

CTR ENCYCLOPAEDIA ON INDIAN TAX LAWS

ISRO SATELLITE CENTRE (ISAC), IN RE

AUTHORITY FOR ADVANCE RULINGS

P.V. Reddi, J., Chairman; A. Sinha & Rao Ranvijay Singh, Members

AAR No. 765 of 2008

22nd October, 2008

(2008) 220 CTR (AAR) 13 : (2008) 307 ITR 59 : (2008) 175 TAXMAN 97 : (2008) 14 DTR (AAR) 212

Legislation referred to

Section 9(1)(vi), 90, 195, DTAA between India & UK, Art. 13

Case pertains to

Asst. Year -,

Decision in favour of

Applicant

Double taxation relief—Agreement between India and UK—Royalty or fees for technical services—Applicant, an Indian tax resident and part of Department of Space, Government of India, entered into an agreement with a UK company, IGL for use of IGL's navigation transponder capacity by taking on lease the space segment capacity consisting of L1 and L5 transponder centered on a satellite—Capacity is utilized through data commands sent from the ground station set up by the applicant—Navigation transponder of the satellite dispatches Satellite Based Augmentation System (SBAS) signals in space on two specified frequencies which are accessed by applicant for its 'G' and 'T' projects—By earmarking a space segment capacity of the transponder for use by the applicant, the applicant does not get possession, actual or constructive, or control of the equipment of IGL—Expression 'use of space segment capacity' of transponder has no reference to any operations performed by means of the transponder—What the applicant does is to get access to the navigation transponder through its own network/apparatus and does not operate the transponder which is always done exclusively by IGL—Further, a navigation transponder, unlike communication transponder is not an active transponder but a passive one in the sense that it does not amplify—Charges paid by the applicant cannot, therefore, be regarded as payment made for the use of IGL's equipment—No income is received by IGL which answers the definition of royalty under the Act or art. 13.3(b) of the DTAA—It is also not fees for technical services as no technical knowledge, experience, skill, know-how or processes or developing and transferring a technical plan or technical design are not made available so as to enable the applicant to utilize the same even after the transaction is over

Held :

It is clear that the applicant in the course of carrying out its objectives and operations will not be

using any equipment of IGL satellite or the transponder. What the applicant needs to do is to adjust or tune its system to access the navigation transponder space segment capacity. By earmarking a space segment capacity of the transponder for use by the applicant, the applicant does not get possession (actual or constructive) or control of the equipment of IGL. The applicant and the end-users are enabled to have the benefit of use of facility provided by Inmarsat 4th generation satellite and the navigational transponder it has. That is the objective of GAGAN Project. The applicant does not use or operate any equipment of IGL. The lease of space segment capacity related to L1 and L5 transponder only means that a segment of the navigational transponder through which the data passes is allocated to the applicant so that it could be utilized for the specific purpose of making available the augmented data sent by the applicant through its ground station to the users extensively. The substance of the contract is the facility given to the applicant for the utilization of space segment capacity of the transponder for transmitting the augmented data as to the position of an object on land, air or water so that the end user can have access to it through SBAS receiver. The use of capacity, as clarified by the applicant involves the use of bandwidth, that is to say, a particular bandwidth in the transponder meant exclusively for navigational purposes is linked to the earth station (INLUS). The expression 'use of space segment capacity' of transponder has no reference to any operations performed by means of the transponder. The use or operation of transponder as such is not at all contemplated under the contract. What really happens is that the augmented data sent by INLUS reaches the transponder and it is transmitted back to the earth and the same is accessed by SBAS user receivers in the coverage area. In response to a query, the applicant specifically clarified that the transponder does not perform any operation with reference to the data uplinked and downlinked and "there is no on-board data storage". The fact that the transponder automatically responds to the data commands sent from the ground station network and retransmits the same data over a wider footprint area covered by Inmarsat satellite does not mean that the control and operation of transponder is with the applicant. Undoubtedly, the applicant does not operate the transponder; it gets access to the navigation transponder through the applicant's own network/apparatus. The data sent by the applicant does not undergo any change or improvement through the media of transponder. In essence, it amounts to the provision of a communication/navigational link through a facility owned by IGL and exclusively operated/controlled by it. The operation and regulation of transponder is always with IGL. It is also pertinent to notice that a navigation transponder unlike a communication transponder is not an active transponder in the sense it does not amplify. It is a passive transponder, as pointed out by the applicant. This is also a pointer that the applicant does not use the equipment (transponder) as such. The analogy of TV operations by means of a remote control is not at all appropriate. The remote control device is an accessory to the TV and the possessor of TV himself operates the TV with that gadget, whereas the ground station of the applicant, namely, INLUS cannot be used to operate the transponder or satellite. The ground station is an independent unit and not an accessory to the satellite. Viewed from any angle, the conclusion is that there is no user of the equipment, viz. satellite or its transponder by the applicant but the applicant is only accessing it as a transmission media for the augmented data sent through INLUS. The SBAS signals sent through INLUS are uplinked to the transponder at a particular frequency and then downlinked. The control of satellite and transponder exclusively lies with IGL. The satellite itself is not a customized one. The applicant is only one of the customers who derives the benefit of navigational transponder capacity. The reservation of a particular capacity or bandwidth for the purpose of providing the augmentation to global satellite navigation system is only a facility which is offered by IGL out of the satellite infrastructure it possesses. The charges paid by the applicant cannot be, therefore, regarded as payment made for the use of IGL's equipment. No income is received by IGL which answers the definition of royalty under the Act or the treaty [art. 13.3(b)]. Obviously, it is not fees for technical services either. In fact, such contention was not put forward by the Revenue. In the context of fees for technical services the only clause in the treaty which needs to be noticed is cl. (c) of art. 13.4 which speaks of making available technical knowledge, experience, skill, know-how or processes or developing and transferring a technical plan or technical design. As per the agreement, nothing in the first part of cl. (c) is made available to the applicant. The technical and operating requirements and procedures and the system's definition manual containing the service requirements are annexed to the agreement so as to ensure uninterrupted access to the space segment capacity and that INLUS is geared up to transmit an

