IN THE INCOME TAX APPELLATE TRIBUNAL "L" BENCH, MUMBAI

BEFORE SHRI P.M. JAGTAP, ACCOUNTANT MEMBER
AND SHRI VIJAY PAL RAO, JUDICIAL MEMBER

ITA NO.6947/Mum/2012
Assessment year: - 2008-09

ITA NO.7211/Mum/2012
Assessment year: - 2009-10

Reuters Transaction Services Ltd.C/o BMR & Associates LLP 36- B Dr RK Shirodkar Marg, Parel-East Mumbai – 400 012.	Vs.	The Deputy Director of Income Tax (International Taxation)-2(1) 1st Floor, Room No. 120 Scindia House, Ballard Estate Mumbai – 400 038.```
PAN:-AACR0226Q		
Appellant		Respondent

Assessee By	Mr. P.J Pardiwalla and Shri Nishant Thakkar
Revenue By	Shri Ajay Kumar Srivastava

Date of hearing	12.06.2014
Date of pronouncement	18.07.2014

ORDER

Per Vijay Pal Rao, JM

These two appeals by the assessee are directed against the order dated 28.09.2012 of CIT(A) and assessment order passed u/s 143(3) r.w.s 144C(13) of the Income Tax Act in pursuance to the directions of DRP u/s 144C(5) of the Act for A.Y. 2008-09 and 2009-10 respectively. For the A.Y. 2008-09 the assessee has raised following grounds:-

> In the facts and in circumstances of the case, Reuters Transaction Services Limited (the 'Appellant') respectfully submits that the learned Commissioner of Income-tax (Appeals) ['Ld CIT (A)'] has:

1. Failed to comprehend the facts of the case and erred in law and in facts in, disregarding the contractual arrangement between the Appellant, its customers and Reuters India Private Limited ('RIPL') and holding that:

a. the contractual arrangement lacks commercial substance and is illusionary and is a camouflage entered into to avoid payment of legitimate taxes;

b. the corporate veil of RIPL, a separate legal entity, be lifted; and

c. the equipment installed at the premises of the customer of Appellant is provided by the Appellant and not RIPL;

2. Failed to comprehend the facts and has erred in law and in facts in presuming certain facts listed in Annexure 1;

3. Erred in law and in facts in holding that the Appellant has provided equipment and related services including connectivity, network access, maintenance, updates and training to the customers through RIPL and in holding that the revenue received by Appellant is for use of equipment and is in the nature of royalty income under Article 13(3)(b) of the Double Taxation Avoidance Agreement between India and the United Kingdom ('India-UK DTAA') and under clause (iva) of Explanation 2 to Section 9(1)(vi) of the Income-tax Act, 1961 ('the Act');

4. Erred in law and in facts in holding that the dealing matching service provided by the Appellant to its customers entails matching of bids in a 'secret environment' and in holding that the revenue received by the Appellant is for use of secret process and is in the nature of royalty income under Article 13(3)(a) of the India-UK DT AA and under clause (ii) of Explanation 2 to Section 9(1)(vi) of the Act;

5. Erred in law and in facts in holding that provisions of dealing matching services entails provision of commercial information to the customers of the Appellant for commercial exploitation and in holding that the revenue received by the Appellant is for use of commercial information and is in the nature of royalty income under Article 13(3)(a) of the India-UK DTAA and under clause (iv) of Explanation to Section 9(1)(vi) of the Act;

6. Erred in law and in facts in holding that the dealing matching services provided by the Appellant is ancillary and subsidiary to the alleged provision of equipments and commercial information to the customers by the Appellant and is in the nature of fees for technical services ('FTS') under Article 13(4)(a) and 13(4)(b) of India-UK DTAA;

7. Erred in law and in facts in disregarding the Appellant's contention that the dealing matching services provided by the Appellant do not make available any technical knowledge and holding that the Appellant has provided technical services to the customers through RIPL and in concluding that the provisions of Article 13(4)(c) of the India-UK DTAA are not operative;

8. Without prejudice to grounds 1 to 7 above, the Ld CIT(A) has erred in law and in facts in not adjudicating on all the grounds raised by the Appellant before the Ld CIT (A) especially dismissing the appellant's claim of characterisinq the income as business income.

For the Assessment Year 2009-10 the assessee has raised following grounds:-

A. On the facts and in the circumstances of the case and in law, the learned members of the Dispute Resolution Panel ('DRP') erred in directing the Learned Deputy Director of Income Tax (International Taxation), Range - 2(1), Mumbai ('Ld Assessing Officer') to proceed on the lines proposed in the draft assessment order, on the premise that the issues raised are similar to issues involved in the earlier assessment years and the matter is sub-judice.

