty term or not, are to be explored, all sources of meanings, including in the domestic law, will be relevant but then, in such a situation, the binding force of article 3(2) will be missing in the sense that it will not be necessary to establish, before adopting a meaning other than the domestic law meaning, that it's the compulsion of context requiring that the domestic law meaning is to be discarded.

12. It's important to note that the provisions of Article 3(2) come into play for domestic law meaning of "any term not defined *(emphasis, by underlining, supplied by us)*" in the tax treaty. To invoke the provisions of Article 3(2), the first thing to be seen is whether the undefined expression can be said to be a treaty term. The expression "term" is defined as "a word or phrase used to describe a thing or to express a concept, especially in a particular kind of language or branch of study". A "term" is thus a word that has meaning and refers to objects, ideas, events or a state of affair. A term is thus, in addition to being a word, some kind of a point of reference, whereas a word is only a constituent of language. As a corollary to these discussions, Article 3(2) will come into play only in respect of the undefined treaty terms, which are in the nature of reference points and which have some peculiar significance as a term employed in the treaty, and not all the

undefined words and expressions used in a treaty. To put a question to ourselves, does the expression "process", in its own right, has any relevance for the tax treaties or can "process" to be said to be a term employed in tax treaties? The answer is in negative. If at all the expression "process" has any relevance, it is in defining a treaty term i.e. "royalty". To look for statutory definitions of each word employed in a definition of the treaty term, and then construct the definition of treaty term as an assembly of the statutory definitions of all these words taken together will be too hyper technical an approach, and, in any case, beyond the mandate of article 3(2). That does not appeal to us. It is even more inappropriate because "process" is judicially explained but the statutory definition is being invoked, under article 3(2), to dislodge the judicial interpretation. Quite clearly, therefore, but for the binding force of article 3(2), this statutory definition does not come to the rescue of Assessing Officer's case, and it is this binding force of article 3(2) which does not come into play in explaining the word "process" used in definition of a treaty term i.e. royalty. Of course, "royalty" is a treaty term but since it is well defined term in the treaty, its domestic law meaning is not relevant for treaty purposes. The expression "process" is defined in the domestic law but this definition is in the limited context of explaining the term "royalty" under the domestic law, it cannot be borrowed in the treaty for understanding connotations of "royalty" under the treaty. It cannot be, in our humble understanding, open to pick up a part of the definition of royalty under the domestic law and supply the same to an undefined expression in the definition of royalty under the treaty. The expression 'process' is not a treaty term *per se*, or a reference point, used in the treaty, rather it is an expression or word used in defining the treaty term 'royalty'. The expression "process" is used in the treaty in that limited context and it does not have an independent existence. The definition of "royalty" under the domestic law, as it stands now, is more exhaustive inasmuch as the expression "process" used in the definition is further elaborated upon in Explanation 6 to Section 9(1)(vi) which does not, in any case, provide a universal rule as it is in the context of this particular sub section dealing with the "income by way of royalty". The definition of expression 'process' is thus not a standalone definition which can be imported in treaty under article 3(2).

13. The domestic law meaning under article 3(2) is relevant only when the treaty term itself is undefined, as noted by Hon'ble Delhi High Court in the case of *DIT* v. *New Skies Satellite BV* [2016] 382 ITR 114/238 Taxmann 577/68 taxmann.com 8. When the expression 'royalty' is a defined expression under the applicable tax treaty, there cannot be any occasion to invoke article 3(2) for further dissecting the issue and explore the domestic law meaning of each expression used in this definition for coming at the conclusions about connotations of royalty. It cannot, therefore, be open to invoke article 3(2) to import domestic law meaning, even partly, when the treaty term has received a definition under the treaty. It is for this reason that Explanation 6 to Section 9(1)(vi), in our humble understanding, has no role, under article 3(2) of the treaty, in explaining the expression "process", in the context of defining royalty under the Indo Singaporean tax treaty. This statutory provision, under the domestic law, is relevant only when the definition of royalty under section 9(1)(vi) of the Income Tax Act, 1961, is subject matter of consideration, as it specifically states that said definition is for the purpose of "for the purpose of this clause *[i.e. Section 9(i)(v)]*".