operational ranging signal; but, it does not amount to making available any technical knowledge, skill, experience, know-how or process. Whatever technical inputs or specifications are furnished to the applicant, it is only limited to this agreement and is meant to enable the applicant to make use of the service or facility offered by IGL effectively. They will be of no use to the applicant once the project related contract is over. The phrase "make available" implies that the technical knowledge, skill, etc. remain with the person utilizing the services even after the particular transaction is over. Merely enabling the use of services or products into which technical inputs have gone does not amount to "making available" technical knowledge, skill, etc. The recipient of service must be able to absorb and apply the technology on its own in its future activities. That criterion is not satisfied in the instant case. The income arising out of payments received by IGL from the applicant pursuant to the agreement, is not in the nature of royalty either under the Act or the treaty nor is it fee for technical services as per the treaty.—[Dell International Service \(P\) Ltd., In re](#) (2008) 218 CTR (AAR) 209 **relied on**.

(Paras 7.3 to 7.5, 9 & 11)

Conclusion :

Payment made by applicant to IGL, a UK company for use of IGL's navigation transponder capacity by taking on lease the space segment capacity navigation transponder of its satellite is neither in the nature of royalty nor fees for technical services either under the Act or under DTAA between India and UK, hence not taxable.

In favour of :

Applicant

Double taxation relief—Agreement between India and UK—Permanent establishment—UK company IGL, though alleged to have its regional office in India, but applicant from whom the UK company received payment availing no services of such regional office whatsoever—Nature of operations carried out under the contract would also rule out the IGL rendering any assistance to the applicant in relation to its day to day operations—No part of receipts can be said to be attributable to any PE in India, hence not exigible to Indian income-tax—Assessee is therefore under no obligation to deduct tax at source

Held :

The second question, as formulated by the applicant, is an involved one and not properly worded. What needs to be considered vis-à-vis second question is whether IGL has a PE in India. If the business is carried on by IGL through a 'PE', the payments by IGL from the applicant can be treated as business profits and a proportionate amount of profits attributable to PE can be taxed in India by reason of the provisions contained in art. 13(6) r/w art. 7 of the treaty. The CIT has pointed out in his comments that as per the website of IGL, there is a regional office in India and it is also stated in the website that the "regional offices provide on the ground, local support for its partners and customers". From this, the Revenue seeks to infer the existence of a PE. In reply, the applicant has clarified that it has no connection with the regional office at Faridabad and in relation to the present contract, no support or assistance of whatsoever nature is being taken from the regional office. In fact, there is no stipulation in the agreement regarding any local support to be provided on regular basis by the personnel of IGL. The nature of operations carried out under the contract would also rule out the IGL rendering any assistance to the applicant in relation to its day to day operations. Therefore, the case set out by the Revenue in regard to the existence of PE has no factual basis. Hence, no part of the business profits flowing from the contract in question is attributable to PE in India. As the income of IGL arising out of the contract with the applicant is not chargeable to income-tax under the provisions of the treaty, the assessee is under no obligation to deduct tax at source.

(Paras 12 & 12.1)

Conclusion :

UK company though alleged to have its regional office in India, but applicant from whom the UK company received payment availing no services of such regional office whatsoever, no part of such receipts can be said to be attributable to any PE in India, hence not exigible to Indian income-tax, therefore, assessee is under no obligation to deduct tax at source.