B. On the facts and in the circumstances of the case and in law, the learned members of the DRP erred in confirming the draft assessment proposed by the Ld Assessing Officer and in directing the Ld Assessing Officer to conclude the assessment on the following grounds:

1. That the subscription revenue received by Reuters Transaction Services Limited (,the Appellant') is in the nature of 'royalty' under Article 13(3) of the Double Taxation Avoidance Agreement between India and United Kingdom ('DTAA') and under Section 9(1)(vi) of the Income-tax Act, 1961 (,the Act'):

2. That the subscription revenue received by the Appellant is in the nature of 'Fees for Technical Services' ('FTS') under Article 13(4)(c) of the DTAA and under Section 9(1)(vii) of the Act;

3. That Reuters India Private Limited ('RIPL') is an 'agent' of the Appellant and that RIPL constitutes a Dependent Agent Permanent Establishment ('DAPE') of the Appellant in India under Article 5(4) of the DTAA;

4. That the server of the Appellant located in Geneva extends to the equipment provided by RIPL to the subscribers of the Appellant and

hence the server located at Geneva constitutes a Permanent Establishment ('PE') of the Appellant under Article 5(1) of the DTAA;

5. That the Ld Assessing Officer may place reliance on the Australian Securities and Investments Commission's ('ASIC') market assessment report issued in 2005, on the activities of the Appellant in Australia to conclude that the Appellant controls the network through which services are provided to it subscribers in India;

6. That Section 44D read with Section 115A of the Act is applicable to the Appellant without appreciating the submissions made by the Appellant;

7. That interest under Section 234B of the Act may be levied on the Appellant, as there is no variation in the total income of the Appellant;

C. Based on the facts and circumstances of the case, the Ld Assessing Officer has erred in facts and in law in:

1. Holding that the subscription revenue received by the Appellant from its subscribers in India are towards the use of equipments and process and hence in the nature of 'royalty' income chargeable to tax in India under Section 9(1)(vi) of the Act and Article 13(3) of the DTAA;

2. Holding that the subscription revenue received by the Appellant from its subscribers in India are in the nature of FTS chargeable to tax in India under Section 9(1)(vii) of the Act and Article 13(4)(c) of the DTAA;

3. Relying on the communication obtained from Standard Chartered Bank during the assessment proceedings for AY 2005-06 and applying the same to the current year and holding that the server of the Appellant located in Geneva extends to the equipment provided by RIPL to the subscribers of the Appellant in India and hence, the server located in Geneva constitutes a PE of the Appellant in India under Article 5(1) of the DTAA;

4. Following the assessment order of the previous assessment years and in placing reliance on the ASIC Market Assessment Report

issued in 2005 on the activities of the Appellant in Australia and applying the observations of the ASIC to the Appellant's case in India;

5. Observing that RIPL is an 'agent' of the Appellant in India and the Appellant is dependent on RIPL and hence RIPL constitutes a dependant agent PE of the Appellant in India;

6. Observing that services are supplied by the Appellant to its subscribers in India and hence the revenue received by the Appellant from its subscribers accrue and arise in India;

7. Without prejudice to the above, the Ld Assessing Officer erred in law and in facts in computing the income chargeable to tax in India of the Appellant at 20 percent of the gross revenue of Rs 65,228,026 as being profits attributable to the PE of the Appellant in India and ignoring the principles laid down by the Honourable Supreme Court in the case of DIT v Morgan Stanley (supra);

8. Levying interest under Section 234B of the Act;

2. Since common issues are raised in both the appeals, therefore, for the sake of convenience, these appeals are clubbed, heard together and are being disposed of by this composite order:-

3. The assessee, M/s Reuters Transaction Services Limited is a company incorporated under the laws of England and is a tax resident of United Kingdom. The assessee is engaged in the business of providing Reuters Dealing 2000-2 and Dealing 3000 which are electronic deal matching systems enabling authorized dealers in foreign exchange such as banks, etc to effect deals in spot foreign exchange with other foreign exchange dealers. The main server of the assessee is located in Geneva and the assessee has executed a Dealing Services Marketing Agreement with M/s. Reuters India Pvt. Ltd ('RIPL') whereby RIPL will market the services of the assessee to the subscribers in India. During the Financial Year ended 31st March 2008, the assessee earned revenue of Rs. 5,42,34,380/- and for the F.Y. ended on 31st March 2009, the assessee earned revenue of Rs. 6,52,28,026/- from its customers in India. The assessee claimed that the revenue earned by the assessee from its subscribers in India are in the nature of business profit and as per Article -7 of the India-UK DTAA, business profits of the

assessee are taxable in India only if it has a Permanent Establishment (PE) in India to the extent the profits are attributable to the PE in India. The assessee claimed that for the A.Ys under consideration, the assessee did not have PE in India as contemplated under Article-5 of the treaty. Thus the assessee claimed that its revenue from the Indian subscribers are not liable to tax in India in terms of provisions of DTAA. The assessee has also claimed that the revenue earned by the assessee are not in the nature of royalty or fee for technical services and accordingly not liable to tax under Article -13 of DTAA.