14. Even if we proceed on the basis that "process" can be treated as an undefined treaty term,

which, in our humble understanding, it is not, and that Explanation 6 to Section 9(1)(vi) can have a role in assigning domestic law meaning to the expression "process", the next fundamental question, however, that we must consider is whether, on the facts and in the circumstances of this case, assignment of the domestic law meaning under article 3(2), to an undefined treaty term, is to be done by way of static interpretation or by way of dynamic or ambulatory interpretation. In plain words, the meaning to be assigned to the undefined treaty terms should be given in the light of the law as it stood at the point of time when treaty was entered into or the law as it stands at the point of time when related taxes are levied. If the static interpretation is to be given, it does not come to the rescue of the revenue's case. The expression "process" was not, at the point of time relevant to static interpretation, not statutorily defined, and if the judicial interpretation of term "process", without the aid of Explanation 6 to Section 9(1)(vi), is to be taken into account, it does not support the case of the revenue either. There is no dispute on this fundamental position. It is also elementary that when Hon'ble Courts lay down the law, or when a judicial interpretation is given, it is not from prospective effect, and it relates back to the point of time when law was legislated. Effectively, therefore, judicial ruling, without taking into account Explanation 6 to Section 9(1)(vi) will hold the field, and undisputedly these rulings do not help the case of the revenue. However, apart from emphasis on ambulatory interpretation in Model Conventions and their Commentaries, and conceptual justification for that approach in general, there are certain observations made by Hon'ble jurisdictional High Court, in the case of *Siemens Aktiongesellschaft* (*supra*) which give an impression that such an exercise can only be ambulatory exercise. Let us, therefore, deal with this judicial precedent in some detail.

15. Hon'ble jurisdictional High Court had, in the case of *Siemens Aktiongesellschaft* (*supra*) had an occasion to consider the question whether the domestic law meaning to be supplied to a treaty provision should be the meaning as prevailing at the point of time when agreement was entered into or as prevailing at the point of time when taxes are levied, i.e. whether such an interpretation should be static interpretation or ambulatory interpretation. Rejecting the plea of the assessee seeking static interpretation, Hon'ble High Court, having noted the argument against the assessee that "**considering article II(2), the expression "laws in force"** *[emphasis, by underlining, supplied by us now]* **as contained in DTAA, the ambulatory interpretation will have to be accepted**" has held that "**Considering the express language of article II(2) it is not possible to accept the broad proposition urged on behalf of the assessee that the law would be the law as was applicable or as defined when the DTAA was entered into".** Interestingly, the words employed in Article II(2) of the old Indo German tax treaty, which is what Their Lordships were dealing with, were to the effect that "**In the application of the provisions of this agreement in one of the territories any term not otherwise defined in this agreement shall, unless the context otherwise requires, have the meaning which it has under the laws in force in that territory** *(emphasis, by underlining, supplied by us now)* **relating to the taxes which are the subject matter of this agreement**", and these words were slightly different than the words employed in the Indo Singapore tax treaty, that we are dealing with, which are as follows: "**As regards the application of the Agreement by a Contracting State, any term not defined therein shall, unless the context otherwise requires, have, the meaning which it has under the law of that State concerning the taxes to which the Agreement applies**". While in the former, there is emphasis on "**laws in force**", which is what Their Lordships have taken very careful note

of, in the latter it simply refers to "**meaning which it has under the law of that State**" without making any specific reference to the laws in force or the laws as they prevailed at any other point of time. We may also add that Their Lordships were dealing with Old German (i.e. India- Federal Republic of Germany) tax treaty [(1960) 40 ITR (St) 21] in which the expression 'royalty' itself was not defined, and the question, therefore, arose whether the definition of 'royalty', as it stood at the point of time when taxes were levied, could be adopted.

16. Apart from the fact that "royalty" is a neatly defined expression in the current Indo Singapore tax treaty that we are concerned with, the expression "laws in force", which was subject matter of focus of judicial analysis in the said case, does not find place in the treaty before us. That is, however, not really true of all the tax treaties currently in force. There are tax treaties which still use the same expression. Our attention was, for example, invited to **India Australia Double Taxation Avoidance Agreement [(1992) 194 ITR (Statute) 91; Indo Australian tax treaty, in short]** which also specifically provide that the assignment of domestic law meaning to an undefined treaty term is an ambulatory exercise inasmuch as article 3(2) therein specifically provides that "**(i)n the application of this Agreement by a Contracting State, any term not defined in this Agreement shall, unless the context otherwise requires, have the meaning which it has under the laws of that State from time to time in force** *(Emphasis, by underlining, supplied by us)* **relating to the taxes to which this Agreement applies**". We are not really concerned with this tax treaty at present and we must not, therefore, get into the academic delights of taking a call on what the legal position will be in such a case, in case one is to proceed on the basis that the expression "process" is a treaty term and the article 3(2) can be invoked in respect of the same.