In favour of :

Applicant

Case referred to

Ishikawajima-Harima Heavy Industries Ltd. vs. Director of IT (2007) 207 CTR (SC) 361 : (2007) 288 ITR 408 (SC)

Counsel appeared :

D.S. Aniruddha, A.S. Ganeshan & H.S. Sheshadri, for the Applicant : Yeshwant U. Chavan, for the CIT concerned

RULING**P.V. Reddi, J., Chairman :**

The applicant, which is a part of the Department of Space, Government of India, has the objective of developing satellite technology and the application of space technology for socio-economic development and space research. It has entered into a contract with M/s Inmarsat Global Ltd., UK (hereafter referred to as IGL) for "leasing of the Inmarsat navigation transponder capacity" for its GAGAN* TDS** project. Under this contract, the applicant has taken on lease the space segment capacity consisting of L1 and L5 transponder centered on an "Inmarsat 4th generation satellite". The Inmarsat satellite which is located at 64 degrees east makes an orbit at 36,000 KM altitude which is far above the earth's atmosphere. The capacity is utilized through data commands sent from a ground station set up by the applicant. Out of the many transponders the satellite carries, the transponder for navigation purposes is meant to dispatch Satellite Based Augmentation System (SBAS) signals in space on two specified frequencies which are accessed for GAGAN. The corrected or augmented data sent from INLUS and transmitted by the said transponder will be used for better navigational accuracies. The applicant pays under the contract a fixed annual charge regardless of the actual use of transponder capacity. Thus, by utilizing the space segment capacity of transponders from the satellite, the applicant is enabled to have the corrected, augmented data collected at the ground station of ISRO to be transmitted over the entire coverage footprint of the satellite.

2. The applicant submits that the access to navigation transponder does not amount to use of any equipment because the applicant will not be able to operate the satellite or transponder by itself. The applicant submits that there is no use of equipment belonging to IGL and therefore IGL does not derive any royalty income. Even assuming that there is use of equipment, the use is not in Indian territory, but it is in space and therefore no income-tax can be levied for want of territorial nexus. It is then contended that if at all, the consideration paid to the IGL under the contract can only be classified as business income in which case it is not exigible to income-tax by virtue of the treaty provisions as there is no PE of IGL in India. Based on these facts and contentions, the applicant seeks advance ruling on the following two questions :

"1. Whether the payment to M/s Inmarsat, UK, for leasing of transponder is not royalty having regard to the provisions of IT Act and DTAA with UK and hence not liable to TDS under s. 195 of the Act ?

2. Whether having regard to the fact that it is the business of M/s Inmarsat, to lease out the navigation transponder it is not liable to tax in India in respect of lease amount and hence not liable to TDS under s. 195 of the IT Act, 1961 having regard to the fact that M/s Inmarsat has no PE or business connection in India and the said leasing is a part and parcel of the business of M/s Inmarsat, UK, carried on outside the taxable territories of India ?"

3. At this juncture, it may be noted that under the contract, all the taxes and duties payable in India shall be to the account of "lessee" i.e. the applicant. Moreover, the applicant has an obligation to withhold the tax under s. 195 of the IT Act in case the income of IGL, UK is liable to be taxed in India. In this background, the applicant has sought advance ruling with reference to the two questions stated above.

4. We shall now refer to the relevant clauses in the contract which is styled as "Contract for leasing of Inmarsat navigation transponder capacity for GAGAN TDS project" entered into between the applicant and IGL on 31st Jan., 2007.

The nature and substance of the contract are set out in art. 1 which is extracted hereunder :

"Article 1 Provision of navigation transponder capacity

A. The lessee has agreed to take by way of lease, and pay for the navigation transponder space segment capacity consisting of L1 and L5 transponder centered at 1575.42 MHz and 1176.45 MHz respectively ("the capacity") on an Inmarsat 4th Generation Satellite at 64 degrees east through a Navigation Land earth Station ("INLUS") to be designated by the lessee, on the terms and conditions of this agreement, including the Inmarsat System Definition Manual

B. The INLUS shall be operated by the lessee or by another entity under direct contract with the lessee ("INLUS operator")."