4. The Assessing Officer noted that in order to receive the services of the assessee, the subscribers in India have entered into two agreements namely

(i) Domestic Service Agreement with the assessee for providing the matching services, and

(ii) Access agreement with M/s Reuters India Pvt. Ltd. for obtaining the equipment to be installed at the subscriber's premises.

The Assessing Officer has examined and analyzed the terms and conditions of these agreements as well as the provisions of the Act and DTAA- for determining the character of the income received by the assessee as well as the existence of PE of assessee in India. The Assessing Officer has held that the revenue received by the assessee during these years is in the nature of "Royalty" as well as Fee for Technical Services(FTS) which is subjected to tax in India under the provisions of Income Tax Act as well as DTAA. Alternatively the Assessing Officer has also held that even if the business profits of the assessee is taxable in India because the RIPL constitutes an agency PE of the assessee as well as the assessee is having equipment in India which constitutes a fixed base PE.

5. For the A.Y. 2008-09, the assessee filed an appeal before the CIT(A), challenging the action of the Assessing Officer. CIT(A) held that the service charges received by the assessee from the Indian subscribers is taxable as Royalty and Fee for Technical Services under the Act as well as under Article-13

clause 4(a) and 4(b) of the DTAA. The CIT(A) was of the view that the clause 4(c) of Article -13 of the U.K treaty has no application in this case as was held by the Assessing Officer. Since the CIT(A) has held that the income of the assessee is taxable as Royalty and FTS, therefore, the CIT(A) did not go into the issue that the assessee has PE in India and taxability of the business income. Accordingly, the CIT(A) has held that the royalty and fee for technical services is taxable on gross basis in case of non resident and the Assessing Officer has taxed the same on the gross basis, and the provisions of section 44D are irrelevant for this purpose.

6. Before us, Mr. P.J Pardiwalla, Ld. Sr. Counsel for the assessee submitted that the service is operated and provided by the Geneva branch of the assessee. The server which facilitates the meeting platform of the subscribers who deals in the spot foreign exchange with other foreign exchange dealers is not situated in India and, therefore, the service charges received by the assessee from the Indian subscribers is not for use of any equipment in India. He has further submitted that RIPL is providing the equipment being computer hardware and installed the same at the location of the Indian subscribers together with the access/connectivity through leased connection lines from Indian service provider such as MTNL, BSNL etc. Beyond India the connectivity is provided by the assessee directly. The actual charges for the connectivity are paid by the customers separately to RIPL. RIPL is maintaining the connectivity through the license service provider and the customer has no role in maintaining and obtaining the connectivity. The customer who deals in foreign exchange places its bid through platform/interface and once the bid of the customer matches with the bid of the another customer, the deal is struck and it is binding on both the customers. This matching facility is provided through the server of the assessee in Geneva. The Ld. Counsel has submitted that the customers do not have any use or right to use any of the copy rights or software of the assessee which enables the subscribers to match the forex deals. Thus the subscribers are not exploiting the copyright subsisting in the products subscribed by them. The facility is copy righted software of the assessee. Further the process used in

providing the facility is not secret but it is a standard facility provided to the subscriber. There is no use of any information concerning industrial, commercial or scientific experiences involving the transfer of know how provided to the subscribers. The Ld. Counsel has pointed out that the CIT(A) has placed reliance on the ruling of AAR in the case of Groupe Industriel Marcel Dassault which has been overruled by the Hon'ble High Court of Andhra Pradesh reported in 354 ITR 316(AP). The Ld. Sr. counsel has contended that Reuters India shall supply the equipments as well as connectivity through leased circuit services to the clients. The necessary equipments with access to dealing 2000-02 system has been provided by the local concern with whom the assessee is having a separate agreement for making the provisions of installation of equipments and connectivity. The clients shall pay all the charges for installation, telecommunication charges including rentals for lines to RIPL apart from the monthly payment to assessee for the services. The assessee in turn pay the RIPL UK£ 1,000 per customer per month for providing marketing and support services to the assessee in India. Ld. Counsel has referred the decision of Hon'ble Delhi High Court in the case of Asia Satellite Telecommunications Co. Ltd (332 ITR 340) and submitted that the Hon'ble High Court has held that when the effective and general control of the equipment is not given to the customers and the customer has no choice of selecting the manner, time and nature of use and enjoyment, then it is not a transfer of right to use the equipment and, therefore the amount in question is not royalty either under the provisions of section 9(1)(vi) or as per the provisions of treaty. The Hon'ble Delhi High Court has examined the provisions of section 9(1)(vi) and particularly Explanation 2 providing definition of royalty and held that when the satellite remains in the control of operator, it had not leased out the equipments to the customers. The Hon'ble High Court has accepted the arguments of the appellant that the equipment is used by the appellant and it is only providing and rendering services to its customers and not allowing the customer to use the process.

