(2013) 10 MAD CK 0179

Madras High Court

Case No: Tax Case (Appeal) No''s. 2206 to 2208 of 2006, 56 to 64 of 2013 and M.P. No''s. 1, 2, 2, 1 and 2 of 2006, 1, 1 and 1 of 2008

M/s. Poompuhar Shipping Corporation Ltd.		APPELLANT
	Vs	
The Income Tax Officer, International Taxation II The Assistant Director of Income Tax, International Taxation Vs M/s. Poompuhar Shipping Corporation Ltd.		RESPONDENT

Date of Decision: Oct. 9, 2013

Citation: (2013) 263 CTR 377

Hon'ble Judges: T.S. Sivagnanam, J; Chitra Venkataraman, J

Bench: Division Bench

Advocate: Arvind P. Datar, S.C. for Mr. Hari Shankar Mani and Subbaraya Aiyar Padmanabhan in T.C. A Nos. 2206 to 2208 of 2006 and 598 to 601 of 2013, Mr. P.S. Raman, S.C. for Srinath Sridevan in T.C. A Nos. 2629, 2630 of 2006 and Mr. N.V. Balaji, for Income Tax in T.C. A Nos. 56 to 64 of 2013, for the Appellant; Arvind P. Datar, S.C. for Mr. Hari Shankar Mani and Subbaraya Aiyar Padmanabhan in T.C. (A) Nos. 56 to 64 of 2013, Mr. N.V. Balaji for Income Tax in T.C. (A) Nos. 2206 to 2208 of 2006 and 598 to 601 of 2013, Mr. T. Ravikumar for Income Tax in T.C. (A) Nos. 2629 and 2630 of 2006, for the Respondent

Judgement

Chitra Venkataraman, J.

T.C. (A) Nos. 2206 to 2208 of 2006, 2629 and 2630 of 2006 and 598 to 601 of 2013 are filed by two different assessees and T.C. (A) Nos. 56 to 64 of 2013 are filed by the Revenue as against the order of the Income Tax Appellate Tribunal. The assessment years under consideration in T.C. (A) Nos. 2206 to 2208 of 2006, 2629 and 2630 of 2006 and 598 to 601 of 2013 are 2002-03, 2003-04 and 2004-05; 2003-04 and 2004-05 and 2002-03, 2003-04 and 2004-05 and 2006-07 respectively. The assessment years under consideration in T.C. (A) Nos. 56 to 64 of 2013 are 2002-03,

2003-04, 2004-05, 2006-07, 2002-03, 2003-04, 2004-05, 2005-06 and 2006-07 respectively. This Court admitted the above Tax Case (Appeals) on the following substantial questions of law:

T.C. (A) Nos. 2206 to 2208 of 2006:

1. Whether on the facts and circumstances of the case, the Tribunal was right in holding that the payment made for taking ship on time chartered basis would constitute "royalty" as defined u/s 9(1)(vi)(b) of the Income Tax Act and tax has to be deducted at source accordingly?

2. Whether on the facts and circumstances of the case, the Tribunal was right in not holding that as per the terms of "time charter of ships", the charterer merely acquires a right for performance of services by the ship owner for carriage of goods and is not for the use of ships pure and simple?

3. Whether on the facts and circumstances of the case, the Tribunal was right in holding that the assessee cannot decide whether to deduct tax at source or not on the basis of bonafide belief that the amounts are not chargeable to Indian Income Tax? and

4. Whether the Tribunal failed to note that the payment for time charter made to a foreign shipping company cannot be subject to Indian Income Tax in view of the provisions of the Double Taxation Avoidance Agreements entered into between India and the respective foreign nations?

T.C. (A) Nos. 2629 & 2630 of 2006:

1. Whether a ship is "equipment" within the meaning of Article XII of the India-Cyprus Double Taxation Avoidance Agreement?

2. Whether payments made by the appellant assessee towards the Bareboat-Charter-cum-Demise will not constitute capital expenditure, when the BBCO is the approved means of finance ship acquisition in the 1990s, in accordance with Ministry of Finance letter dated 19.10.92?

3. Whether payments made under the BBCD are exigible to tax in India, when the vessel is flying the Cyprus flag, and is deemed to be flying the Indian flag only for the purpose of lifting Government cargo, under the provisions of the Merchant Shipping Act?

4. Whether the Tribunal''s interpretation of Articles 7, 8 and 12 of the India-Cyprus Double Taxation Avoidance agreement is correct?

5. Whether the Tribunal''s construction of BBCD is correct, especially in the light of position now abundantly clarified by Section 115V of the Act?

T.C. (A) Nos. 56 to 64 of 2013:

1. Whether under the facts and circumstances of the case, the Income Tax Appellate Tribunal was right in holding that the assessee is not an agent of the foreign shipping companies to whom it has made payment towards hire charges for the vessels?

2. Whether under the facts and circumstances of the case, the Income Tax Appellate Tribunal was right in holding that the lease of vessels by the assessee from the Foreign Shipping Companies is only on time charter?

3. Whether under the facts and circumstances of the case, the Income Tax Appellate Tribunal was right in holding that the payment made by the assessee to the foreign shipping companies towards hire charges is not ''royalty''?

4. Whether under facts and circumstances of the case, the Income Tax Appellate Tribunal was right in not following its earlier decisions in its own case reported in 109 ITD 226 and in the case of West Asia Maritime Limited 297 ITR 202 (AT-Chen), wherein it was held that the remittances were in the nature of royalty and liable for tax deduction at source?

5. Whether under the facts and circumstances of the case, the Income Tax Appellate Tribunal was right in remitting the matter back to the assessing officer for fresh consideration and initiate proceedings either u/s 163 or u/s 201, after disposal of matters in sub-judice before the Hon''ble High Court (in TCA Nos. 2464 & 2465 of 2006)?

T.C. (A) Nos. 598 to 601 of 2013:

1. Whether on the facts and the circumstances of the case and in law the Tribunal was right in holding that assessee is liable to deduct tax u/s. 195 in respect of Charter Hire Charges paid to Foreign Shipping Companies after holding that the assessee cannot be treated as a representative assessee u/s. 163 of the Act and the payment of Charter Hire charges would not constitute Royalty in terms of Section 9(1)(vi) of the Act?

2. Whether on the facts and the circumstances of the case and in law the Tribunal was right in directing the assessing officer to initiate proceedings against assessee either u/s. 201 or u/s. 195 of the Act in the light of Judgment of the Hon''ble Bombay High Court in the case of Commissioner of Income Tax, Bombay City-II Vs. Premier Tyres Ltd.,

3. Whether on the facts and the circumstances of the case and in law the Tribunal having held that assessee cannot be treated as a ''representative assessee'' and payment towards charter hire is not royalty, erred in setting aside the matter to the assessing officer to initiate proceedings against the assessee under one of the provisions of the Act in the light of the judgment of the Bombay High Court in the case of Commissioner of Income Tax, Bombay City-II Vs. Premier Tyres Ltd.,

2. The appellant in Tax Case (Appeal) Nos. 2206 to 2208 of 2006 is a Government of Tamil Nadu owned company engaged in the business of moving coal from various ports in India to Tamil Nadu Electricity Board, Chennai. For the purpose of transportation of coal, to meet the requirements of the Tamil Nadu Electricity Board, the assessee chartered foreign shipping vessels by entering into agreements in standard time charter form, approved by the New York Produce Exchange. As far as the foreign shipping vessels are concerned, the appellant entered into time charter agreement with the shipping companies having their vessels registered in different countries. The following table gives the name of the shipping company, chartered hire charges and the country of residence.

Name of the Shipping Company	Charter Hire Charges	Country of Residence
Setaf Segat	112,352,982	France
Star Shipping	123,415,610	Norway
Jing Feng Marine Inc	1,537,923	Hong Kong
Handy Bulk AG, Germany	78,587,302	Germany
Singapore Shipping Int. Pte. Ltd.	698,567	Singapore
Western Bulk Carriers	113,723,125	Australia

3. In response to a query from the Assessing Officer on the details of payment made to the foreign shipping companies, under the time charter, the assessee gave the details. On going through the same, the Assessing Officer issued notice u/s 201 of the Income Tax Act calling upon the assessee to show cause as to why they should not be treated as assessee in default for non-deduction of tax at source while remitting charter payments to the shipping company. According to the Assessing

Officer, the charges paid by the assessee company was on account of the use and hire of the ship; hence, ''royalty'', within the meaning of Section 9(1)(vi) of the Income Tax Act, falling under Explanation 2 Clause (iv(a)) and within the purview of Article 12 of the Double Taxation Avoidance Agreement (hereinafter referred to as ''DTAA'').

4. The assessee resisted the view of the Assessing Officer and contended that the charges paid to the foreign companies for hiring the ship would not come within the definition of ''royalty'' and the use of the ship would not amount to use of equipment. In any event, the charges paid could only be treated as one for rendering of services, assessable as profits and gains in business, falling under Article 8 of the DTAA. Even herein, the charges though income in the hands of the recipient, is not taxable in India, there being no business connection and permanent establishment of the shipping companies in India.

5. The Assessing Officer rejected this contention in respect of the assessment years under consideration and passed orders u/s 201(1) and 201(1A) of the Income Tax Act. Aggrieved by this, the assessee preferred appeals before the Commissioner of Income Tax (Appeals) in respect of all the above assessment years.

6. The assessee contended that payments made under time charter would not constitute ''royalty'' under the Income Tax Act as well as under DTAA, since the payment was for delivery of standard services, which the owner of the ship provided through their Officers, crew and ship. Reiterating their contention that ship is not an ''equipment'' falling within the meaning of Section 9(1)(vi) Explanation 2 Clause (iva) of the Income Tax Act, the assessee referred to the OECD commentary and from the text book by Klaus Vogel and submitted that the payments made under the Time Charter were not liable to be treated as royalty; consequently, the assessment was bad.

7. The first Appellate Authority rejected the contentions of the assessee that payments made were for rendering of services. Referring to DTAAs, the Commissioner of Income Tax (Appeals) held that charges for use of equipment were liable to be treated as ''royalty'' and hence ship, being an equipment, the receipts were liable to be treated as ''royalty'', within the meaning of Clause (iva) of Explanation 2 to Section 9(1)(vi) of the Income Tax Act. Referring to ''international traffic'' as defined in DTAA, the Commissioner of Income Tax (Appeals) held that Article 8 of the DTAA would apply in a case where the shipping company itself derived profits from the transportation by sea of passengers etc., carried on by the owner. The profits covered by Article 8 of the DTAA included profits derived by an enterprise from rental of ships incidental to any activity directly connected with such transportation by sea of passengers, mail, livestock or goods carried on by the lessees or charterers of the ship. The first Appellate Authority held that the foreign vessels have been designated as coastal Vessels employed to trade between Ports in India and hence, would not come under international traffic, as defined under DTAA.