Article 2 bears the heading "Use of the capacity for designated purposes". It states that the capacity shall be used only for the purposes either of providing, or for developing, an augmentation to global satellite navigation systems, including a ranging signal valid over the entire coverage footprint of the satellite. It also includes the use of the capacity for system test and verification during limited periods of time. Clause (B) of art. 2 inter alia states that the agreement shall be subject to IGL's written certification that the capacity to be provided meets the requirements of the SDM (System Definition Manual) and "is available for service" and the lessee's INLUS is ready to transmit an operational ranging signal in conformity with the SDM. Once the certification of operational readiness is done, the lessee (applicant) shall be given access to the capacity and shall start utilizing the service in accordance with the terms and conditions of the agreement. Article 4 deals with "charges". The charge payable by the lessee for the utilization of the leased capacity during the specified term shall be firm and fixed at the rate of US Dollars 1,415,000. The whole of the charges shall be payable by the lessee irrespective of the amount of utilization of the capacity by the lessee. Article 10 provides for INLUS access authorization which enables the lessor to make a check of INLUS according to the verification test procedures etc. Under art. 12, the lessor reserves the right to relocate, reposition or replace any satellite through which the capacity is provided, after giving prior notice. Article 21 is the confidentiality clause. The other provisions in the agreement are not very material.

5. After the first hearing of the case, the applicant has filed a note containing the technical features of the GAGAN Project. A summary of the material portions of that 'technical report' is given below :

5.1. The applicant—ISRO and the Airport Authority of India are implementing the GAGAN Project as a Satellite Based Augmentation System (SBAS) for the Indian air space. It has two phases (i) TDS (Technology Demonstration System) which is a pilot project; and (ii) final operations phase (FOP) which would be an operational system over Indian air space. On the success of the pilot project, the FOP will be implemented to provide a seamless navigation for civil aviation users.

5.2. GPS (Global Positioning System of the US) is a 24 satellite constellation orbiting at about 20,100 kms. above the surface of the earth. The GPS allows free access of data/signal. A GPS receiver uses 'the distance information' from the GPS satellites to obtain the position information to an accuracy of about 20-30 mtrs. which is inadequate to meet the accuracy of aircraft landing. It requires accuracy below 7.5 mtrs. which can be met by GAGAN when it is put into operation. GAGAN—a SBAS can provide the much needed accuracy and integrity of the data by means of differential corrections. The addition of SBAS @ to GPS allows the integrated GPS-SBAS system to be used as primary means of navigation for better accuracy of position and time.

As to how the satellite based augmentation of data received from GPS is carried out to achieve the accuracy is explained in the following para :

5.3. The GAGAN TDS System primarily comprises of the ground-based elements inclusive of 8 Indian reference stations (INRES) located at different places in India, one Indian Navigation Land Uplink Station (INLUS), one Indian Master Control Centre (IMCC) collocated in Bangalore and one Geo-stationary satellite as a passive space segment (Inmarsat—4F 1). The INRES are connected to IMCC through dedicated communication links. Each INRES can receive data simultaneously from a maximum of 14 GPS satellites, and GEO satellites, in view. INRES receives and forwards all distance data from the GPS satellites in view, to IMCC for further processing. IMCC processes the data from GPS received through INRES for correction of errors. The INLUS then sends the INMCC generated data, i.e. corrected data to the transponder of GEO satellite (Inmarsat—4F 1) and the same is transmitted by the Inmarsat satellite/ transponder to spread over the entire footprint area of satellite. The end-user can access the data/messages through a SBAS receiver. The SBAS receiver user is thereby enabled to correct the errors in the GPS signal leading to significant improvement in position accuracy. All the activities at INRES, IMCC and INLUS are carried out by ISRO and AAI* as a team with no involvement of IGL personnel.

5.4. The entire operations and maintenance of Inmarsat-4F1 spacecraft is under the control of Inmarsat Global Ltd., UK. The satellite is located at 64 deg E location and is in a Geo-synchronous orbit of 36,000 kms. altitude which is much above the earth's atmosphere. (It may be noted that the civilian aircrafts cruise around 10 kms. above the earth's surface). The Inmarsat satellite carries many transponders out of which the transponder for navigation purposes providing SBAS signals in space at two frequencies i.e. 1575.42 MHz (GPS-L1) and 1176.45 MHz (GPS-L5) are accessed for GAGAN. The signals from INMARSAT are free-to-air and any person equipped with a GAGAN receiver can receive the GAGAN messages and improve the position accuracy over the entire coverage area. The spacecraft maintenance, repositioning of the satellite in the orbit, reorientation etc. are totally carried out by IGL, UK. ISRO/AAI can only access the passive navigation transponder for uplinking the data, which cannot affect the satellite operations or that of the transponder. That is to say, the transponder is maintained and regulated by the Inmarsat and ISRO/AAI makes use of the facility the satellite and transponder provides for relaying the satellite based augmented data.

6. The principal question that arises for consideration is whether the payment made to IGL, UK by the applicant is in the nature of 'royalty' within the meaning of Art. 13 of the "Convention between the Government of Republic of India and the Government of the United Kingdom of Great Britain and Northern Ireland for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and capital gains" (hereinafter referred to as 'treaty') and s. 9(1)(vi) of IT Act, 1961.