7. Relying upon the decision of Hon'ble Delhi High Court in the case of Asia Satellite Telecommunications Co. Ltd (supra), the Ld. Counsel has submitted that when the server remains in the control of the assessee and only services are provided to the customers then the payment against such services cannot be held as royalty. As regards providing the broad band facility for connectivity to dealing 2000-02, the Ld. Counsel has submitted that the Hon'ble High Court has considered the Ruling of AAR in case of ISRO and held that the appellant had merely given access to a broadband available in a transponder which could be utilized for the purpose of transmitting the signals of the customers and, therefore the data sent by the telecast operator does not undergo any change or improvement through the media of transponder. Ld. Counsel has submitted that the services provided by the assessee is only in the nature of data processing for facilitating the match of the orders placed by one client with the availability of the commodity from other side. Therefore, the payment made by the clients to the assessee is only for availing the service of data processing and not for use of any specialized software. In support of his contention he has relied upon the decision of this Tribunal in the cae of Kotak Mahindra Primus Ltd. Vs. Deputy Director of Income Tax. He has also relied upon the following decisions:-

1. ISRO Satellite Centre (ISAC), IN RE (307 ITR 59)
2. Cable & Wireless Networks India (P) Ltd., (315 ITR 72)
3. Dell International services India P. Ltd. IN RE (305 ITR 37)

8. The Ld. Counsel has pointed out that after deciding the issue of royalty and fee for technical services, the CIT(A) has not gone into the issue of Permanent Establishment. Further the CIT(A) has held that the amount is taxable as fee for technical services under Article -13 clause 4(a) and clause 4(b) of the treaty and, therefore, in view of the CIT(A), clause 4(c) of Article -13 of the Indo-UK treaty has no application in this case. The Ld. Counsel has submitted that if the amount received is treated as fee for technical services under clause 4(a) and 4(b) of Article – 13 then the same is taxable at 15% of the gross amount of such royalty or fee for technical services whereas the CIT(A) has confirmed the 20% of taxability of the royalty on gross basis. The Ld. Counsel then submitted that

though the CIT(A) has not discussed the issue of PE, however in case RIPL constitutes a PE of assessee in India then as per the provisions of clause 6 of Article - 13 such royalty or FTS has to be taxed as per the provisions of Article – 7 as busineess profits and it will not be subjected to tax under the provisions of Article – 13 (2). In support of his contention he has relied upon the decision of this Tribunal in the case of Nippon Kaiji Kyokoi Vs. Income-tax Officer, International Taxation, (47 SOT 41). The Ld. Counsel then submitted that if the amount in question has to be assessed to tax as per Article – 7 of Indo-UK DTAA then it has to be taxed under the provisions of section 44DA and not u/s 44D as held by the Assessing Officer and CIT(A). The payment in question is not for use of any equipment but only for the services provided by the assessee using its own equipments. The customer has no dominion or control over the server situated in Geneva rather the assessee is using the server for rendering the services to the customers.

9. On the other hand, the Ld. DR has submitted that the services are provided in India and at the doorstep of the clients. He has referred the trading service order form and submitted that the equipments are supplied by the assessee through its Indian concern. The agreement entered into by the Reuters India Pvt. Ltd. (RIPL) also includes all terms and conditions contained in the Reuters Trading Service agreement. Supply of equipments is only subsequent to the assessee's trading service agreement and all other agreements are essence of the umbrella agreement and, therefore the services provided through a group entity are not an independent activity but part and parcel of the services provided by the assessee to its clients. He has referred the definition clause of the agreement and submitted that entire service is provided by RTSL though the equipments were arranged through its Indian group company. Reuter Trading Agreement is the master agreement and the services provided by the Indian subsidiary to the clients are subjected to the master agreement namely Reuter Trading Agreement. Thus the Reuters Service Agreement entered into between the RIPL and the Indian Banks is not an independent agreement but it is a part and parcel of the