The definition on ''international traffic'' would apply where the journey of a ship or aircraft goes between a place in one Contracting State to a place in the other Contracting State and then continues to another destination also located in that other Contracting State. This definition would not apply when the ship is operated between two places in the same contracting State. Citing an example that cruise beginning and ending in the same contracting State without a stop in a foreign Port does not constitute a transport of passengers in international traffic, on the admitted fact that the foreign ship was put to use solely for operating between the Indian ports, the Commissioner of Income Tax (Appeals) held that the payments for hiring under Time Charter would not come within the purview of Article 8 of the DTAA, applicable to income from operation of ships in international traffic. Even assuming for a moment that the amount paid would not come under royalty and are to be treated as business income, yet, income arising in India could be taxable in India. The Commissioner of Income Tax (Appeals) pointed out that as per the existing agreement between Ennore Port and TNEB, two berths in Ennore Port are under lease to TNEB exclusively for ships chartered by the assessee. The facilities, i.e., place of berth is guaranteed for the foreign ships in coastal waters chartered by the assessee; such facility would tantamount to permanent establishment for the foreign company. The Commissioner of Income Tax (Appeals) also referred to the period of operation available, as furnished by the assessee, that it was evident that some ships had been put to use for more than 180 days and in some cases, more than 90 days continuously in Indian waters. Going by the above facts and referring to the OECD commentary on Article 8 of the DTAA, the Commissioner of Income Tax (Appeals) held that payments made would not come under the purview of Article 8 of the DTAA. Thus, the Commissioner of Income Tax (Appeals) upheld the order of the Assessing Officer passed u/s 201(1) and 201(1A) of the Income Tax Act.

8. Aggrieved by this, the assessee preferred further appeals before the Income Tax Appellate Tribunal, which dismissed the appeals and thereby confirmed the order of the Commissioner of Income Tax (Appeals). The Tribunal followed the decision rendered in the case of West Asia Maritime Ltd., V. ITO in ITA Nos. 2376 and 2377/Mds/2005 dated 19.5.2006, wherein the Tribunal held that ''ship'' was an equipment and the hire charges partook the character of ''royalty'' for the use of the equipment under the provisions of Section 9(1)(vi) of the Income Tax Act. The Tribunal held that the foreign shipping company was in shipping business; as such, in the context of the business, ship could be construed to be an equipment of the business. It further held that the word ''equipment'' has got various shades of meaning, one such being, things which are needed for a particular purpose or activity. On the submission of the assessee that the time charter was not for the hire of the ship, but for rendering the services, the Tribunal held that the consideration was paid for the use of the ship; hence, the payments were liable to be held as ''royalty''. The Tribunal further rejected the arguments of the assessee on the aspect of permanent establishment and ultimately referred to Section 195 of the Income

Tax Act and pointed out that it was obligatory on the part of the person responsible for making the payment to the non-resident to deduct tax at source in respect of any sum chargeable under the provisions of the Act. If there existed any doubt as regards the taxability of such income, the person responsible for deducting tax should make an application to the Assessing Officer in this regard and it was not for the assessee to decide on its own on the non-liability of the payment to tax.

9. Referring to the decision reported in The Transmission Corporation of A.P. Ltd. and Anr Vs. The Commissioner of Income Tax, A.P., , the Tribunal held that deduction at source was only a convenient method of tax collection and it acted as a check on tax evasion. The amount payable to the non-resident was exigible to tax and as no tax was deducted on that amount, rightly, the Assessing Officer treated the assessee as one in default, within the meaning of Section 201 of the Income Tax Act. Thus the Tribunal dismissed the appeals. Aggrieved by this, the assessee has filed the above Tax case (Appeals). Thus, T.C. (A) Nos. 2206 to 2208 of 2006 relate to the levy of interest and penalty for non-deduction of tax at source u/s 201 and 201(1A) of the Income Tax Act.

10. In respect of the very same assessee for the very same assessment years, the Assessing Officer proceeded to make assessment, treating the assessee herein as a representative assessee, it being an agent of the foreign shipping companies u/s 163 of the Income Tax Act. These are the subject matters of appeals before this Court in T.C. (A) Nos. 56 to 64 of 2013. For the assessment year 2002-03, in the proceedings initiated u/s 147 of the Income Tax Act, the Assessing Officer pointed out that the foreign companies had not filed the return of income and paid tax on the amounts received on hire charges treated as ''royalty''. Thus, treating the assessee as an agent of the foreign shipping company as per Section 163(2) of the Income Tax Act, assessment was made on the income, namely, hire charges, at the hands of the assessee as per Section 160(1)(i) of the Income Tax Act.

11. Referring to the definition of ''business connection'' as per Explanation 2 to Section 9(1)(i) of the Income Tax Act, the Assessing Officer found that the foreign shipping companies were the owners of the ship hired by M/s. Poompuhar Shipping Corporation. The Assessing Officer held that considering the element of continuity of activity, there was business connection between the assessee and the foreign company.

12. The Assessing Officer further pointed out that payments had been made towards hiring of ships on a fixed rate per day basis i.e., even if there was no freight element or even if the ship was not plying at all, still the payment would have to be made to the foreign companies for hiring of ships. Thus, on a consideration of the various terms of the agreement, he viewed that it was not one for affreightment. Referring to the decision reported in The Union of India Vs. Gosalia Shipping (Pvt.) Ltd., , the Assessing Officer came to the conclusion that the payments made to the foreign shipping companies, which were put to use between the ports in the Indian

coast were assessable as ''royalty'' as per the provisions of the Income Tax Act. On the question of ship as equipment, the Assessing Officer also referred to the earlier order of the Tribunal, holding that ship was an equipment. Thus, the Assessing Officer held that hire charges were liable to tax u/s 115A read with Section 44D of the Income Tax Act or at the rates specified by DTAA, whichever is beneficial to the assessee. The assessment order in respect of all the assessment years under consideration are almost similar. Aggrieved by this, the assessee went on appeal before the Commissioner of Income Tax (Appeals), who considered the contentions under the common order.

13. On a perusal of the agreement, the Commissioner of Income Tax (Appeals) held that the nature of payments to the foreign companies was only for hiring of ships, which is similar of hiring a car or chauffer. Going through the various clauses in the time charter agreement, the Commissioner of Income Tax (Appeals) held that the assessee company had control over the captain. As far as the transportation and delivery of goods are concerned, the relationship between the assessee company and the foreign company was that of an agent and principal; thus on a consideration of the nature of relationship as well as on the payment made, the Commissioner of Income Tax (Appeals) confirmed the view of the Assessing Officer and thereby dismissed the appeals. The assessee preferred further appeals before the Income Tax Appellate Tribunal. We find from the order of the Tribunal that applying the decision of this Court reported in The State of Tamil Nadu Vs. Tvl.Essar Shipping Limited No. 7, Chennai House Esplanade Chennai 600108 , the Tribunal held that the hire charges paid by the assessee to the foreign shipping companies was for providing services for transportation of coal from one Port to another on hire basis; hence payment did not partake the character of royalty. The payment was made for the use of the ship by its owner in rendering services to the assessee. Hence, the payment could not constitute ''royalty'' for the use of industrial, commercial, scientific equipment. Thus, Section 9(1)(vi) of the Income Tax Act was not attracted. Although the assessee could not be treated as a representative assessee u/s 160 of the Income Tax Act, it was however liable to deduct tax on the payments made to the shipping companies as per the provisions u/s 195 of the Income Tax Act. Non-compliance of provisions of Section 195 resulted in initiation of proceedings u/s 201 of the Income Tax Act. Hence, the Tribunal remitted the matter back to the Assessing Officer to initiate proceedings under one of the provisions of the Act for the purpose of assessing the income. Aggrieved by this, Revenue filed appeals before this Court in T.C. (A) Nos. 56 to 64 of 2013.

14. The assessee also filed tax cases in T.C. (A) Nos. 598 to 601 of 2013, questioning the view of the Tribunal on the remand order passed by the Tribunal directing the Assessing Officer to initiate proceedings against the assessee under one of the provisions of the Act for the purpose of assessing the income. The assessee submits that considering the view that the Tribunal has taken on the representative capacity of the assessee, the further direction given to initiate proceedings, either u/s 201 or

u/s 195, applying the decision reported in Commissioner of Income Tax, Bombay City-II Vs. Premier Tyres Ltd., , is erroneous in law. The Tribunal rejected the contention of the assessee that the reopening of assessment u/s 148 of the Income Tax Act was barred by limitation and that the reopening was only a change of opinion. The Tribunal dismissed the assessee''s claim on both counts holding that the Officer had valid reasons for reopening of the assessment and that there was no change of opinion in the reopening of the assessment. The Tribunal further held that once a notice was issued within the time limit, but served after the expiry of the time limit, the assessment could not be set aside as time barred. Aggrieved by the direction of the Tribunal, the present appeals are filed before this Court by the assessee.

15. We have already pointed out in the preceding paragraph, particularly with reference to T.C. (A) Nos. 2206 to 2208 of 2006, that while rejecting the assessee''s appeal on the aspect of royalty and treating the ship as an equipment, the Tribunal followed its earlier order in the case of West Asia Maritime Ltd., V. ITO in ITA Nos. 2376 and 2377(Mds/2005 dated 19.5.2006. The said order relates to the assessment years 2002-03 and 2003-04, which are subject matters of appeals at the instance of the assessee in T.C. (A) Nos. 2629 and 2630 of 2006.

16. The assessee - West Asia Maritime Limited is a Public Limited Company engaged in the business of shipping. Besides owning ships, it also charters ships. During the relevant year, it made payments to M/s. Dolphin Maritime Co. Limited, an associate enterprise in Cyprus towards hire charges, payable under bare boat charter-cum-demise for the use of the ship by name, Gem of Paradip. The Assessing Officer held that hire payments by the assessee therein was ''royalty'' for the use of equipment, namely, ship, without deducting TDS u/s 195 of the Income Tax Act. The Assessing Officer pointed out that according to the agreement, the assessee could exercise its option to purchase the ship at the end of each year. However, the assessee had not done so. Hence, the payment made for each of the assessment years, namely, 1999-2000 to 2004-2005 was to be taken as for hire, taxable under Article 12 of the DTAA. According to him, as the ship was put to use on the coastal line between Ports in India by the hirer, namely, Poompuhar Shipping Corporation, Article 8 of DTAA would not be of any application. Thus the Assessing Officer rejected the case of the assessee that bare boat charter-cum-demise was a purchase transaction.