17. So far as our purposes are concerned, it is sufficient to take note of the fact that the provisions of Article 3(2) of Indo Singaporean tax treaty are differently worded vis-à-vis the old Indo German tax treaty that Hon'ble jurisdictional High Court were dealing with in *Siemens Aktiongesellschaft's* case (*supra*) and the crucial words **"laws in force" o**n which so much emphasis was placed in judicial analysis by Hon'ble jurisdictional High Court do not find place in this treaty. Strictly speaking, therefore, the judicial sanction for the theory of ambulatory interpretation, for the purpose of article 3(2), does not, therefore, necessarily extend to Indo Singaporean tax treaty that we are concerned with.

18. Of course, even without the words "meaning which it has under the laws of that State from time to time in force", one could still justify the ambulatory interpretation in the normal course of interpretation- though without the binding force of judicial precedents, but then, for the reasons we will set out now, there is a strong conceptual basis for not adopting the ambulatory interpretation on peculiar facts of this case.

19. While it is indeed true, as held by Hon'ble jurisdictional High Court in the case of **Siemens Aktiongesellschaft's,** that "**the rule of referential incorporation or incorporation cannot be applied when we are dealing with a treaty (DTAA) between two sovereign nations"** because **"it is open to a sovereign legislature to amend its laws**", Their Lordships have put in a word of caution by suggesting an element of "reasonableness" in construing the treaty superiority vis-à-vis the domestic law by observing that "**a DTAA entered into by the Government in exercise of the**

powers conferred by section 10(1) *[sic- section 90(1)]* **while considering section 10(2)** *[sic- section 90(2)]* **has to be reasonably construed** *[Emphasis, by underlining, supplied by us now]*". In the Siemen's decision (*supra*) itself, while quoting, with approval, Hon'ble Supreme Court of Canada's decision in the case of *Her Majesty The Queen* v. *Melford Developments Inc.* 82 DTC 6281, Their Lordships had also observed that "**The ratio of that judgment, in our opinion, would mean that by an unilateral amendment it is not possible for one nation which is party to an agreement to tax income which otherwise was not subject to tax**". Quite clearly, therefore, whatever be the approach adopted, for the purpose of article 3(2) i.e. static or ambulatory, a unilateral treaty override, howsoever subtle, is not really permissible.

20. It is important to bear in mind the fact that the insertion of *Explanation* 6 to Section 9(1)(vii) was admittedly to nullify certain judicial rulings, which gave an interpretation, unfavourable to the tax administration, to the expression "process". The Memorandum to the Finance Bill 2012 specifically stated that "**Considering the conflicting decisions of various courts in respect of income in nature of royalty and to restate the legislative intent**, **it is further proposed to amend" ……. …… "section 9(1)(vi) to clarify that the term "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**".

21. Let us appreciate the nature of development, from the treaty perspective, in case one is to hold that the retrospective amendments defining the expression 'process' would be equally applicable for definition of 'royalties' under the tax treaty. Thus viewed, situation could be like this. There are judicial rulings which decide something in favour of the residence jurisdiction, and the source jurisdiction is not happy with that outcome, and it's a coincidence, coincidence if it is, that the source jurisdiction changes the domestic law in a way that, once that amended domestic law is applied in the context of article 3(2), a different outcome to the same treaty provision, which favours the source jurisdiction, is possible. In effect, thus, what was not taxable in the source jurisdiction in pre domestic law amendment situation becomes taxable in source jurisdiction post domestic law amendment. Undoubtedly, legislation is a sovereign function and it is indeed open to any jurisdiction to amend, even retrospectively, its domestic laws to bring new incomes to taxability in the source jurisdiction, but so far as the source jurisdiction taxability under the treaty provisions is concerned, legal amendments so as to influence the taxability even under the treaty situation, by the source jurisdictions unilaterally, are impermissible. That is a classic case of a subtle unilateral treaty override. While, in India, the expression 'treaty override' is often loosely used for the situations where the provisions of tax treaty prevails over any inconsistent provisions of domestic law, this approach seems to be at variance with the international practices wherein connotations of 'treaty override' refer to a situation in which domestic legislation of a treaty partner jurisdiction overrules the provisions of a single treaty or all treaties hitherto having had effect in that jurisdiction. That will be the end result of a domestic law amendment of an undefined treaty term, in departure from the current position, and import such amended meaning of that term, under article 3(2), in the treaty situations as well. Such an approach, on the first principles, is unsound inasmuch as it is well settled in law that the treaty partners ought to observe their treaties, including their tax treaties, in good faith. Article 26 of Vienna Convention on Law