master agreement under which the principles are defined and applicable to this agreement. The termination of agreement between RIPL and the Indian Banks is also provided on breach of the term of Reuters business principles. He has referred clause 8 of Agreement of Reuters Service Contract between RIPL and Indian Banks and submitted that the Reuters Business Principles and any Order Form are an integral part of the Agreement. Thus the Ld. DR has submitted that this agreement is not an independent agreement but is an integral part of Reuters Business Principles and Order Form as contained in the master agreement. The activity performed by the RIPL are inseparable from the services provided by the assessee. The equipments and other installation provided through RIPL were on behalf of the assessee. No charges for use of equipments is to be paid by the clients to RIPL except the actual uses of the communication facility. The Ld. DR has submitted that the payment has been made by the Indian clients for use and right to use the equipment comprising the computer and communication and connection provided as well as the information and software provided by the assessee from its server. He has referred clause 8 of the RTS agreement and submitted that the assessee is providing software and license to the Indian clients to use the software to install and use the software at the site solely in the ordinary course of business and further with the prior written consent, the Indian subscriber may sublicense its license to use Development tools to a developer for the sole purpose of carrying out the development work. The services provided by the assessee in the nature of "subscriber interface" and "subscriber detail" is also available in clause 9 of the RTS agreement. It is an interactive service and not one time agreement. The Ld. DR has referred the definition of software under Explanation 2 of section 9(1)(vi) of the Act and submitted that the services provided by the assessee is a design involving the technology to deliver the service to the subscriber through scientific equipments/commercial equipments. Scientific and commercial equipment are used for providing commercial information. Subscribers in turn use the services to manipulate and create driven data and information for their individual use. The services received by the clients are manipulated information which involves the processing, therefore, it is also a

business support service. He has relied upon the decision of Hon'ble High Court of Madras in the case of Verizon Communications Singapore Pte Ltd. (361 ITR 575) as well as in the case of Poompuhar Shipping Corporation Ltd. (360 ITR 257). The Ld. DR has also relied upon the decision of Hyderabad Bench of this Tribunal in the case of Frontline Soft Ltd Vs. DCIT (12 DTR (Hyd.) (Trib) 131) and submitted that the Hon'ble Madras High Court has considered the amendment in section 9(1)(vi) whereby Explanation 4 and 6 has been inserted and held that the expression 'use' or 'right to use' has to be understood in the light of the meaning of term 'royalty' provided in Explanation 5 and, therefore, when the services are rendered in India and consideration received from Indian clients the same attracts incidents of taxation in India as royalty. The possession, control of such right purported or information used directly by the payer and location of the right are not relevant in deciding the character of payment as royalty after insertion of Explanation 5 to section 9(1)(vi). The Ld. DR has also relied upon the Ruling of AAR in the case of Cargo Community Network (P.) Ltd., In re (289 ITR 355) and submitted that it has been held that royalty means a consideration paid for the use or right to use the equipment simplicitor is sufficient being called as royalty. The authority has discussed the term 'Plant' which would include any article or object fixed or movable, live or dead used by businessmen for carrying on his business and it is not necessary to confined to an apparatus which is used for mechanical and industrial business. The AAR has held that the word equipment construed in the light of section 9(1)(vi) (c) thus expand the normal meaning of word to cover even this specified categories of machinery or plant that would not constitute within its plain and ordinary meaning. The Ld. DR then relied upon the decision of this Tribunal dated 28.03.2014 in the case of Viacom "18" Media Pvt. Ltd. Vs. ACIT in ITA No. 1584/Mum/2010 and submitted that the Tribunal after considering the amended provisions of section 9(1)(vi) held that the transmission of satellite including uplinking, amplification, conversion for downlinking of any signal) falls under the expression "process". The Ld. DR has submitted that the Tribunal while deciding the issue of royalty has also considered the decisions,

relied upon by the Ld. Counsel, in the case of Asia Satellite Telecommunications Co. Ltd as well as other cases.

10. In rebuttal, the Ld. Counsel has submitted that Explanation 5 of section 9(1)(vi) has expanded the definition of royalty which is not *pari materia* with the definition provided under Article – 13(3) of the Indo-U.K treaty. He has thus submitted that a unilateral amendment in the Act, cannot take away the benefit provided under the treaty when the definition of royalty has been provided under the treaty. In support of his contention he has relied upon the decision of Hon'ble Jurisdictional High Court in the case of CIT Vs. Siemens Aktiongesellschaft (310 ITR 320) as well as the decision of Hon'ble Delhi High Court in the case of Director of Income Tax Vs. Nokia Networks OY (212 Taxman 68) (Del). The Ld. Counsel has also relied upon the decision of this Tribunal in the case of WNS North America Inc. Vs. ADIT (Intl. Taxation) 28 Taxmann.com 173 (Mumbai) and submitted that it has been held that any retrospective amendment to the provisions of Act will not *per se* have the effect of automatically altering the analogous provisions of the treaty.