17. Aggrieved by this, the assessee went on appeal before the Commissioner of Income Tax (Appeals). The Commissioner of Income Tax (Appeals) went through the agreement and pointed out that in consonance with the policy of the Government, on the acquisition of Vessel, as early as 23.1.1999, the assessee received no objection from the Ministry of Shipping in extending the BBCD permission in respect of the Ship, by name, ''M.V. Yaqui'' to be renamed as ''m.v. Gem of Paradip'' for a further period of 90 days from 13.02.1999. The assessee negotiated with the Marine

group of ICICI Limited for concomitant funding from March 31, 1999 onwards on the proposal to acquire the Vessel on BBCD basis in respect of the vessel from the owners DMCL, Cyprus. The assessee entered into an agreement with DMCL on 14th May, 1999 on various aspects relating to the vessel and the modalities including delivery, inspection, maintenance and operation, insurance and repairs, bank guarantee etc. The first Appellate Authority pointed out that a reading of the agreement showed that the assessee was not the owner of the vessel until the last month''s hire installment was paid to DMCL, in exchange of which, the owner would execute a bill of sale in favour of the assessee. The cost of the Vessel would vary depending on the date on which such option was to be exercised by the assessee. Thus, till the option to purchase and to make the balloon payment to the owner was exercised, ownership remained with DMCL. It was noted that the owner executed a bill of sale on 12.1.2005, acknowledging the receipt to 2.75 million US Dollars from the assessee. This bill of sale was executed in Nicosia, Cyprus. Thus, till 12.1.2005, ownership remained with DMCL; thus the consideration paid periodically was in the nature of hire charges for the use of the ship and was not the deferred payment of the consideration. In the circumstances, the first Appellate Authority rejected the argument of the assessee that it had purchased the ship on outright basis and hence, became the owner. He pointed out that till 12th January, 2005, ownership never passed on to the assessee. The periodical payments were in the nature of hire charges for the use of the ship as described in the agreement. The first Appellate Authority further referred to the letter from Marine group of ICICI Ltd. that there would be no down payment for the acquisition of the vessel on BBCD basis. It approved the bare boat charter hire charges to be paid. The first Appellate Authority pointed out that none of the correspondences on the policy of the Government for BBCD method of acquiring ships stated that the payment made towards hire charges should be treated as part of the sale consideration. Considering the above, the payment made was in the nature of hire charges for the use of the ship as long as the option to buy the ship, remained with the charterer. He also referred to UN model convention and commentaries and thus rejected the assessee''s arguments. The first Appellate Authority rejected the plea of the assessee based on Article 8 of the DTAA and ultimately held that payments made to the non-resident Indian was for hire charges, which would be covered by Article 12 of the DTAA, it being royalty payment. As to the meaning of the expression ''equipment'' appearing in Explanation 2(iva) to Section 9(1)(vi) of the Income Tax Act, he referred to the dictionary meaning as well as to the book by Klaus Vogel on Double Taxation Convention and ultimately rejected the assessee''s appeal. On further appeal before the Tribunal, it confirmed the view of the first Appellate Authority, thereby dismissed the appeals. Hence the present appeals by the assessee relating to the assessment years 2002-03 and 2003-04 in T.C. Nos. 2629 and 2630 of 2006.

18. Learned senior counsel Mr. Arvind P. Datar appearing for the appellant in T.C. (A) Nos. 2206 to 2208 of 2006 and 598 to 601 of 2013 submitted that the payment for

chartering of Vessel is not a consideration for right, property or information. The phrase, ''Use or right to use'' is an expression which is there in Article 12 of OECD model and UN model, which came to be adopted in Explanation 2(iva) of Section 9(1)(vi) of the Income Tax Act. Referring to the commentaries on the UN and OECD model, he submitted that payment under time charter party or voyage charter party or for liner services is more in the nature of a payment for services and hence, cannot be construed as royalties. The expression ''use of or right to use of'' is not defined in the Act or in the DTAA. So too the OECD Model. Yet, the commentaries make a clear distinction between the amount paid for the use of equipment called royalty and the payment constituting consideration for sale of equipment and for availing of the services. Time charter is not a contract for hire of the ship, but for provision of standard services which the owner of the ship provides through the ship, crew and the master. Time charter party merely gives the right to use the carrying capacity of a ship; hence, under a time charter, there is only a contract for services. Thus, referring to the meaning of the expression ''use or right to use'' in the context of the time charter party internationally accepted, learned Senior Counsel submitted that neither Clause (iva) of Explanation 2 to Section 9(1)(vi) nor Section 9(1)(vi) of the Income Tax Act could cover a payment under time charter to hold the payment as ''royalty''. Referring to the provision of DTAA of Australia and the Model Code, he submitted that shipping income are separately dealt with under DTAA.

19. Referring to the provision in Clause (iva) of Explanation 2 to Section 9(1)(vi) of the Income Tax Act as excluding the income from the business operation of ships by a non-resident for providing services in connection with or supplying plant and machinery on hire for ''use or to be used'' in the extraction or production of mineral as given u/s 44BB of the Income Tax Act, he submitted that Clause (iva), at best, could apply only to those use or right to use of equipment relating to the activities mentioned in Clause (i) to (iv) and (v) of Explanation 2 to Section 9(1)(vi) of the Income Tax Act. Thus, in a time charter, there being no hiring of the ship in the sense in which the said term ''hire'' is understood, Clause (iva) must receive the understanding that similar provision contained in OECD model have received, which was the basis for the amendment to insert Explanation 2(iva). Referring to Explanations 4 and 5, he submitted that going by the scope of the Explanation introduced to clear the doubts, it is clear that what is included by reason of the inclusive definition, must have relevance to those equipment having relevance to Clauses (i), (ii), (iii), (iv) and (v) of Explanation 2 to Section 9(1)(vi) of the Income Tax Act. While Explanation 2 includes four types of assets, falling under tangible and intangible assets, Explanation 5 uses three types of assets, viz., right, property or information relating to these alone. With the conscious omission of ''equipment'' in Explanation 5 and it having relevance to the aspects of possession, control or place with reference to right, property or information, the same has to be understood to mean that what could not be taxed by reason of presence or absence of possession,

control or place alone is now sought to be taken care of by Explanation 5. The Circular issued reported in 252 ITR (ST) 65 at 75 thus clearly brings out the scope of Explanation 2. Learned senior Counsel further referred to the definition of ''equipment'' under the Merchant Shipping Act to contend that ship cannot be construed as an equipment. Thus, in any event, Clause (iva) of Explanation 2 to Section 9(1)(vi) of the Income Tax Act cannot rope in ''ship'' as an equipment to call the payments as one for the use or right to use of an equipment.

20. He further referred to the definition given u/s 44BB of the Income Tax Act on the expression ''plant''. In the absence of any definition on ''equipment'', the said term has to be understood in the manner in which it is commercially used and understood. In other words, ship cannot be called as ''equipment'' in an ordinary commercial parlance and with the exclusion of the income falling u/s 44BB of the Income Tax Act, it is clear that the intention is not to treat ship an equipment. Placing reliance on the decision reported in The State of Tamil Nadu Vs. Tvl.Essar Shipping Limited No. 7, Chennai House Esplanade Chennai 600108 , particularly at page 226, he submitted that going by the said decision, which primarily dealt with the hiring of a ship under a time charter in the context of the liability on the transfer of right to use u/s 3-A of the Tamil Nadu General Sales Tax Act, there being no possession transferred to the hirer for use or right to use, the payments under the time charter cannot be treated as one for the use or right to use the ship as an equipment. Thus, apart from the fact that ship is not an equipment, Clause (iva) of Explanation 2 to Section 9(1)(vi) of the Income Tax Act has no relevance to the receipts on time charter, which is essentially one of service. Thus the decision of this Court reported in The State of Tamil Nadu Vs. Tvl.Essar Shipping Limited No. 7, Chennai House Esplanade Chennai 600108 covers the issue on the scope of the expression ''use or right to use'' and when the payment is not royalty, then it could, at best, be only ''business profits'' falling under Article 7 of the DTAA. Even herein, unless the assessee has a permanent establishment linked to the earning of profit, the Indian Authority has no jurisdiction to assess the same. Referring to the Revenue''s case that the non-resident has a permanent establishment, he again referred to Article 5 of the OECD model and the meaning of ''permanent establishment'' as given in various DTAAs and submitted that the berths in the Port belong to the Chennai Port and this was allotted to TNEB for unloading of coal; thus limited to usage by TNEB, the view of the Authorities as though the berth was the permanent establishment, is totally incorrect and against the definition of ''permanent establishment''. In the absence of any control and exclusive possession and use and as the fixed place as in the case of an owner or a lessee, the non-resident having no such right over the space or the berth, the Revenue cannot treat it as a permanent establishment, even to assess the business income. Thus, even applying the source concept, the income being not assessable as ''income'' under the Income Tax Act or ''royalty'' under Clause (iva), the Revenue has no jurisdiction to assess this income under the provisions of the Income Tax Act. In any

event, except Hong Kong, all other charter agreements are covered by DTAA; hence, the various clauses in the DTAA have relevance in the matter of considering the case of the assessee.

21. Continuing the said arguments further, Mr. P.S. Raman, learned senior counsel appearing for the appellant in T.C. (A) Nos. 2629 and 2630 of 2006, submitted that the assessee in the said case had taken a ship on bare boat charter-cum-demise hire from M/s. Dolphin Maritime Co. Limited in the year 1998. This ship was subsequently renamed by the assessee as ''Gem of Paradip''. The assessee contended that it had taken a ship on bare boat charter cum demise in the year 1999 from a Cyprus company and as per the agreement, the assessee could exercise the option to purchase the Vessel at the end of each year. He further pointed out that the vessel-Gem of Paradip was given on hire to M/s. Poompuhar Shipping Corporation, which was used for movement of coal to TNEB from Haldia/Paradip/Vizag to Chennai/Tuticorin. The agreement between the assessee and the Cyprus company is one covered by DTAA dated 26th November, 1995. According to learned senior counsel, the case of the assessee squarely falls under Article 8 of the DTAA and not under Article 12 of the DTAA relating to royalty, since ''royalty'', even as per Clause (iva) of Explanation 2, applies to use or right to use of scientific, commercial or industrial equipment.

22. Taking us through Explanation 2 of Section 9(1)(vi) of the Income Tax Act, he submitted that read in the context of other Clauses in the said Explanation, ''equipment'' referred to in Clause (iva) to Explanation 2 must be read as having relevance to those special equipment relating to intellectual property rights, which are of industrial, commercial and scientific nature; hence, not every kind of transaction, ''equipment'', for use or right to use, is covered by Clause (iva) of Explanation 2. The attempt of the Revenue to include a Vessel given on time charter or by demise within the meaning of the term ''equipment'' would only strain what is understood as ''equipment'' and thereby ''royalty''. On the admitted fact that there is no definition of ''equipment'' in the said Section, the decisions of the Court say that common parlance test alone should be applied to understand the meaning of the term used in the enactment. Under the common parlance, whatever is there in the Vessel alone are ''equipment''. He pointed out to the definition of ''equipment'' under the Merchant Shipping Act, and submitted that there being no definition on the expression ''equipment'', Revenue cannot artificially strain the expression ''equipment'' to include ship. Thus, whenever Parliament intended that the expression is to cover more than the common parlance meaning, it gave expansive meaning. In the absence of any such definition, the safe guide is to go by a common parlance test alone.