6.1. The relevant portion of Art. 13 is extracted below :

"Article 13 : Royalties and fees for technical services :

1. Royalties and fees for technical services arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.

2. However, such royalties and fees for technical services may also be taxed in the Contracting State in which they arise and according to the law of that State; but if the beneficial owner of the royalties or fees for technical services is a resident of the other Contracting State, the tax so charged shall not exceed :

(a) in the case of royalties within para 3(a) of this articles, and fees for technical services within para 4(a) and (c) of this article,—

.....

(b) in the case of royalties within para 3(b) of this article and fees for technical services defined in para 4(b) of this article, 10 per cent of the gross amount of such royalties and fees for technical services.

3. For the purposes of this Article, the term "royalties" means :

(a) payments of any kind received as a consideration for the use of, or the right to use, any copyright of a literary, artistic or scientific work, including cinematography films or work on films, tape or other means of reproduction for use in connection with radio or television broadcasting, any patent, trademark, design or model, plan secret formula or process, or for information concerning industrial, commercial or scientific experience; and

(b) payments of any kind received as consideration for the use of, or the right to use, any industrial, commercial or scientific equipment, other income derived by an enterprise of a Contracting State from the operation of ships or aircraft in international traffic.

.....

6. The provisions of paras 1 and 2 of this article shall not apply if the beneficial owner of the royalties or fees for technical services, being a resident of a Contracting State, carries on business in the other Contracting State in which the royalties or fees for technical services arise through a PE situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the right, property or contract in respect of which the royalties or fees for technical services are paid is effectively connected with such PE or fixed base. In such case, the provisions of art. 7 (business profits) or art. 15 (independent personal services) of this convention, as the case may be, shall apply."

We are more concerned herewith para 3(b) of art.13.

6.2. The definition of 'royalty' under the domestic law i.e. IT Act, 1961 is almost similarly worded. Clause (iva) of the Explan. 2 to s. 9(1)(vi) of IT Act speaks of consideration for the "use or right to use any industrial, commercial or scientific equipment".

6.3. It may be noticed that sub-art. (6) provides for a situation in which the income in the nature of 'royalty' arising in a Contracting State (which is not the State of residence of the beneficial owner) is to be dealt with under art. 7 governing business profit if the business is carried on in that other State through a PE .

7. As IGL does not carry on any business in India through PE, as discussed towards the end, the main contention of Revenue is that the 'charges' paid by the applicant—ISRO under the terms of the agreement is in the nature of consideration paid for the 'use of' or 'right to use' the scientific equipment within the meaning of cl. (b) of Art. 13(3) of the treaty.

7.1. The crucial question that needs to be addressed, therefore, is whether the payment made to IGL under the aforementioned contract constitutes consideration for the use of or right to use equipment of IGL. To answer this question, we have to discern the substance and essence of the contract as revealed from the terms of the contract document, the technical report and other facts furnished by the applicant. The first Article in the contract makes it clear that the payment is for the "lease of navigation transponder segment capacity". From the designated transponder (L1 and L5) of Inmarsat satellite, this capacity at a particular frequency is made available to the applicant through INLUS (Navigation Land Uplink Station) which is set up and operated by the applicant. The capacity is meant to be used for the purpose of providing an augmentation to global satellite navigation system. The capacity will be utilized through data commands issued from the ground station (INLUS). Undeniably, the applicant will not be able to operate the transponder in the space but it will be transmitting/uplinking the augmented data to the navigation transponder. Access to the transponder's space capacity is established through the applicant's operations at the ground station (INLUS) pursuant to which the transponder transmits signals/data received from INLUS from the geo-stationary orbits. The Inmarsat satellite carries many transponders out of which the transponder for navigation purposes will provide the SBAS signals in space at two frequencies i.e. 1575.42 MHz (L1) and 1176.45 MHz (L5) which are accessed for the GAGAN project undertaken by the applicant. It is also seen that the navigation transponder which uplinks and downlinks the data is a passive transponder unlike the communication transponder.

7.2. It will be relevant to know the connotation of the term 'transponder'. In McGraw Hill's Dictionary of Scientific and Technical Terms, the meaning given is "a transmitter-receiver capable of accepting the challenge of an interrogator and automatically transmitting an appropriate reply". In Chamber's Dictionary of science and technology, 'transponder' (communication) is defined as an equipment forming part of a communications satellite, which receives signals from a ground station at one frequency and retransmits them to another ground station or to domestic satellite receivers at another frequency."