11. We have considered the rival submissions as well as relevant material on record. The assessee has entered into a contract with Indian clients for providing its foreign exchange deal matching system services namely dealing 2000-02. The clients of the assessee are mainly Indian Banks. The services are provided against the monthly charges as per the agreement. In order to provide the service and access to the foreign exchange deal matching system, the assessee has also entered into agreements with its Indian Subsidiary namely Reuters India Pvt. Ltd in short (RIPL). The said agreements are called as promotion service agreement as well as advertising and marketing service agreement both dated 20.11.2006. The terms and conditions of the services provided to the Indian subscribers are stipulated in the Reuters Trading Service agreement (in short RTS agreement). The agreements are executed in accordance with the Reuters Business Principles reduced in writing being part and parcel of the RTS agreement. The RIPL in turn

also entered into Reuters Service Contract with the Indian clients for providing the necessary equipments, connection facility, installation and support service in order to avail the foreign exchange deal matching system provided by the assessee. Thus the Indian clients could avail the services of the assessee only through the equipments and connectivity provided by the assessee itself through its Indian subsidiary namely RIPL. The fee for providing the services is charged by the assessee from the Indian subscribers and actual uses of telecommunication are paid to the RIPL. The assessee is remunerating the RIPL for the services of marketing and installation of the equipment on behalf of the assessee to its clients. Thus though the equipments and other installation and connectivity are installed and provided through RIPL but the charges for the entire services and facility are paid by the clients to the assessee and not to the RIPL. The Ld. Counsel has also submitted that it is an integrated service rendered to the clients from its server situated in Geneva, therefore, there is no control or possession of the Indian clients to use or right to use the server of the assessee situated outside India. It is also contended that the assessee is rendering the services to the Indian clients by using its own server situated in Geneva and, therefore, in view of the decision of Hon'ble High Court of Delhi in the case of Asia Satellite Telecommunications Co. Ltd (supra), the charge/fee received by the assessee in rendering the services is not royalty. He has also strongly relied upon the decision of Hon'bld Andhra Pradesh High Court in the case of Sanofi Pasteur Holding SA (354 ITR 316)(supra).

11.1 It is pertinent to note that in the case of Asia Satellite Telecommunications Co. Ltd (supra), the issue fell for consideration of the Hon'ble Delhi High Court was whether rental charges for lease of transponder capacity to TV channels carrying out operations in India is the income deemed to accrue or arise in India and whether such income is royalty. The income to the non resident was for leasing out the transponder capacity to the non resident TV channels who are providing their channel services in India. The Hon'ble High Court in the case of Asia Satellite Telecommunications Co. Ltd (supra), after considering the fact that

the appellant is a foreign company incorporated in Hongkong and carried on business of providing private satellite communications and broadcasting facilities to the clients with whom the appellant had entered into agreement are not resident of India. The appellant had merely given access to a broadband available with the transponder which could be utilized for the purpose of transmission of signals to the customers. Thus it was found by the Hon'ble High Court that the data sent by the telecast operator does not undergo any change for improvement through the media of transponder. Since the transponder was in control and used by the appellant/transponder owner and it does not vest with the telecast operator/TV channels, therefore, the Hon'ble High Court has held that the process carried on in the transponder in receiving signals and retransmitting the same, is an inseparable part of the process of the satellite and that process is utilized only by the owner of the transponder who is in control thereof and, therefore, there was no use of process by the T.V. channels. Moreover, no such purported use has taken place in India as both the assessee and the broadcaster/T.V. channels are situated outside India. In the said case the payment by the broadcaster/T.V. Channels were paid for using the transponder capacity of satellite and not for using any information or data to be provided to Indian customers. In the case in hand the assessee is rendering the services of providing foreign exchange deal matching system. This system facilitates the Indian subscribers i.e. Banks to deal in the foreign exchange with the other counterparts who are ready for the transaction of purchase and sale of foreign currency. Thus the role of the deal matching system is to provide a platform where both purchaser and seller find the respective match for the intended transaction of purchase and sale. Therefore, the decision of Hon'ble Delhi High Court in the case of Asia Satellite Telecommunications Co. Ltd (supra), is not applicable in the facts of the case and particularly when the said decision is based on the finding that the transponder capacity has only a media for uplinking and downlinking of signals of the broadcaster and TV operators to be transmitted to their customers without any manipulation for improvement, whereas in the case in hand, the assessee is providing not only media but also the necessary

information and data which process the order of the clients and find the corresponding match to meet the order.

12. One more aspect which was involved and relevant for deciding the issue in the case of Asia Satellite Telecommunications Co. Ltd (supra) was the income deemed to accrue or arise in India on account of lease of transponder capacity to TV channels which is not in dispute in the case before us as the income in question has been received by the assessee from the Indian clients. The limited issue before us is the nature of income whether it is business income or royalty or fee for technical services. The Ld. Counsel has forcefully contended that a unilateral amendment in the Act without a corresponding change in DTAA cannot take away the benefit available in the treaty. There is no dispute that if a particular income is not taxable as per the provisions of DTAA then a unilateral amendment in the statute of the contracting state alone would not bring the said income to tax because as per the provisions of section 90 of the Income Tax Act, the beneficial provisions of DTAA will have the overriding effect to the provisions of Act. Thus the question arises whether the amount received by the assessee is Royalty or FTS income under the provisions of DTAA. The definition of royalty and fee for technical services has been provided under Article -13(3) and (4) as under:-

3 "For the purpose 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 pr other means of reproduction for use in connection with radio or television broadcasting, any patent, trade mark, 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 work, other than income derived by an enterprise of a Contracting State from the operation of ships or aircraft in international traffic.