23. Pointing out that there is a clear distinction between plant and machinery and ships, he sought to rely on the depreciation table given in the Rules on depreciation showing separate distinct treatment to plant and machinery and to ships as

separate class by themselves. Although, certain provisions like Section 43(3), 44BB as well as Section 32A of the Income Tax Act define ''plant'' to include ship, yet, in the absence of any meaning given to the expression ''equipment'' or any indication in the Section that the term has to be read in an expansive way, the term ''equipment'', as referred to in clause (iva), must be read in the context of the other entries in the Explanation. Thus, for the purpose of royalty, use or right to use of an equipment must be in relation to Clauses (i) to (iv) and (v) of Explanation 2 to Section 9(1)(vi) of the Income Tax Act; hence, only a restricted meaning should be given. Thus, having contended that ''equipment'' would not include a ship, he took us through the various Articles in DTAA, in particular to Article 8 relating to receipts from the business of the ship transport, Article 12 on royalty and submitted that going by the BBCD agreement between the parties, the receipts could not be brought under Article 12 of the DTAA and it can only be brought under Article 8 of the DTAA. Even in respect of this income from business, he referred to the definition of ''international traffic'' under Article 3(e) of the DTAA that when a transport by a ship is operated by an enterprise registered, having headquarters in the contracting State, the income can only be taxed in the contracting State and not in India.

24. Taking us through Section 115 of Chapter XIIG of the Income Tax Act, he submitted that with the definition given on bare boat charter-cum-demise, with the option given to the assessee to purchase the Vessel, the payment made has to be considered as deferred payment on the option for purchase of the vessel Thus Clause (iva) will not be of relevance to the case on hand.

25. In sum and substance, the contention of the learned senior counsel is that the policies of Ministry of Finance and Ministry of Surface Transport govern the purchase of a ship under BBCD. Thus the agreement was a means for acquiring the ship and not for hiring the ship simpliciter. In any event, ship not being an equipment, the payment cannot be brought under clause (iva) of Explanation 2 to Section 9(11)(vi) of the Income Tax Act. Referring to the decision reported in The Indian Hotels Company Ltd. and Others Vs. The Income Tax Officer, Mumbai and Others, , he submitted that the Authorities should have given a meaningful reading to the expression ''equipment''.

26. Countering the submissions made by learned senior counsel appearing for the assessees, Mr. N.V. Balaji, learned standing counsel appearing for the Revenue in T.C. (A) Nos. 2206 to 2208 of 2006 and 598 to 601 of 2013 and 56 to 64 of 2013, submitted that the assessees'' contention that the decision of this Court reported in The State of Tamil Nadu Vs. Tvl.Essar Shipping Limited No. 7, Chennai House Esplanade Chennai 600108 has relevance, is totally misplaced. Taking us through the amendment to Section 9(1)(vi) of the Income Tax Act in the year 2001 and the insertion of Explanations 4 and 5, he submitted that the case of the Revenue could be well sustained even without the aid of the newly inserted Explanation 5. Referring to the arguments of the learned senior counsel appearing for the assessee that

Section 9(1)(vi) has to be interpreted in terms of OECD model and to the Circular reported in 252 ITR (ST) 65 at 75 and the DTAA, he pointed out that originally, the definition ''royalty'' under DTAA under the Act did not cover the case of use or right to use scientific, commercial and industrial equipment. To remove this anomaly alone, amendment was brought in by the insertion of Clause (iva) under Finance Act, 2001 with effect from 01.04.2002. Referring to Section 90(2) of the Income Tax Act, he pointed out that the moment the income sourced to a non-resident is identified, then the assessment of the same has to be seen in the light of the provisions of the Income Tax Act as well as DTAA provisions. In the background of Section 90(2) of the Act, for the purpose of the applicability of the Act and the DTAA, the country of source of income and the residence of the recipient assumes great significance and to the extent beneficial to the assessee, the provisions of the Act would apply. Referring to Article 23A of OECD, he pointed out that when the contingency of taxation of income in two countries arise, then the need for avoiding such a contingency in the form of granting relief, arises.

27. Taking us through the various articles in OECD model as well as to the commentary therein, he submitted that even in applying the commentaries under the said Code, one cannot lose sight of the fact that Explanation 2(iva) has nothing in conflict with the provisions under OECD model. He pointed out that the assessees in appeals before us have entered into time charter and bare boat charter with the foreign companies. The ships chartered sail only on the Eastern Coasts. Under the Act, what is taxable is the traffic within India and even though the effective management may be outside, nevertheless, when the ships are operated between the places in the other contracting State, namely, India, income arising from the transaction on the coast is taxable in India; hence, the transaction does not fall within the meaning of ''international traffic'' to be covered under Article 8 of the DTAA. Referring to the examples given under the Model Code, he thus pointed out that what is taxable is the traffic within India; hence, the assessee''s case in West Asia Maritime Co. Limited would not fall for consideration under Article 8 of the DTAA. Thus, reading the Clauses in Article 8, on facts, he submitted that international traffic being absent, the receipts would not fall for consideration under Article 8 of the DTAA.

28. On the treatment of the receipts as royalty falling under Clause (iva)/Article 12, he referred to Article 12 of the OECD model (prior to amendment of the Article in the year 1992) as well as to the DTAAs that the definition of ''royalty'' included receipts arising from use or right to use of industrial, commercial and scientific equipment. Thus, lease income receipts were included under royalty. However, after 1992, apart from consideration paid on the use right to use of copyright on literary, artistic or scientific work, patent, trade mark, design or model plan, secret formula or process or for information, consideration on the use or right to use on the industrial, commercial and scientific experience, was brought under the definition of royalty and the lease income on use or right to use industrial, commercial and scientific

equipment taken out to treat it as business to be taxed under Article 7 of the DTAA. However, India did not amend the DTAA following the amendment under OECD model and not being a party to OECD, there is no compulsion too to follow suit. Thus the unamended provision alone would be of relevance for the purpose of understanding the issue before the Court.

29. Learned Standing Counsel appearing for the Revenue further drew our attention to the Clause in the Australian DTAA, that in the application of the agreement by the Contracting State, any term not defined in the agreement shall have the meaning which it has under the laws of that State from time to time in force, relating to the taxes to which the agreement applied. Referring to the authoritative text by Klaus Vogel on the right to use of industrial, commercial and scientific equipment, he submitted that wherever the term ''equipment'' is used, payment is treated as ''royalty'' only. Thus, there is no difference between the treaty treatment on royalty and the Act on royalty.

30. Answering the submissions made by Mr. P.S. Raman, learned senior counsel appearing for the assessee in T.C. (A) Nos. 2629 and 2630 of 2006, learned Standing Counsel appearing for the Revenue submitted that Explanation 2(iva) excluded specific cases falling u/s 44BB of the Income Tax Act alone, which means all other cases relating to the consideration for the use of the ship would get covered under Clause (iva). Drawing inspiration from the decision of the Apex Court reported in Daman Singh and Others Vs. State of Punjab and Others, , he submitted that by the said specific exclusion, all that the Act conveys on the scope of the expression ''equipment'' is that payment made for the use or right to use of any other ship not falling u/s 44BB of the Income Tax Act stands included within the meaning of ''equipment''. Thus, given the wider interpretation to the word ''equipment'', he submitted that the first part of the Explanation must be understood to include all other ships and but for the exclusion of Section 44BB, even those ships would get covered under the definition of ''equipment''.

31. Referring to Law Lexicon 3rd Edition giving the meaning of the definition ''equipment'', he submitted that vehicles, ships, or aircraft are treated as ''equipment'' only. Referring to the contention based on the different depreciation rate in the schedule on which heavy reliance is placed by the assessee, thus drawing the inference that plant and ships are two distinct categories, learned standing counsel pointed out that the depreciation table is for the specific purpose of granting a deduction and the various entries in the schedules cannot be the basis for understanding the meaning of ''equipment''. Thus, wherever the statute thought of special treatment to a specific business or article, the Act contains special provisions either in the main Act or in the delegated Legislation; hence, depreciation schedule, which is a matter of administrative convenience, cannot be a tool for understanding the expression ''equipment''.

32. Taking us through the depreciation schedule as prevailing between 1984-85 and 1987-88, and for the period from 1988-89 to 2002-03, ship stood as falling under separate entry with a different depreciation percentage and it continued to be so in the year 2003-04 to 2005-06, he submitted that the specific purpose for which such treatment is given cannot be understood as having a general effect on other provisions too or having a guiding effect in the matter of considering as to whether ship would fall under ''plant'' at all. Pointing out to the definition of ''plant'' u/s 43(3) of the Income Tax Act as to include a ship having relevance to Sections 28 to 41 of the Income Tax Act, he submitted that it is totally unsafe to go by the treatment under one Section relating to one purpose to understand the scope of the treatment given in other provisions. His submission, therefore, is, ship is an ''equipment'' within the meaning of Clause (iva) of Explanation 2 to Section 9(1)(vi) of the Income Tax Act.

33. On the submission of the assessee that ''equipment'' in Clause (iva) has relevance to those covered under Clauses (i) to (iv) and (v) and hence, they have relevance only to special equipment, learned standing counsel referred to the decision reported in (2010) 320 ITR 290 and submitted that it is not necessary that specialised ships in oil exploration alone are covered u/s 44BB of the Income Tax Act and as per this decision, even a chase Vessel relating to seismic survey and data acquisition are inextricably linked to prospecting operations covered under second part of Section 44BB(1) of the Income Tax Act. He submitted that for the purpose of treating receipts for use or right to use an equipment, it is not necessary that it be restricted to specialised equipment, relatable to clauses (i) to (iv) and (v) of Explanation 2 to Section 9(1)(vi) of the Income Tax Act. He pointed out that admittedly the consideration paid was for hire and not for affreightment. Placing reliance on the decisions reported in (1991) 3 WLR 609 (Care Shipping Corporation V. Itex Itagrani Export S.A.); (2001) All ER 403 (Whistler International Limited V. Kawasaki Kisen Kaisha Limited); (1978) 3 WLR 309 (927 Federal Commerce Navigation Co. Ltd. V. Molena Alpha Inc.) and The Union of India Vs. Gosalia Shipping (Pvt.) Ltd., , he submitted that de hors Explanation 5, time charter being one for usage of ship and the consideration is for the right to use the ship, the transaction would fall clearly within the ambit of ''use'' under Clause (iva) of Explanation 2 to Section 9(1)(vi) of the Income Tax Act, which language is also found in Article XII of the DTAA.