7.3. It is clear that the applicant in the course of carrying out its objectives and operations will not be using any equipment of IGL satellite or the transponder. What the applicant needs to do is to adjust or tune its system to access the navigation transponder space segment capacity. By earmarking a space segment capacity of the transponder for use by the applicant, the applicant does not get possession (actual or constructive) or control of the equipment of IGL. The applicant and the end-users are enabled to have the benefit of use of facility provided by Inmarsat 4th generation satellite and the navigational transponder it has. That is the objective of GAGAN Project. The applicant does not use or operate any equipment of IGL. The lease of space segment capacity related to L1 and L5 transponder only means that a segment of the navigational transponder through which the data passes is allocated to the applicant so that it could be utilized for the specific purpose of making available the augmented data sent by the applicant through its ground station to the users extensively. The substance of the contract is the facility given to the applicant for the utilization of space segment capacity of the transponder for transmitting the augmented data as to the position of an object on land, air or water so that the end user can have access to it through SBAS receiver. The use of capacity, as clarified by the applicant involves the use of bandwidth, that is to say, a particular bandwidth in the transponder meant exclusively for navigational purposes is linked to the earth station (INLUS). The expression 'use of space segment capacity' of transponder has no reference to any operations performed by means of the transponder. The use or operation of transponder as such is not at all contemplated under the contract. What really happens is that the augmented data sent by INLUS reaches the transponder and it is transmitted back to the earth and the same is accessed by SBAS user receivers in the coverage area. In response to a query, the applicant specifically clarified that the transponder does

not perform any operation with reference to the data uplinked and downlinked and "there is no on-board data storage".

7.4. It is contended by the Revenue that in substance, there is use of equipment i.e. transponder by the applicant. The exclusive capacity of specific transponder is kept entirely at the disposal of the applicant. The use of transponder is ensured when it responds to the directions sent through the ground station. Such directions, it is stated, are akin to the operation of TV by remote control apparatus. We find it difficult to accept this contention. The fact that the transponder automatically responds to the data commands sent from the ground station network and retransmits the same data over a wider footprint area covered by Inmarsat satellite does not mean that the control and operation of transponder is with the applicant. Undoubtedly, the applicant does not operate the transponder; it gets access to the navigation transponder through the applicant's own network/apparatus. The data sent by the applicant does not undergo any change or improvements through the media of transponder. In essence, it amounts to the provision of a communication/navigational link through a facility owned by IGL and exclusively operated/controlled by it. The operation and regulation of transponder is always with IGL. It is also pertinent to notice that a navigation transponder unlike a communication transponder is not an active transponder in the sense it does not amplify. It is a passive transponder, as pointed out by the applicant. This is also a pointer that the applicant does not use the equipment (transponder) as such.

7.5. The analogy of TV operations by means of a remote control is not at all appropriate. The remote control device is an accessory to the TV and the possessor of TV himself operates the TV with that gadget, whereas the ground station of the applicant, namely, INLUS cannot be used to operate the transponder or satellite. The ground station is an independent unit and not an accessory to the satellite. Viewed from any angle, we have to conclude that there is no user of the equipment, viz. satellite or its transponder by the applicant but the applicant is only accessing it as a transmission media for the augmented data sent through INLUS. The SABS signals sent through INLUS are uplinked to the transponder at a particular frequency and then downlinked. The control of satellite and transponder exclusively lies with IGL. The satellite itself is not a customized one. The applicant is only one of the customers who derives the benefit of navigational transponder capacity. The reservation of a particular capacity or bandwidth for the purpose of providing the augmentation to global satellite navigation system is only a facility which is offered by IGL out of the satellite infrastructure it possesses. The charges paid by the applicant cannot be, therefore, regarded as payment made for the use of IGL's equipment.

8. We are spared of the need to enter into a discussion on the connotation of the expression "use" or "right to use" occurring in cl. (iv.a) of Explan. 2 to s. 9(1)(vi) of IT Act in view of our recent ruling in the case of Dell International Service (P) Ltd., AAR/735/2006 [reported at (2008) 10 DTR (AAR) 249 : (2008) 218 CTR (AAR) 209—Ed.]. The relevant passages which have significant bearing on the issue involved in the present case will be referred to hereinafter. That was a case in which the applicant—Dell International entered into an agreement with BTA, a US company under which BTA provided the applicant with two-way transmission of voice and data through telecom bandwidth. While BTA provided the international half circuit from US/Ireland, the Indian half circuit was provided by an Indian telecom company at the instance of BTA. The bandwidth so provided would give full country coverage in both the countries of delivery i.e. USA and India. Fixed monthly recurring charges also referred to as 'rental charges' were payable by the applicant, apart from installation fee (for access line). As seen from the 'Service Description' in the contract, dedicated, digital, international point to point circuits for the transmission of voice, data IP and image were made available to the applicant 24 hours a day for a fixed 'rental charge'. Connectivity was provided by a number of physical components, specifically domestic access lines in both countries of delivery and core international network which ensured bandwidth speeds upto 155 Mbps. It was pointed out by Revenue that dedicated private circuit was provided by the BTA through its network for the use of the applicant which made it possible to use bandwidth upto the requisite capacity. The electronic circuits being equipment were made available for constant use by the equipment for transmission of data, etc. The access line was installed for the benefit of the applicant. It was also

contended that the rendition of service by way of maintenance and fault repairs was only incidental to the dominant object of renting the automated telecommunication network. These contentions were rejected. Assuming that the circuit is equipment, the Authority held that the applicant—Dell did not use that equipment in any real sense. The consideration was paid for providing a facility or service through sophisticated telecom network. It was therefore held that 'royalty' definition under cl. (iva) was not satisfied.

