

Payment for transponder service is 'royalty'; ITAT refers Explanation 6 to sec. 9(1)(vi) to interpret 'process'

Summary – The Mumbai ITAT in a recent case of Viacom 18 Media (P.) Ltd., (the Assessee) held that payment of fees for use of transponder service is 'royalty' taxable under Article 12 of India-USA DTAA - Held, Yes - Since, the word 'process' as used in Article 12 of India-US DTAA has not been defined in the DTAA, its meaning shall be interpreted as per Income-tax Act, 1961 in view of Article 3(2) of said DTAA - Held, Yes - The use of transponder for broadcasting programme involves transmission by satellite which falls in the expression 'process' as per Explanation 6 of Section 9(1)(vi) - Held, yes

Facts

- The assessee, engaged in broadcasting television channels from India, received transponder service from Intelsat, a tax resident of USA, in lieu of a fee.
- The assessee approached to the AO under 195(2) of I-T Act for *Nil* withholding tax certificates, for such payment of fees to Intelsat, which was denied by the AO.
- On the question of whether fee payable to Intelsat is in the nature of 'Royalty' in the light of amended provisions of section 9(1)(vi) as well as under Article 12 of Indo-US DTAA, the Tribunal held in favour of revenue as under.

Held

- The definition of term 'royalty' remained unchanged despite insertion of Explanation 6 by Finance Act 2012. The introduction of Explanation 6 w.r.e.f.01-6-1976 is clarificatory in nature and, therefore, it does not amend the definition of royalty per se.
- There is no quarrel on the point that any payment for use or right to use of process is in the nature of royalty as per the provisions of Article 12(3) of DTAA as well as per the Explanation 2 of section 9(1)(vi) of the Act.
- Since the term 'process' is not defined under the DTAA, therefore, by virtue of Article 3(2) of the India-US DTAA, the meaning of term 'process' as defined in the Act would apply for this purpose.
- The use of transponder by the assessee for telecasting/broadcasting the programme involves the transmission by the satellite including up-linking, amplification, conversion for downlinking of signals which falls in the expression 'process' as per Explanation 6 of section 9(1)(vi).
- Hence the payments made for use/ right to use of process falls in the ambit of expression 'royalty' as per DTAA as well as per provisions of Income Tax Act.
- The decision of Hon'ble Delhi High Court in the case of *Asia Satellite Telecommunications Co. Ltd. v. DIT* [2011] 197 Taxman 263 (Delhi) was not applicable in present case as it was pronounced prior to the insertion of Explanation 6 and Explanation below section 9(2).