34. Referring to the reliance placed on the decision reported in The State of Tamil Nadu Vs. Tvl.Essar Shipping Limited No. 7, Chennai House Esplanade Chennai 600108 , he submitted that the said decision has no relevance to the provisions of the Income Tax Act. The expression ''use'' u/s 3-A of the Tamil Nadu General Sales Tax Act is on transfer of right to use. Going by the chargeable event therein, where possession and control are sine qua non to attract chargeability and that the use under time charter being in the nature of the contracting party not having possession and control thereon and which attracted service tax liability, following

the decisions of the Apex Court on similarly worded provision in other States'' General Sales tax Acts, this Court held that the transaction did not attract the charge u/s 3-A of the Tamil Nadu General Sales Tax Act.

35. Referring to Section 68(105)(zzzj) on Service Tax provision under the Finance Act, 1996, he submitted that the supply on tangible goods for use without transferring the right of possession and effective control was considered for taxation under the service tax provisions. Thus, even assuming that it is taxable as service, still, the consideration being for use or right to use, the reference being for use simplicitor, the receipts are liable to be treated as ''royalty''. Considering the language difference and the chargeable event in the Tamil Nadu General Sales Tax Act, the decision reported in The State of Tamil Nadu Vs. Tvl.Essar Shipping Limited No. 7, Chennai House Esplanade Chennai 600108 has no relevance to the case on hand. In the circumstances, the Tribunal committed a serious error in following this decision in respect of the appeals filed by the assessee, which has given rise to the Revenue filing T.C. (A) Nos. 56 to 64 of 2013.

36. Referring to the decisions reported in Rashtriya Ispat Nigam Ltd. Vs. Commercial Tax Officer, Company Circle, Visakhapatnam, affirmed in Controller of Estate Duty (Central), Bombay Vs. Jaisinh Gopaldas, and 20th Century Finance Corpn. Ltd. and Another Vs. State of Maharashtra, , he submitted that the distinction between ''transfer of right to use'' and ''use'' for the purposes of sales tax enactments thus being clearly spelt out in the above decisions, Clause (iva) of Explanation 2 to Section 9(1)(vi) of the Income Tax Act being transfer of use or right to use, where custody is sufficient, one cannot view the provisions in a narrow manner and in any event, going by the terms of agreement, the receipts for the use of the ship are covered by the expression ''royalty''.

37. Referring to the decisions reported in The Union of India Vs. Gosalia Shipping (Pvt.) Ltd., ; Commissioner of Income Tax Vs. Hongkong Oceans Shipping and others, and Commissioner of Income Tax Vs. Taiyo Gyogyo Kabushiki Kaisha, dealing with cases u/s 172 of the Income Tax Act, learned Standing Counsel appearing for the Revenue submitted that where the facts are covered by charter agreements and the payment not being one for freight but for the use of the ship, the receipts are rightly brought under the definition of ''royalty''. As to the reliance placed on the Australian decision by Mr. Arvind P. Datar, learned senior counsel appearing for the assessee, he submitted that those decisions relate to e-commerce issues and have no relevance to the time charter as well as bare boat charter. The control of the ship and the usage right being with the charterers, the consideration could only be seen as one for use or right to use. Thus, even prior to the amendment, the case would directly be covered by the expression ''use'' in Clause (iva) of Explanation 2 and even without the aid of Explanation 5 to Section 9(1)(vi) of the Income Tax Act, the receipts could be properly brought under the above said Clause in Explanation 2.

38. Referring to the position post amendment, wherein Explanation 5 is introduced retrospectively, learned Standing counsel submitted that the insertion of Explanation 5 was introduced as a clarificatory amendment for the purpose of removing the doubts raised on certain aspects of the payment treated as ''royalty''. Couched in a language to give exhaustive meaning to the term ''royalty'' in respect of any right, property or information, he submitted that the amendment made it clear that irrespective of the possession, control, direct use by the payer and the location of the right, property or information in India, the consideration paid for, would nevertheless be treated as ''royalty''. In Explanation 2, Clauses (i), (v) and (iva) deal with transfer of any right relating to the intangible and tangible property rights, not including any amount referred to in Section 44BB of the Income Tax Act, respectively; Clauses (ii) and (iv) deal with imparting of any information concerning the IPR rights concerning technical, industrial, commercial or scientific knowledge, experience or skill and Clause (iii) deals with use of IPR or similar property. Thus, after the amendment, any right, any property and any information, irrespective of possession or control, whether or not being with the payer or used directly by the payer or the location in India, are covered under Explanation 5; in other words, what is implicit in Clause (iva) of Explanation 2 is now made explicit through Explanation 5. Thus, payment for providing a facility without a transfer of right to use, would also fall for consideration under ''royalty''. He further pointed out that the Articles on royalty in the DTAAs are no different from what is given under Clause (iva) and the Explanation does not override the DTAA provisions on royalty; consequently, there is no conflict between DTAA and Clause (iva) of Explanation 2 to Section 9(1)(vi) of the Income Tax Act.

39. Referring to the decisions reported in (1999) 113 ITR 317 (Aggarwal Brothers V. State of Haryana and another) and Rashtriya Ispat Nigam Ltd. Vs. Commercial Tax Officer, Company Circle, Visakhapatnam, , he submitted that the right to use of an equipment need not always be followed by a transfer of the equipment and for a transfer of use or right to use; Clause (iva) in Explanation 2 never looked upon on a transfer of possession or control. Thus, Explanation 5 has not created fresh or additional charge but has merely reiterated or made it explicit on what is contemplated under Clause (iva). Thus, for the purpose of bringing a receipt under Clause (iva), so long as there is use or right to use an equipment, barring those cases covered by Section 44BB, all equipment, usage or right to use of those equipment, would stand covered by Clause (iva) and the concept of specialised equipment to those restricted to Clauses (i) to (iv) and (v) to be read into Clause (iva), is totally uncalled for. Thus, going by Section 192 of the Income Tax Act, the assessee has an obligation to deduct tax on the royalty paid and failure to deduct tax attracts Section 201 and 201(1A) of the Income Tax Act, relevant to T.C. (A) Nos. 2206 to 2208 of 2006.

40. On the question as to whether the assessee Poompuhar Shipping Corporation could be treated as an agent of the non-resident u/s 160 read with Section 163(1)(c)

and that there could not be a parallel proceedings with one under Sections 195, 201, 201(1A) and 160, he pointed out that Sections 195 and 195(2) are on TDS on non-resident and certificate of non-deduction to be obtained, that the income is not chargeable. The obligation to deduct tax at source is on any person liable to make payment. When a person contends or the recipient contends that receipts are not liable to be charged under the provisions of the Income Tax Act, necessary safeguard is provided for in the form of certificate to be obtained from the Assessing Authority u/s 195(2) of the Income Tax Act. Admittedly, neither the assessee nor the non-resident invoked Section 195(2) of the Income Tax Act. The mechanism on TDS is more a facility for recovery and at that stage, the question of that person being treated as an agent of the recipient does not arise. The question as to whether a person could be assessed as an agent or not in a representative capacity, hence, is a stage arising after the deduction stage contemplated u/s 195. Thus Sections 160, 163, 195, 201, 201(1A) of the Income Tax Act operate on different fields and they are not in conflict.

41. Learned Standing Counsel appearing for the Revenue contended that as far as Section 160 is concerned, for the purposes of the Act, a representative assessee means an agent of the non-resident including a person treated as an agent u/s 163 of the Income Tax Act in respect of the income of a non-resident specified in sub-section (1) of Section 9. Referring to Section 163(1)(c) on the definition of ''agent'' in relation to non-resident as any person in India from or through whom the non-resident is in receipt of any income, whether directly or indirectly, learned standing counsel submitted that if the income does not fit in with Section 9(1)(vi), then the applicability of Section 9(1)(i) becomes relevant. According to the assessee, the receipt is business income and for determining the status of the assessee u/s 163, it is enough to show that the receipts fall under any of the Clauses u/s 9 of the Income Tax Act.

42. As far as the assessee is concerned, business connection exists in India and as per Explanation 2 to sub clause (i), ''business connection'' includes any activity carried on through a person acting on behalf of a non-resident. Explanation 2 thus includes certain transactions with effect from 1.4.2004. The expression ''business connection'', has been explained in the decision reported in Commissioner of Income Tax, Punjab Vs. R.D. Aggarwal and Company, and this decision has been consistently followed. Thus, when the relationship is not of an occasional one but of a continuous nature, the regularity of the activity and the intimate connection between the non-resident and Indian business for earning global income resulting in profit in India by the existence of the time charter agreement is clearly seen thus indicating business connection in India.

43. On the question as to whether the non-resident could be said to have a permanent establishment, he referred to Article 5 in OECD commentary as well as Article 5 in DTAA for Australia, that a place of business, as given under a permanent

establishment, includes facilities; thus, a Port used by every person is also a place of business and there need not be any exclusive usage of the space by the foreign enterprise, as has been contended by the assessee. Hence, it is immaterial whether the non-resident is the owner or the place is a rental one or otherwise, at the exclusive disposal of the enterprise, there need not be a formal legal right to use that place, for, even under Article 5, for a permanent establishment, what is contemplated is (a) business, (b) a fixed place of business and (c) the business to be carried on partly or fully therein. Referring to the OECD commentary, he submitted that the place of business need not be a fixed place fixed to geographical location and depending on the nature of business, it may vary, the only requirement being that there must be a close connection between the business needs and the geographical points. Thus, the ship docks used by several persons is also a place of permanent establishment; thus the ship dock, the berthing facility available for regular use, to wait and move on instruction, the facility being available for regular use by the non-resident, thus clearly show the existence of permanent establishment and the particular location within which the activities moved and identified, constituted a commercial and geographical coherence with respect to the business of the assessee. Thus the assessee cannot plead that the non-resident had no permanent establishment. Touching on the expression "through which" the business is carried on under the definition of ''permanent establishment'', he pointed out that the chartered ship on lease moved along the Indian coast granted by the Indian Authority and for giving a permanent establishment, there need not be a specific geographical location as a fixed place of business. Given the nature of business requiring movement between two points, specific geographical point, as a fixed one, cannot be insisted upon. In any event, Port being a fixed place where the ship is docked, the operation of the ship between two ends is necessitated by the business exigencies and that, by itself, would not negate the concept of permanent establishment as far as the non-resident is concerned. This is so in the context of the nature of business, which requires moving. Thus, if the assessee''s contention is to be accepted that the activity is only in the nature of service, hence, would not fall under ''royalty'', the receipts being ''business income'', with the business connection and place of permanent establishment thus shown to exist, the receipts are assessable in the source territory. Article 5 being common in all the treaties, the data furnished by the assessee in any event negate the claim of the assessee that it had no permanent establishment. Thus the concept of permanent establishment is treaty specific and is common to all the treaties.