of Treaties provides that, "***Pacta sunt servanda*: Every treaty in force is binding on the parties to it and must be performed by them in good faith** ". What it implies is that whatever be the provisions of the treaties, these provisions are to be given effect in good faith. Therefore, no matter how desirable or expedient it may be from the perspective of the tax administration, when a tax jurisdiction is allowed to amend the settled position with respect to a treaty provision, by an amendment in the domestic law and admittedly to nullify the judicial rulings, it cannot be treated as performance of treaties in good faith. That is, in effect, a unilateral treaty over-ride which is contrary to the scheme of Article 26 of Vienna Convention on Law of Treaties. As observed by Hon'ble Delhi High Court, in the case of *DIT* v. *New Skies Satellite BV* [2016] 68 taxmann.com 8/238 Taxman 577/382 ITR (Delhi), "**the Vienna Convention on the Law of Treaties, 1969 ("VCLT") is universally accepted as authoritatively laying down the principles governing the law of treaties".** Even though India is not a signatory to the Vienna Convention, Hon'ble Supreme Court has referred to the same time and again and, in the case of *Ram Jethmalani* v. *Union of India* [2011] 339 ITR 107/200 Taxman 171/12 taxmann.com 27 (SC)], observed that "**it contains many principles of customary international law**" and the rules set out therein provides "**a broad guideline as to what could be an appropriate manner of interpreting a treaty in the Indian context also**". In our humble understanding, therefore, the additional test that is required to be put, while adopting the ambulatory interpretation in such a situation, is whether the amendment is domestic law ends up unsettling a conclusion arrived at under the pre domestic law amendment position i.e. reversing the judicial rulings in favour of the residence jurisdiction, and, if the answer is in the positive, the ambulatory interpretation is to be discarded because that approach would patronise, and legitimise, a unilateral treaty override, and the outcome of ambulatory interpretation in such a case will be incompatible with the fundamental principles of treaty interpretation under the Vienna Convention. The approach is justified on the first principles on the ground that when two approaches are possible for incorporation of domestic law provisions in the tax treaties and one of these approaches is compatible with Article 26 of the VCLT while the other is incompatible with the same, the approach compatible with the VCLT provisions is to be adopted.

22. In view of these discussions, and bearing in mind entirety of the case, we find no legally sustainable merits in the grievances raised before us. The arguments raised before us do not lead us to a different conclusion either. Concurring with the coordinate bench decisions, therefore, we approve the conclusions arrived at by the learned CIT(A) and decline to interfere in the matter. As we hold so, we may add that these observations regarding ambulatory or dynamic approach being inappropriate in the context of article 3(2) is confined to the peculiar facts discussed above, and, are not, therefore, of general application.

23. Ground nos. 1 to 4, as common to all the appeals, are, therefore, dismissed.

24. In ground no. 5, the Assessing Officer appellant has raised the following grievance:

> ***5. Whether on the facts and circumstances of the case and in law, Ld. CIT(A) has erred in holding that the payments made by assessee to RJIPL Singapore for providing Operations and Maintenance (O&M) services is not in the nature of fees for technical services under section 9(1)(vii) of the Act read with Article 12 of the India-Singapore DTAA?"***