4. For the purpsoe of paragraphe 2 of this Article, and subject to paragraph 5, of this Article, the term "fees for technical services" means payment of any kind of any person in consideration for the rendering of any technical or consultancy services (including the provision of services of a technical or other personnel) which:

(a) are ancilliary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 3(a) of this article is received;or
(b) are ancially and subsidiary to the application or enjoyment of the property for which a payment described in paragraph 3(b) of this Article is received; or

(c) make available technical knowledge, experience, skill know-how or processes, or consist of the development and transfer of a technical plan or technical design."

13. The payment received by the assessee against the services rendered to the Indian Banks whether falls under the term royalty or fee for technical services has to be decided by considering the definition as provided under the treaty and the real nature of the service provided in terms of the various contracts entered into between the parties. The various terms of agreement are defined under clause 1 of the RTS agreement and some of the relevant terms are defined as under:-

"Application Programming Interface(API) means a subscriber interface for use with the related service;
Autoquote Subscriber Interface means a subscriber interface for use with the Autoquote service"

Services
Means the product, materials or services provided by Reuters to Subscriber from time to time purusant to the Agreement

Site
Means my location of subscriber to which Reuters supplies access to the services directly;

Software
Means software, including APIs and related documentation provided by Reuters;"

System

Means the Reuters Equipment and networks used for the provision for the Services:

14. The assessee is facilitating its clients to use its system and application programming interface which is subscriber interface for use with the related services includding Autoquote service. The assessee is also providing the equipments with pre-loaded software to its subscribers and network used for provision of the services. The assessee grants subscriber limited license of software to install and use at the site as per clause 8.1 of the agreement as under:-

> *"8.1 Reuters grants Subscriber a non-exclusive, non-transferable, terminable license for so long as Subscriber receives the service to which the software relates, to install and use the software at the site solely in the ordinary course of its own business unless otherwise set forth in this Agreement."*

15. Even the said license can be sub-licensed by the subscriber with the prior consent of the assessee as per clause 9.5 as under:-

> *"9.5 Upon Reuters' prior written consent, subscriber may sublicense its license to use Development Tools to a Developer for the sole purpose of carrying out the development work described in clause 9.2 for the subscriber and only if subscriber ensures that the developer*
>
> *(a) Is made aware of any complies with the provisions of the agreement.*
> *(b) Does not re-use in any way the development work carried out for subscriber;*
> *(c) becomes a mamber of Reuters Developer Partner Program (or any successor program) and signs the Retuers Trading Application Partner Agreement (or any successor agreement)."*

16. As per the Reuters license principles interactive features of the system includes messaging, chatroom, bulletin board or those that allow interactivity between the users. Hardware/software and related documentation supplied by the assessee's group concern also includes the assessee's Application Programming Interface (API). All the services are rendered by the assessee on the

site /office of the subscriber as per the clause 2.1 and 2.1.1 of the business principles as under:

> *2.1 Usage rights for information*
> *We classify services containing information into families sharing common business terms, as follows*
> *2.1.1 Individual Services (listed here)*
> *Individual services are user-based Services priced, postitioned and packaged for users. For as long as they take the relevant service, users can:*
> *a) View, manipulate and create Derived Data fron information for their individual use:*
> *b) Store informatiion, Manipulated Information and/or Derived Data for their individual use;*
> *c) Distribute and Redistribute limited extracts of information, Manipulated information and/or Derived Data to anyone, provided this is doen in a non systematic manner and (except for derived data) is attributed to Reuters:*
> *d) Systematically Distribute Information and Manipulated Information if you comply with paragraph 2.4; and*
> *e) Systematically Distribute and Redistribute certain derived Data if you either*
> *(i) Pay the relevant Derived Date Redistribute Service fees; or*
> *(ii) Sent the relevant Derived Data to us as Contributed Data.*
>
> *Provided that, in each case, you pay any related charges specified in the Contract and such Redistribution does not form part of a saleable product. The rights in the paragraph 2.1.1(e) are granted only in respect of specified sources of information and are subject t further conditions imposed by Third Party Providers.*