44. He further pointed out that Article 12(4) in the treaty with Australia (similar are the terms with other countries too), specifically pointed out that if the resident of the Contracting State is beneficially entitled to ''royalty'' carries on business in the other Contracting State through a permanent establishment and the property, right or services in respect of which royalties paid are effectively connected with the permanent establishment or fixed base and in such case, the provisions of Article

12(1) and (2) would not apply, but Article 7 or Article 11(5), as the case may be shall apply; thus Article 7 will be applicable to ''business profits'' which do not belong to categories of income not covered by the other Articles.

45. In this connection, he drew our attention to the commentary on model convention, particularly to the 1977 model, which included payments "for the use or the right to use of industrial, commercial or scientific equipment" as falling under ''royalty'' and subsequently deleted. To bring this apart from the income from container leasing under Article 7 or 8, as the case may be, rather than under Article 12, in other words, if the economic ownership of the property is permanently allocated to the permanent establishment, then, the property would form part of the ''business property'' of the permanent establishment and the income would be taxable as ''business profits'' under Article 7.

46. As to the contention of the assessee, particularly with reference to West Asia Maritime Co. Limited, as to whether income should fall under Article 7 or 8 or not, learned standing counsel replied that rental income as profits from the operation of the ship are clearly spelt out in the DTAAs, which are the results of the negotiation between the two Countries; wherever it is not negotiated, it would remain as ''business profit'' and not as a profit from the operation of the ship, to fall under Article 8. As far as this case is concerned, as found out by the learned Commissioner of Income Tax (Appeals), the payment cannot be treated as towards the cost of the ship being paid as deferred payment and the transfer itself took place long after the assessment years under consideration. He further contended that the contention to bring the case under Article 8 is also misconceived. The factual findings of the authorities clearly point out that the deferred payment made were in the nature of lease rentals and were not towards deferred consideration.

47. As to the objection of the assessee that when the assessee had time charter with several foreign non-resident ship owners, one assessment order passed covering all the recipients in a representative capacity, is illegal, learned standing counsel submitted that this, at best, could only be viewed as a technical violation and this cannot, however, introduce any illegality in the assessment. Thus, learned standing counsel submitted that the case of the assessee would fall for consideration under Explanation 2(iva) of Section 9(1)(vi), as ''royalty'' and ''equipment'' would include ship. The time charter agreement being one for the use of the ship, the payments made thus would come under ''royalty'' and the obligation being there on the assessee to deduct tax, failure to do so would attract penal action. This would be so even in the case of BBCD. In the alternative, if the assessee''s contention that it is not royalty but it is a business income is to be accepted, he fairly submitted that the question as regards permanent establishment not being considered by any of the Authorities, which, it is argued, that the matter may be remanded for considering this income as ''business income'' for deciding the allocable profits as per the DTAA. The amendments brought in by insertion of Explanation 5 being clarificatory, does

not, in any manner, affect the position of law as it existed under Clause (iva) of Explanation 2 to Section 9(1)(vi) of the Income Tax Act. In any event both before and after the amendment the payment remains royalty only.

48. Regarding the contention of the assessee on the provisions of DTAA and OECD model, he submitted that the expression of ''royalty'' in DTAA is on the same lines as in Clause (iva) and since the Explanation is a clarificatory one and when no new charge is created, the Explanation cannot be read as though it had enhanced the scope of the definition of ''royalty'' in Explanation 2 for the first time. In fact, the UN model and the Income Tax Act are on the same lines and only post 1992 amendment, OECD model omitted "use or right to use industrial, commercial and scientific equipment" to substitute the same as "use or right to use industrial, commercial and scientific experience." Thus, practically, there is no conflict between DTAA and the Income Tax Act. Thus, wherever there is a DTAA and the receipt being ''royalty'', there could be no dispute in applying DTAA to the assessee''s case and going by the decision reported in Union of India and Another Vs. Azadi Bachao Andolan and Another, , the effect of DTAA has to be given its full thrust.

49. On the assessee''s argument that ''receipts'' would fall under Article 8 and not as ''royalty'' as argued by Mr. P.S. Raman, learned Senior Counsel appearing for West Asia Maritime Co. Limited, that income from shipping income could not be charged in the country of source, learned standing counsel submitted that the ships operated within Indian coastal waters and going by the meaning of ''international traffic'', the movement being within the Indian coastal waters, Article 8 has no relevance. Wherever the treaty contemplated otherwise, it specifically stated so. To that end, he placed reliance on the treaty provisions in Italy, Kuwait, Mongolia, Netherlands, U.K. and Ukraine, which specifically includes rental charges as income from the operation on international traffic. Taking the argument of the assessee that the income would be ''business income'' under Article 7 of the DTAA and that the assessee has no permanent establishment in India, learned standing counsel submitted that if this Court is to accept the plea of the assessee that the income is not taxable as ''royalty'' but income in the ''nature of service'', even then a question arises as to whether the income arises out of the business connection through the permanent establishment. Therefore, the assessee is bound to deduct tax.

50. Mr. T. Ravi Kumar, learned standing counsel appearing for the Revenue in T.C. (A) Nos. 2629 and 2630 of 2006, took us through the order of the Income Tax Officer as well as the Commissioner of Income Tax (Appeals) and pointed out that as far as the bare boat charter is concerned, initially, the assessee had gone for a bare boat charter agreement alone. He further pointed out that the assessee had subsequently addressed a letter in October, 1999, seeking permission to purchase a Vessel in terms of the agreement entered into between the assessee herein and M/s. Dolphin Maritime Co. Ltd., Cyprus. In terms of the agreement, there was an addendum entered into on 14th May, 1999, giving the hire charges payable

quarterly for 69 months for the purchase option at the end of each period at a price to be paid by the assessee. The letter addressed to ICICI also showed the intention. The letter by ICICI merely gave its approval to the Bare boat charter hire charges, to be paid quarterly. Thus, according to the learned standing counsel, the first Appellate Authority found that the charges paid during the charter period was in the nature of hire charges for the use of ship along with the option to buy the ship.

51. Referring to the various clauses in the DTAA and the agreement, he pointed out that the Commissioner of Income Tax (Appeals) found that on the given set of facts what the foreign company earned was hire charges for the use of bare boat from 15.4.1999 to 25.10.2002. Referring to Article 8, the Commissioner of Income Tax (Appeals) held that the assessee did not fulfil the requirement of Article 8, since profits derived from the operation of ships in the coastal traffic is distinguished from the international traffic. As regards the relevance of Article 12 relating to royalties, the Commissioner further pointed out that the provisions of Article 7 would be applicable only in case where the foreign company itself was in operation of ships for transportation of passengers/goods in the international traffic. Since the payments made were with reference to the hire charges for operating the ships on the Indian Coast, the same would be covered by Article 12 of the DTAA. The Commissioner of Income Tax (Appeals) also upheld the contention of the Revenue that ship was an equipment. Thus, on the facts found, learned standing counsel submitted that the contention of the assessee claiming hire charges as capital expenditure was clearly an after thought, the accounting treatment given clearly showed the assessee treating it as revenue expenditure. Once the accounts were placed before the AGM, it is no longer open to the assessee to shift its stand to wriggle out of the liability u/s 201 and 201(1A) of the Income Tax Act. Learned standing counsel adopted the arguments of Mr. N.V. Balaji, learned standing counsel appearing for the Revenue in T.C. (A) Nos. 2206 to 2208 of 2006 and 56 to 64 of 2013 and submitted that the facts of the case clearly attracted Article 12 of the DTAA.

52. Replying to the arguments taken by the Revenue, Mr. P.S. Raman, learned senior counsel appearing for the assessee in T.C. (A) Nos. 2629 and 2630 of 2006 submitted that the Tribunal as well as the Authorities below committed serious error in thinking that the assessee did not exercise its option for purchase. Going by the terms of the agreement dated 14.5.1999, it was clear that the payment structure as is given in the addendum itself would show that what was agreed to between the parties was deferred payment on the consideration. Referring from the text by Klaus Vogel, particularly Pages 788 and 789, he submitted that ship not being an equipment to fall for consideration under Article 12 and there being no permanent establishment, BBCD would clearly show that it is concerned more about the sale of the Vessel; consequently, Article 8(6) would be of relevance. Touching on the terms of the said agreement that no right is reserved on the Cyprus company to retrieve the Vessel except in stated circumstances, BBCD has to be seen as one for sale of

the Vessel. In the hire purchase agreement the option to purchase being predominant, the question of treating the deferred consideration as ''royalty'' did not arise. He pointed out that for Article 8(6), the test of international traffic has no relevance. In any event, even taking the view that till the exercise of option to purchase the use or right to use being there, ship not being an equipment, Explanation 2 on ''royalty'' is not attracted to the facts of the case. He also laid emphasis on the principles of interpretation as propounded in the decision reported in Union of India and Another Vs. Azadi Bachao Andolan and Another, .

53. Mr. Arvind P. Datar, learned senior counsel appearing for the assessee in T.C. (A) Nos. 2206 to 2208 of 2013, in reply, submitted that the normal understanding of the term "equipment" is that it relates to plant and machinery. There is no provision anywhere in the Income Tax Act treating plant and machinery to include ''ship''. Therefore, when there is enough material in the Act itself to show that ship is treated differently from general plant and machinery, then ship cannot be treated as something similar to plant and machinery to become an ''equipment''. Since Clause (iva) of Explanation 2 to Section 9(1)(vi) of the Income Tax Act is similar to OECD model and internationally, ship is not treated as an ''equipment'', the attempt on the part of the Revenue to treat ship as an equipment for the purpose of attracting Clause (iva) is totally against the provisions of the Act. Further referring to Clause (iva) of Explanation 2, he pointed out that ''use or right to use'' is with reference to industrial, commercial and scientific equipment. While industrial equipment relates to manufacturing and production aspect; commercial equipment relates to trade and commerce and scientific equipment relates to research equipment. Read in the context of the preceding Clauses, when Ship is not an equipment, the logical syllogism would be that the payment not being towards equipment, it could not be royalty. On the meaning of ''equipment'', he referred to the decisions reported in Commissioner of Income Tax, Bangalore Vs. Venkateswara Hatcheries (P) Ltd. etc. etc., and P.C. Cheriyan Vs. Mst. Barfi Devi, and submitted that the disputed expression ''equipment'' has to be construed in the context of the Scheme of the Act and legislative history. When relatively large/different meanings are there for a word in the dictionary, it is not safe to follow the dictionary meaning. Hence, the term ''equipment'' has to be seen in the background of the various provisions of the Act. Learned senior counsel admitted that the Ship not being in international traffic, Article 8 would not be of any relevance. Hence, the only other Article relevant would be Article 7.