25. As far as this grievance of the appellant Assessing Officer is concerned, it is sufficient to take note of the fact that the assessee tax made payments for operations and maintenance services in respect of bandwidth services infrastructure, such as cable landing stations and equipment used to avail the bandwidth services. These payments are made by the assessee to its Singapore affiliate RJ-S. The short case of the assessee is that under Indo Singapore tax treaty, an amount paid as fees for technical services can be taxed in the source jurisdiction only when it satisfies the "make available" condition i.e. when the recipient of services was enabled to apply technology contained therein, and that since it's a case of repairs and maintenance *simplictor*, there cannot be any occasion of transfer of technology in the course of rendition of these maintenance services. Learned CIT(A) has upheld this plea, and observed as follows:

> **(B) Non-taxability of payments for O&M services**
>
> **The O&M services includes routine and regular upkeep of the infrastructure such as maintenance of the Cable Landing Station, equipment used by RJIPL to provide the bandwidth services. These kind of routine O&M is required to ensure smooth and uninterrupted provision of the bandwidth services by RJIPL to the Appellant.**
>
> **In note ii to sl. no.1 ("Bandwidth Services requirements, activation timelines and payment obligations) in Schedule I of the Agreement, it is mentioned that:**
>
> **"It is hereby clarified that Service Charges are remuneration for provision of Bandwidth Services by RJIPL. The obligation and liability for operation and maintenance is that of RJIPL."**
>
> **The O&M services being routine services, the payment made for the same will not constitute FTS as per Explanation 2 to section 9(l)(vii) of the Act.**
>
> **I also agree with the Appellant's contention that the payments/credits under the Agreement by the Appellant to RJIPL for the O&M services also cannot be regarded as FTS under Article 12 of the India - Singapore DTAA since the O&M services do not make available technical knowledge, experience, skill, know-how or processes, which enables the Appellant to apply the technology contained therein.**
>
> **Article 12(4) of the India-Singapore DTAA defines fees for technical services as:**
>
> **"The term "fees for technical services" as used in this Article means payments of any kind to any person in consideration for services of a managerial, technical or consultancy nature (including the provision of such services of technical or other personnel) if such services:**
>
> (*a*). ** ** **
>
> **(*b*) make available technical knowledge, experience, skill, know-how, or processes, which enables the person acquiring the services to apply the technology contained therein."**
>
> (*c*). ** ** **"

It would be worthwhile 10 refer to the jurisdictional Tribunal decision in the case of *ExxonMobil Company India (P.) Ltd* v. *ACIT* [20181 (92 taxmann.com 5) wherein it has held that the expression "make available" which also appears in Article 12(41(b) of the India-US tax treaty would mean the recipient of such service is able to apply or make use of the technical knowledge, knowhow. etc.. by himself in his business or for his own benefit and without recourse to the service provider in future and for this purpose a transaction of the technical knowledge, experience, skills, etc.. from the service provider to the service recipient is necessary. Some sort of durability or permanency of the result of the rendering of services is envisaged which will remain at the disposal of the service recipient. In other words, the technical knowledge experience, skill, etc.. must remain with the service recipient even after the rendering of the services has come to an end. In contrast to Article-12(4)(b) of the India-U.S. tax treaty, Article-12(4)(b) of India-Singapore tax treaty has made it more specific by providing that technical knowledge, experience, skill, knowhow or process, would not amount to fees for technical service unless it enables the person acquiring the service to apply the technology therein.

I also agree with all the other decisions relied on by the Appellant which explains the concept of "make available".

Further, I also agree with the below decisions relied on by the Appellant, wherein the Courts have held that repairs and maintenance services do not make available technical knowledge, skills etc and therefore are not FTS under the DTAA:

- ***DCIT* v *VSNL Broad Band Ltd* [2013] 38 taxmann.com 287 (Mumbai ITAT)**
- ***Sandvik Australia Pty. Ltd.* [2013] 31 taxmann.com 256 (Pune ITAT)**
- ***ACIT* v *M/s HCL Comnet Ltd* (ITA no. 321/Dei/2012) (Delhi ITAT)**
- ***Solar Turbines International Company, In re* [2012] 21 taxmann.com 548 (AAR)**
- ***ADIT* v. *Rolls Royce Industrial Power (India) Ltd* [2013] 33 taxmann.com 423 (Delhi ITAT)**

No technology is made available by RJIPL to the Appellant in the course of providing the O&M services. As mentioned in the Agreement, the obligation and liability for operation and maintenance is that of RJIPL. The Appellant is only interested in availing the bandwidth services and is not concerned or obliged in any manner with the infrastructure deployed by RJIPL. Thus, in view of the facts of the case and relying on the above decisions, I am of the view that the provision of O&M services by RJIPL to the Appellant cannot be regarded as Fees for Technical Services under the Indie - Singapore DTAA as there is no transfer of technical knowledge, experience, skill, know-how, or processes from RJIPL to the Appellant.