17. Therefore, the subscriber/user can view, manipulate and create the derived data from information for their individual use. Further the subscriber can Store information, Manipulate information for its use and also to Distribute or Redistribute information and Drive Data to anyone to a limited extent so far as it is not done in a sytematic manner. The subscribers are allowed to use the information and even to manipulate and Drive the Data to anyone for their individual use. Thus it is clear from the terms and conditions of the contract between the parties that it is subscriber who is using the information and system of the assessee for their commercial/business purposes. The information is made

available by the assessee through its system and other equipments installed at the site of the subscriber to facilitae the connectivity with the assessee's system/reuter located in Geneva. The portal design having the system of matching the request of the clients of the Assessee is hoisted on its server. The system which is a complex, commercial device /apparatus provides a gateway for processing request of the clients and makes available the matching counter request and thereby ensures the transactions of purchase and sale of foreign exchange between the two counter parts of the clients. Therefore, the portal having system of matching the request along with the computer and internal access to the clients constitute integrated commercial equipment which performs complex functions of processing the request, providing information and facilitates the transaction of purchase and sale of foreign exchange by matching the demand and supply. The platform of transacting the purchase and sale is commercial equipment allowed to be used by clients/subscribers for commercial purposes. The payments made by Indian clients/subscribers to the Assessee for use and right to use of such equipment and information for processing their request of purchase and sale of foreign exchange constitute royalty.

17.1 The nature of service rendered by the assessee includes the information concerning commercial use by the subscriber. Further the entire system of the assessee including the equipments and connectivity facility is provided at the site of the subscriber. Therefore, the assessee is providing the service in the form of information and solution to the need of the subscribers by providing the matching party. The entire system along with the matching system and connectivity involves processing of subscriber's business queries and orders and finding out the matching reply in the shape of counterpart demand or supply for execution of the transaction of purchase and sale of foreign exchange. This sytem of the assessee is available only to the subscribers who have been given the access to the information concerning commercial as well as processing the orders

placed by the subscribers. It is the term of the contract/agreement that the subscriber is given the license to use the software running the system.

17.2 As per the terms and conditions stipulated in the agreement the Indian clients/subscribers accept the individual non-transferable and non exclusive license to use the licensed software programme for the purpose of carrying out the purchase and sale of foreign exchange. Thus, what is granted under the agreement is license to use the software for internal business of Indian clients. Further, the Assessee also permitted the Indian clients to sub-license the software with prior permission of assessee. It is pertinent to note that its not the license to use the software alone but the Assessee has made available the computer system along with the software. The Indian clients are paying for use and right to use of equipment (scientific, commercial) along with software for which license was granted by assessee. It is clear from the terms and conditions of the agreement and arrangement between parties that the Indian clients are not permitted to access the portal of the Assessee from any other computer system other than the computer provided by the Assessee and by use of software provided in the said computer system. Therefore, it is not a case of simplicitor payment for access to the portal by use of normal computer and internal facility but the access is given only by use of computer system and software system provided by the Assessee under license. Indian clients make use of the copyright software along with computer system to have access to the requisite information and data on this portal hoisting on the server of the Assessee . Accordingly, by allowing the use of software and computer system to have access to the portal of the Assessee for finding relevant information and matching their request for purchase and sale of foreign exchange amount to imparting of information concerning technical, industrial, commercial or scientific equipment work and payment made in this respect would constitute royalty.

18. As we have given the finding that the income received by the assessee from the Indian Banks is in the nature of royalty, therefore, the other issues of fee for technical services becomes academic and we do not propose to decide the same. Further, though the assessee has not raised any specific ground on the issue of PE, however, the Ld. Counsel for the assessee has submitted that even if the Indian subsidiary of the assessee constitute PE or otherwise the assessee has PE in India in that case para 6 of Article 13 of DTAA will apply and the royalty or fee for technical services is assessed to tax in terms of provisions of Article -7 or Article -15 of DTAA. We do not agreewith the contention of the ld. Counsel for the Assessee because once the receipt in question has been decided as royalty in nature then there is no need to go into the question of assessee having PE in India. Para 6 of Article-13 can be pressed into service only in the case when the existence of PE of a non resident is not in dispute. In the case in hand the assessee has not come up with the claim that the services rendered to the Indian Banks are through its PE. Rather the assessee has vehemently contended that it has no PE in India. In these facts and circumstances, the provision of para 6 of Article -13 canot be invoked in case when the receipt is found as royalty in terms of Article – 13(3) of the DTAA and assessee has not admitted any PE in India.

19. In the result appeal of the assessee is dismissed.

Order pronounced in the open court today i.e 18-7-2014.

Sd/-	Sd/-
(P.M. Jagtap)	**(Vijay Pal Rao)**
(Accountant Member)	**(Judicial Member)**

Mumbai dated 18-7-2014
SKS Sr. P.S, and
JV. Sr.PS

Copy to:

1. *The Appellant*
2. *The Respondent*
3. *The concerned CIT(A)*
4. *The concerned CIT*
5. *The DR, "L" Bench, ITAT, Mumbai*

By Order

Assistant Registrar
Income Tax Appellate Tribunal,
Mumbai Benches, MUMBAI