54. Touching on Article 7 of the DTAA, Mr. Arvind P. Datar submitted that the profits on the operation of Ship under time charter under Article 7 would arise only if and when there existed a permanent establishment. Countering the claim of the Revenue that a Port could be a permanent establishment, he submitted that before the Commissioner of Income Tax (Appeals) and the Tribunal, the Revenue took a plea that berth was permanent establishment. The arguments now taken by the Revenue before this Court were never raised before the Authorities below.

55. Leaving aside this technicality, he referred to the definition of ''permanent establishment'' under Article 5, to mean a fixed place of business through which the business of an enterprise is wholly or partly carried on. Referring to sub-Article (2) which is an inclusive definition, he submitted that barring clause (j) therein, all other enumerated places relate to immovable property. Referring to Sub-Article (3), which deems a permanent establishment, he pointed out that under sub-clause (c), where a permanent establishment provides services including managerial services and those mentioned under Paragraph 3(h) to (k) of Article 12, but not including those services in respect of which payments be treated as ''royalty'', as defined under Article 12 within the time specified therein, then, the service rendered by a foreign enterprise would not fall under the above-said definition. Thus, to bring the case of the assessee under Article 7, the foreign company should have a permanent establishment, meaning thereby, the dominion and disposal of the place must be at the hands of the foreign enterprise as a place of business to earn income. Even to deem a place as a permanent establishment, it must be in the nature of what is enumerated under sub-clause (3) of Article 5. Thus, even if a time charter is treated as one of service and admitting that berth is a fixed place for business, still when there is no dominion over this place at the hands of the foreign enterprise, berth cannot be treated as a permanent establishment for the foreign enterprise. The berth reserved for TNEB was at the disposal of M/s. Poompuhar Shipping Corporation for operating its domestic as well as foreign ships. Thus, the same place cannot be a subject of relatable dominion and disposal. Referring to the time charter agreement, he submitted that in the absence of any certainty as to the permanency in carrying its operations or to the certainty of berthing in different places, there is no permanent establishment; consequently, Article 7 also fails in this case.

56. Touching on the submission of the Revenue that the decision of this Court reported in The State of Tamil Nadu Vs. Tvl.Essar Shipping Limited No. 7, Chennai House Esplanade Chennai 600108 would have no relevance, he submitted that the consideration paid if at all to come under royalty, it must be for ''use or right to use'' and in both cases, there must be a transfer. Referring to the decision of the Apex Court reported in Commissioner of Income Tax Vs. P.V.A.L. Kulandagan Chettiar (dead) through L.Rs., confirming the decision of this Court reported in Commissioner of Income Tax Vs. Vr. S.R.M. Firm and others, , in the case of DTAA between India and Malaysia as regards the capital gains arising out of sale of immovable property located in Malaysia and the recipient being in India, he pointed out to the interpretation made on the phrase ''direct use or use in any other form'' and submitted that such expression were held to be wide enough to include within its scope, ''transfer, sale or exchange of the property''. Consequently, this Court held that capital gains was income arising from the use of the assets attracting Article 6. Extending the reasoning, learned senior counsel appearing for the assessee submitted that the decisions of this Court reported in The State of Tamil Nadu Vs.

Tvl.Essar Shipping Limited No. 7, Chennai House Esplanade Chennai 600108 that a time charter does not amount to right to use a ship or use of ship and it is contract for services, would squarely govern the case on hand. Learned Senior Counsel, however, pointed out that even though the Revenue had not argued their case on permanent establishment before the Tribunal in the manner in which it is now done before this court and raised an issue thereon, this Court itself may consider the question, it being a question of law on the facts narrated.

57. Heard Mr. Arvind P. Datar, learned senior counsel appearing for the assessee in T.C. (A) Nos. 2206 to 2208 of 2006 and 598 to 601 of 2013; Mr. P.S. Raman, learned senior counsel appearing for the assessee in T.C. (A) No. 2629 and 2630 of 2006; Mr. T. Ravikumar, learned standing counsel appearing for the Revenue in T.C. (A) Nos. 2629 and 2630 of 2006 and Mr. N.V. Balaji, learned standing counsel appearing for the Revenue in T.C. (A) Nos. 2206 to 2208 of 2006, 598 to 601 of 2013 and 56 to 64 of 2013 and perused the materials placed before this Court.

58. Before going into the merits of the case, the provisions, as are relevant to this case, need to be extracted:

Section 9(1)(i) & Explanation 2, Sec 9(1)(vi) Explanation 2, 4 and 5 to Section 9(1)(vi):

9(1). The following incomes shall be deemed to accrue or arise in India:

(i) all income accruing or arising, whether directly or indirectly, through or from any business connection in India, or through or from any property in India, or through or from any asset or source of income in India, or through the transfer of a capital asset situate in India.

.....

Explanation 2. For the removal of doubts, it is hereby declared that "business connection" shall include any business activity carried out through a person who, acting on behalf of the non-resident,

(a) has and habitually exercises in India, an authority to conclude contracts on behalf of the non-resident, unless his activities are limited to the purchase of goods or merchandise for the non-resident; or

(b); or

(c) .....

(vi) income by way of royalty payable by

(a) the Government; or

(b) a person who is a resident, except where the royalty is payable in respect of any right, property or information used or services utilised for the purposes of a business or profession carried on by such person outside India or for the purposes

of making or earning any income from any source outside India; or

(c) .....

.....

Explanation 2. For the purposes of this clause, "royalty" means consideration (including any lump sum consideration but excluding any consideration which would be the income of the recipient chargeable under the head "Capital gains") for

(i) the transfer of all or any rights (including the granting of a licence) in respect of a patent, invention, model, design, secret formula or process or trade mark or similar property;

(ii) the imparting of any information concerning the working of, or the use of, a patent, invention, model, design, secret formula or process or trade mark or similar property;

(iii) the use of any patent, invention, model, design, secret formula or process or trade mark or similar property;

(iv) the imparting of any information concerning technical, industrial, commercial or scientific knowledge, experience or skill;

(iva) the use or right to use any industrial, commercial or scientific equipment but not including the amounts referred to in section 44BB;

(v) the transfer of all or any rights (including the granting of a licence) in respect of any copyright, literary, artistic or scientific work including films or video tapes for use in connection with television or tapes for use in connection with radio broadcasting, but not including consideration for the sale, distribution or exhibition of cinematographic films; or

(vi) the rendering of any services in connection with the activities referred to in sub-clauses (i) to (iv), (iva) and (v).

.....

Explanation 4. For the removal of doubts, it is hereby clarified that the transfer of all or any rights in respect of any right, property or information includes and has always included transfer of all or any right for use or right to use a computer software (including granting of a licence) irrespective of the medium through which such right is transferred.

Explanation 5. For the removal of doubts, it is hereby clarified that the royalty includes and has always included consideration in respect of any right, property or information, whether or not

(a) the possession or control of such right, property or information is with the payer;

(b) such right, property or information is used directly by the payer;

(c) the location of such right, property or information is in India.

SECTION 43(3):

43. In sections 28 to 41 and in this section, unless the context otherwise requires (3) "plant" includes ships, vehicles, books, scientific apparatus and surgical equipment used for the purposes of the business or profession but does not include tea bushes or livestock or buildings or furniture and fittings.

SECTION 44BB:

44 BB.(1) Notwithstanding anything to the contrary contained in sections 28 to 41 and sections 43 and 43A, in the case of an assessee, being a non-resident, engaged in the business of providing services or facilities in connection with, or supplying plant and machinery on hire used, or to be used, in the prospecting for, or extraction or production of, mineral oils, a sum equal to ten per cent of the aggregate of the amounts specified in sub-section (2) shall be deemed to be the profits and gains of such business chargeable to tax under the head "Profits and gains of business or profession":

Provided that this sub-section shall not apply in a case where the provisions of section 42 or section 44D or section 44DA or section 115A or section 293A apply for the purposes of computing profits or gains or any other income referred to in those sections.

.....

Explanation. For the purposes of this section,

(i) "plant" includes ships, aircraft, vehicles, drilling units, scientific apparatus and equipment, used for the purposes of the said business;

(ii) "mineral oil" includes petroleum and natural gas.

SECTION 160:

Representative assessee.

160. (1) For the purposes of this Act, "representative assessee" means

(i) in respect of the income of a non-resident specified in sub-section (1) of section 9, the agent of the non-resident, including a person who is treated as an agent u/s 163;

SECTION 163:

Who may be regarded as agent:

163. (1) For the purposes of this Act, "agent", in relation to a non-resident, includes any person in India

(a) who is employed by or on behalf of the non-resident; or

(b) who has any business connection with the non-resident; or

(c) from or through whom the non-resident is in receipt of any income, whether directly or indirectly; or

(d) who is the trustee of the non-resident;

.....

Explanation. For the purposes of this sub-section, the expression "business connection" shall have the meaning assigned to it in Explanation 2 to clause (i) of sub-section (1) of section 9 of this Act.

(2) No person shall be treated as the agent of a non-resident unless he has had an opportunity of being heard by the Assessing Officer as to his liability to be treated as such.

SECTION 195:

195.(1)Any person responsible for paying to a non-resident, not being a company, or to a foreign company, any interest (not being interest referred to in section 194LB or section 194LC) or section 194LD or any other sum chargeable under the provisions of this Act (not being income chargeable under the head "Salaries") shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, deduct income tax thereon at the rates in force:

Provided that in the case of interest payable by the Government or a public sector bank within the meaning of clause (23D) of section 10 or a public financial institution within the meaning of that clause, deduction of tax shall be made only at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode:

Provided further that no such deduction shall be made in respect of any dividends referred to in section 115-O.

Explanation 1. For the purposes of this section, where any interest or other sum as aforesaid is credited to any account, whether called "Interest payable account" or "Suspense account" or by any other name, in the books of account of the person liable to pay such income, such crediting shall be deemed to be credit of such income to the account of the payee and the provisions of this section shall apply accordingly.

Explanation 2. For the removal of doubts, it is hereby clarified that the obligation to comply with sub-section (1) and to make deduction thereunder applies and shall be

deemed to have always applied and extends and shall be deemed to have always extended to all persons, resident or non-resident, whether or not the non-resident person has

(i) a residence or place of business or business connection in India; or

(ii) any other presence in any manner whatsoever in India.

(2) Where the person responsible for paying any such sum chargeable under this Act (other than salary) to a non-resident considers that the whole of such sum would not be income chargeable in the case of the recipient, he may make an application to the Assessing Officer to determine, by general or special order, the appropriate proportion of such sum so chargeable, and upon such determination, tax shall be deducted under sub-section (1) only on that proportion of the sum which is so chargeable.