In light of the above discussion. I hold that the payments made by the Appellant to RJIPL for rendition of O&M services will be in the nature of business profits and cannot be classified as Fees for Technical Services either under the Act or the India-

Singapore DTAA. Further, in absence of RJIPL's business connection or a PE in India, the business profits will not be taxable in India.

26. The Assessing Officer is aggrieved of the relief so granted by the CIT(A) and is in appeal before us.

27. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of the applicable legal position.

28. We find that there is no dispute with the factual position that the RJ-S did not have any permanent establishment in India, and with the legal principle laid down in the applicable tax treaty that, in the absence of the PE of RJ-S, its business profits could not be taxed in India. The taxability under the source state under Article 7 of the applicable tax treaty, therefore, clearly fails. We further find that so far as taxability under Article 12, i.e. with respect to 'Royalties and fees for technical services' is concerned, we find that Article 12(4) provides that, "The term "fees for technical services" as used in this Article means payments of any kind to any person in consideration for services of a managerial, technical or consultancy nature (including the provision of such services through technical or other personnel) if such services : (a) are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 3 is received ; or (b) make available technical knowledge, experience, skill, know-how or processes, which enables the person acquiring the services to apply the technology contained therein ; or (c) consist of the development and transfer of a technical plan or technical design, but excludes any service that does not enable the person acquiring the service to apply the technology contained therein." So far as 12(4)(a) is concerned, that comes into play only when the services are incidental to enjoyment of right, property or information held to be in the nature of "royalty". Vide our discussions earlier in this order, we have already held that the payments made to RJ-S for availing bandwidth services are not in the nature of royalty. Once the taxability of payment for the main services as 'royalty' is ruled out, article 12(4)(a) ceases to be applicable for this short reason alone. As regards the scope of article 12(4)(b) is concerned, it can indeed be invoked for the payments for fees of technical services but, even it is a condition precedent that the services should enable the person acquiring the services to apply technology contained therein, but then it is nobody's case that services rendered by RJ-S were such that the assessee was enabled to apply technology contained therein. The services were simply maintenance services which did not involve any transfer of technology. In response to our specific question, learned DR could not enlighten us about what was the nature of technology transferred under these arrangements. The amounts received by RJ-S could not, therefore, be taxed as 'fees for technical services either. There are at least two non-jurisdictional High Court decisions, namely Hon'ble Delhi High Court in the case of *DIT* v. *Guy Carpenter & Co. Ltd.* [2012] 20 taxmann.com 807/207 Taxman 121/346 ITR 504 (Delhi) and Hon'ble Karnataka High Court in the case of *CIT* v. *De Beers India (P.) Ltd.* [2012] 346 ITR 467/208 Taxman 406/21 taxmann.com 214 (Kar.), in favour of the assessee, and there is no contrary decision by Hon'ble jurisdictional High Court or by Hon'ble Supreme Court. We bow before higher wisdom of Hon'ble Courts above and hold that unless there is a transfer of technology involved in technical services extended by Singapore company, the 'make available' clause is not satisfied and, accordingly, the consideration for such services cannot be taxed under Article 12(4)(b) of India Singapore tax

treaty. As regards the taxability under article 12(4)(c), it is nobody's case that there is any development and transfer of a technical plan or technical design, and, therefore, this provision does no come into play either. Once we come to the conclusion that the payment for these services is not taxable as fees for technical services under article 12(4), it is immaterial whether it could be taxable under section 9(1)(vii) for the simple reason that this being a treaty situation, the provisions of the Income Tax Act, 1961, could come into play only when favourable to the assessee.

29. In view of these discussions, as also bearing in mind entirety of the case, we approve the conclusions arrived at by the learned CIT(A) on this issue as well. We, therefore, confirm the stand of the learned CIT(A) and decline to interfere in the matter.

30. Ground no. 5, as common to all the appeals, is also thus dismissed.

31. In the result, all the appeals are dismissed.

SB

---

*In favour of assessee.