8.1. Some of the relevant extracts from the Ruling are given hereunder :

"The word 'use' in relation to equipment occurring in (iv.a) is not to be understood in the broad sense of availing of the benefit of equipment. The context and collocation of the two expressions 'use' and 'right to use' followed by the word "equipment" suggests that there must be some positive act of utilization, application or employment of equipment for the desired purpose. If an advantage is taken from sophisticated equipment installed and provided by another, it is difficult to say that the recipient/ customer uses the equipment as such. The customer merely makes use of the facility, though he does not himself use the equipment." (para 12-8.)

8.2. At para 13.1 and 13.2 it was observed :

"There is no doubt that the entire network consisting of under-sea cables, domestic access lines and the BT equipment—whichever is kept at the connecting point, is for providing a service to facilitate the transmission of voice and data across the globe. One of the many circuits forming part of the network is devoted and earmarked to the applicant. Part of the bandwidth capacity is utilized by the applicant. From that, it does not follow that the entire equipment and components constituting the network is rented out to the applicant or that the consideration in the form of monthly charges is intended for the use of equipment owned and installed by BTA. The questions to be asked and answered are : Does the availing of service involve user of equipment belonging to BT or its agent by the applicant? Is the applicant required to do some positive act in relation to the equipment such as operation and control of the same in order to utilize the service or facility ? Does the applicant deal with any BT equipment for adapting it to its use ? Unless the answer is 'yes', the payment made by the applicant to BTA cannot be brought within the royalty cl. (iva). In our view, the answer cannot be in the affirmative. Assuming that circuit is equipment, it cannot be said that the applicant uses that equipment in any real sense. By availing of the facility provided by BTA through its network/circuits, there is no usage of equipment by the applicant except in a very loose sense such as using a road bridge or a telephone connection. The user of BT's equipment as such would not have figured in the minds of parties. As stated earlier, the expression 'use' occurring in the relevant provision does not simply mean taking advantage of something or utilizing a facility provided by another through its own network. What is contemplated by the word 'use' in cl. (iv.a) is that the customer comes face to face with the equipment, operates it or controls its functioning in some manner, but, if it does nothing to or with the equipment (in this case, it is circuit, according to the Revenue) and does not exercise any possessory rights in relation thereto, it only makes use of the facility created by the service provider who is the owner of entire network and related equipment. There is no scope to invoke cl. (iv.a) in such a case because the element of service predominates." (Para 13.1.)

"Usage of equipment connotes that the grantee of right has possession and control over the equipment and the equipment is virtually at his disposal. But, there is nothing in any part of the Agreement which could lead to a reasonable inference that the possession or control or both has been given to the applicant under the terms of the agreement in the course of offering the facility. The applicant is not concerned with the infrastructure or the access line installed by BTA or its agent or the components embedded in it. The operation, control and maintenance of the so-called equipment, solely rests with BTA or its agent being the domestic service provider. The applicant does not in any sense possess nor does it have access to the equipment belonging to BTA. No right to modify or deal with the equipment vests with the applicant. In sum and substance, it is a case of BTA utilizing its own network and providing a service that enables the applicant to transmit voice

and data through the media of telecom bandwidth." (para 13.2)

8.3. What is stated in para 13.3 is also relevant for the purpose of this case :

"In cases where the customers make use of standard facility like telephone connection offered by the service provider, it does not admit of any doubt that the customer does not use the network or equipment of the service provider. But, where the service provider, for the purpose of affording the facility, has provided special infrastructure/network such as a dedicated circuit (as in the instant case), controversies may arise as to the nature of payment received by the service provider because it may not stand on the same footing as standard facility. However, even where an earmarked circuit is provided for offering the facility, unless there is material to establish that the circuit/equipment could be accessed and put to use by the customer by means of positive acts, it does not fall under the category of 'royalty' in cl. (iv.a) of Expln. 2". (para 13.3)

8.4. At para 13.5, this Authority referred to Prof. Klaus Vogel's commentary on Double Taxation Convention. The learned author commented that "..... ,the use of a satellite is a service, not rental; this would not be the case only in the event that the entire direction and control over the satellite such as piloting, steering were transferred to the user". Then, this Authority remarked that "the proposition though stated too broadly, does furnish guidance in understanding the scope of the relevant royalty clause".

8.5. The views expressed by this Authority in Dell International apply fortiori to the present case. In Dell's case, the telecom bandwidth was provided to the applicant Dell by means of dedicated private line circuit through the network of service provider. In the present case, what is provided to the applicant is the existing space segment capacity of the navigation transponder which enables the transmission of uplinked data over the entire footprint of satellite. The applicant does not use nor is it conferred with the right to use the transponder of IGL, UK.

9. In the light of foregoing discussion, we hold that no income is received by IGL which answers the definition of royalty under the Act or the treaty [art. 13.3(b)]. Obviously, it is not fees for technical services (FTS) either. In fact, such contention was not put forward by the Revenue. In the context of FTS the only clause in the treaty which needs to be noticed is cl. (c) of art.13.4 which speaks of making available technical knowledge, experience, skill, know- how or processes or developing and transferring a technical plan or technical design. As per the Agreement, nothing in the first part of cl. (c) is made available to the applicant. The technical and operating requirements and procedures and the system's definition manual containing the service requirements are annexed to the agreement so as to ensure uninterrupted access to the space segment capacity and that INLUS is geared up to transmit an operational ranging signal; but, it does not amount to making available any technical knowledge, skill, experience, know-how or process. Whatever technical inputs or specifications are furnished to the applicant, it is only limited to this agreement and is meant to enable the applicant to make use of the service or facility offered by IGL effectively. They will be of no use to the applicant once the project related contract is over. The phrase "make available", it is fairly well settled by a series of decisions of this Authority as well as the Tribunal implies that the technical knowledge, skill, etc. remains with the person utilizing the services even after the particular transaction is over. Merely enabling the use of services or products into which technical inputs have gone does not amount to "making available" technical knowledge, skills, etc. The recipient of service must be able to absorb and apply the technology on its own in its future activities. That criterion is not satisfied in the instant case.

10. An alternative contention has been raised by the applicant that even if it be held that the consideration stipulated in the agreement is for the use of or right to use the scientific equipment, it cannot be subjected to tax under the Act for the reason that the use of transponder takes place in the space and the taxable event has no territorial nexus with 'India' as defined in s. 2(25A) of the Act. In this regard, reliance has been placed on some of the observations in the decision of the Supreme Court in Ishikawajima-Harima Heavy Industries Ltd. vs. Director of IT (2007) 207 CTR

(SC) 361 : (2007) 288 ITR 408 (SC). In reply, the Revenue contended that there is sufficient territorial nexus in view of the fact that the applicant gets access to space segment capacity through its network in India. Moreover, it was pointed out that the introduction of Explanation to s. 9(2) after the said judgment has altered the legal position. It is unnecessary to deal with this contention in view of the conclusion reached by us on the point of user or right to use the equipment.

11. Thus, we hold, with reference to question No. 1, that the income arising out of payments received by IGL from the applicant pursuant to the Agreement, is not in the nature of royalty either under the Act or the treaty nor is it fee for technical services as per the treaty.

12. The second question, as formulated by the applicant, is an involved one and not properly worded. What needs to be considered vis-à-vis second question is whether IGL has a Permanent Establishment in India. If the business is carried on by IGL through a 'PE', the payments by IGL from the applicant can be treated as business profits and a proportionate amount of profits attributable to PE can be taxed in India by reason of the provisions contained in art. 13(6) r/w Art. 7 of the treaty. The CIT has pointed out in his comments that as per the website of Inmarsat (IGL), there is a regional office in India located at Sector 15, Faridabad and it is also stated in the website that the "regional offices provide on the ground, local support for its partners and customers". From this, the Revenue seeks to infer the existence of a PE. In reply, the applicant has clarified that it has no connection with the regional office at Faridabad and in relation to the present contract, no support or assistance of whatsoever nature is being taken from the regional office. In fact, there is no stipulation in the agreement regarding any local support to be provided on regular basis by the personnel of IGL. The nature of operations carried out under the contract would also rule out the IGL rendering any assistance to the applicant in relation to its day to day operations. We, therefore, hold that the case set out by the Revenue in regard to the existence of PE has no factual basis. Hence, no part of the business profits flowing from the contract in question is attributable to PE in India.

12.1. The second part of Question No. 2 is with regard to tax deduction at source under s. 195 of the IT Act. As the income of IGL arising out of the contract with the applicant is not chargeable to income-tax under the provisions of the treaty as discussed above, the applicant is under no obligation to deduct tax at source.

13. Thus, both the questions are answered in favour of the applicant and accordingly the ruling is given.

© Wolters Kluwer (India) Pvt. Ltd.