(3) Subject to rules made under sub-section (5), any person entitled to receive any interest or other sum on which income tax has to be deducted under sub-section (1) may make an application in the prescribed form to the Assessing Officer for the grant of a certificate authorising him to receive such interest or other sum without deduction of tax under that sub-section, and where any such certificate is granted, every person responsible for paying such interest or other sum to the person to whom such certificate is granted shall, so long as the certificate is in force, make payment of such interest or other sum without deducting tax thereon under sub-section (1).

(4) A certificate granted under sub-section (3) shall remain in force till the expiry of the period specified therein or, if it is cancelled by the Assessing Officer before the expiry of such period, till such cancellation.

(5) The Board may, having regard to the convenience of assessees and the interests of revenue, by notification in the Official Gazette, make rules specifying the cases in which, and the circumstances under which, an application may be made for the grant of a certificate under sub-section (3) and the conditions subject to which such certificate may be granted and providing for all other matters connected therewith.

(6) The person referred to in sub-section (1) shall furnish the information relating to payment of any sum in such form and manner as may be prescribed by the Board.

(7) Notwithstanding anything contained in sub-section (1) and sub-section (2), the Board may, by notification in the Official Gazette, specify a class of persons or cases, where the person responsible for paying to a non-resident, not being a company, or to a foreign company, any sum, whether or not chargeable under the provisions of this Act, shall make an application to the Assessing Officer to determine, by general or special order, the appropriate proportion of sum chargeable, and upon such determination, tax shall be deducted under sub-section (1) on that proportion of the sum which is so chargeable.

59. The relevant Articles in the DTAA on royalty, international traffic, business profits, permanent establishment, profits from the operation of ships and aircraft are identical in respect of all the DTAAs that India has with Italy, Kuwait, Mongolia, Netherlands, U.K. and Ukraine and there are no variations therein. Hence, Articles dealing with the definition on international traffic, permanent establishment, tax on profits and gains, payment of royalty, as given under the DTAA with Australia are given here under:

ARTICLE V-Permanent establishment - 1. For the purposes of this Agreement, the term permanent establishment means a fixed place of business through which the business of an enterprise is wholly or partly carried on.

2. The term permanent establishment shall include especially:

(a) a place of management;

(b) a branch;

(c) an office;

(d) a factory;

(e) a workshop;

(f) a mine, an oil or gas well, a quarry or any other place of extraction of natural resources;

(g)a warehouse in relation to a person providing storage facilities for others;

(h) a farm, plantation or other place where agricultural, pastoral, forestry or plantation activities are carried on;

(i) premises used as a sales outlet or for receiving or soliciting orders;

(j) an installation or structure, or plant or equipment, used for the exploration for or exploitation of natural resources;

(k) a building site or construction, installation or assembly project, or supervisory activities in connection with such a site or project, where that site or project exists or those activities are carried on (whether separately or together with other sites, projects or activities) for more than 6 months.

ARTICLE VII-Business profits - 1. The profits of an enterprise of one of the Contracting States shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other State but only so much of them as is attributable to:

(a) that permanent establishment; or

(b) sales within that other Contracting State of goods or merchandise of the same or a similar kind as those sold, or other business activities of the same or a similar kind as those carried on, through that permanent establishment. ARTICLE VIII-Ships and aircraft-1. Profits from the operation of ships or aircraft, including interest on funds connected with that operation, derived by a resident of one of the Contracting States shall be taxable only in that State.

ARTICLE XII-Royalties - 1. Royalties arising in one of the Contracting States, being royalties to which a resident of the other Contracting State is beneficially entitled, may be taxed in that other State.

....

3. The term royalties in this Article means payments or credits, whether periodical or not, and however described or computed, to the extent to which they are made as consideration for:

(a) the use of, or the right to use, any copyright, patent, design or model, plan, secret formula or process, trade mark or other like property or right;

(b) the use of, or the right to use, any industrial, commercial or scientific equipment;

(c) the supply of scientific, technical, industrial or commercial knowledge or information;

(d) the rendering of any technical or consultancy services (including those of technical or other personnel) which are ancillary and subsidiary to the application or enjoyment of any such property or right as is mentioned in sub-paragraph (a), or any such equipment as is mentioned in sub-paragraph(b) or any such knowledge or information as is mentioned in sub-paragraph (c);

(e) the use of, or the right to use:

(i) motion picture films;

(ii) films or video tapes for use in connection with television; or

(iii) tapes for use in connection with radio broadcasting;

(f) total or partial forbearance in respect of the use or supply of any property or right referred to in sub-paragraphs (a) to (e);

(g) the rendering of any services (including those of technical or other personnel), which make available technical knowledge, experience, skill, know-how or processes or consist of the development and transfer of a technical plan or design;

but that term does not include payments or credits relating to services mentioned in sub-paragraphs (d) and (g) that are made;

(h) for services that are ancillary and subsidiary, and inextricably and essentially linked, to a sale of property;

(i) for services that are ancillary and subsidiary to the rental of ships, aircraft, containers or other equipment used in connection with the operation of ships or aircraft in international traffic;

(j) for teaching in or by an educational institution;

(k) for services for the personal use of the individual or individuals making the payments or credits; or

(l) to an employee of the person making the payments or credits or to any individual or firm of individuals (other than a company) for professional services as defined in Article 14.

60. As far as the assessee in T.C. (A) Nos. 2206 to 2208 of 2006 and 598 to 601 of 2013 and 56 to 64 of 013 is concerned, this is a case on time charter and T.C. (A) Nos. 2629 and 2630 of 2006 relates to bare boat charter cum demise. Since all the charter agreements are based on New York Produce Exchange, the common features relating to time charter may be noted.

61. A reading of the time charter agreement shows that it gives the name of the owner of the ship, details of the ship, Port in which the delivery and re-delivery were to take place and the capacity of the ship. The charter agreement further shows that the charterers have the liberty to sub-let the vessel for all or any part of the time covered by the charter, but the charterers remained responsible for the fulfillment of the charter party. Clause 4 further states that the charterers shall pay for the use and hire of the vessel at the rate of US Dollars per day commencing from the day of delivery and dropping lust outward sea, pilot station at safe port etc. The agreement further shows that the whole reach of the Vessel''s hold, docks and usual places of loading shall be at the charterer''s disposal and the Vessels are to work day and night. The Captain shall be under the direction of the charterer as regards the employment and agency. In some of the agreements, there is also a reference to the agents of the owners, as for instance, in the charter agreement, with SETAFSAGET EXPLOITATION, Clause 53 gives the name and address of the Owners'' agents, which reads as follows:

Clause 53 Agents

Name and address of Owners'' agents at Charterer''s ports of call:

Haldia	South India Corporation Agencies LTD.
Paradip	J.M. Baxi & Co.
Vizag	J.M. Baxi & Co.

Ennore	Interocean Shipping Agency
Chennai	Interocean Shipping Agency
Tuticorin	Pearl Shipping Agencies LTD.

62. The agreements, in general, also specify the coastal trading as in East Coast India. The delivery of the ship is at the owners'' option and the re-delivery was left to the charterers'' option at any time - day or night, Sundays and holidays included. The agreement also specifies that the Vessel under the charter was intended for moving thermal coal on the East Coast of India. The Masters and others working in the ship shall act at the disposal of the charterer and the charterers were to provide pay for all the fuel, except as otherwise agreed, port charges, pilotages, agencies, commissions, consular charges etc.

63. In the decision reported in The Union of India Vs. Gosalia Shipping (Pvt.) Ltd., , the Supreme Court considered the similar clauses in a time charter agreement and pointed out that the conclusion that one would draw from the terms is that the payment by time charterers to the owners of the ship was not one payable on account of the carriage of goods, but was payable on account of the use and hire of the ship. Pointing out that the charter party was approved by the New York Produce Exchange and that there is no warrant for supposing that though the payment which the charterers bound themselves to make to the owners of the ship is on account of the carriage of goods, the parties described it as payable for the use and hire of the Vessel, in order to avoid the payment of Indian Income Tax. Referring to the clause on the liberty reserved to the charterers to sub-let, and the captain of the ship should be under the orders and directions of the charterers as regards employment and agency, the Supreme Court pointed out "the character of the payment cannot change according to the use to which the charterers put the ship or according as to whether the ship is loaded with goods in a port in India. What is payable as hire charges for the use of the ship cannot transform itself into an amount payable on account of the carriage of goods, by reason of the circumstance that the ship was loaded with goods in India." Thus, neither the one nor the other receive any amount on account of the carriage of goods, the charterer paid hire charges to the owner of the ship for the use of the ship and since they loaded the ship with their own goods, they received nothing on account of the carriage of goods. Referring to the various authors'' view on time charter party, the Apex Court pointed out that it being distinguishable from charter by demise and voyage charter, time charter is essentially the one for the use and hire of the ship. The amount payable is irrespective of what use the ship is to be put to by the time charterers. Thus, no part of the amount could be said as one paid on account of the carriage of goods.

64. In fact, in the decision reported in The State of Tamil Nadu Vs. Tvl.Essar Shipping Limited No. 7, Chennai House Esplanade Chennai 600108 , to which one of us was a

party (Chitra Venkataraman, J.), this Court had an occasion to consider the taxability on the consideration paid under the time charter agreement in the context of Section 3A of the Tamil Nadu General Sales Tax Act. This Court pointed out that in a time charter, there is no transfer of effective control of the Vessel. This Court also referred to the Statements by Scrutton on "Charter-Parties" that in a time charter, the charterer has no interest in the ship and the ship owner has to do the agreed work with the use of his Vessel. Not being demise of the ship, but a contract for hire of services, there is no possession given to the charterer under a time charter party, to result in delivery or redelivery, as is normally understood as though on the delivery of the Vessel, the owner lost control to resume the same on the expiry of the period of time charter. In the context of the charge created u/s 3A, this Court held that in the absence of passing of effective control to the charterer, the mere fact that the agreement had been entered into and that the assessee had paid the hire charges, the transaction, per se, would not come within the scope of Section 3A of the Tamil Nadu General Sales Tax Act. In so holding, this Court also referred to the decision reported in 20th Century Finance Corpn. Ltd. and Another Vs. State of Maharashtra, and the decision of the Apex Court reported in Aggarwal Brothers Vs. State of Haryana and Another, , for the understanding of the expression use or right to use''. This Court also referred to the decision reported in Bharat Sanchar Nigam Ltd. and Another Vs. Union of India (UOI) and Others, and pointed out to the attributes in right to use goods for the purposes of attracting the charge to hold that a transfer of right to use goods implied transfer of effective control for use. In that context, going by the charging provisions u/s 3A of the Tamil Nadu General Sales Tax Act, this Court held that in a time charter party, there being no transfer of effective control for use, the transactions would not attract Section 3A of the Tamil Nadu General Sales Tax Act.

65. Learned senior counsel appearing for the assessee submitted that the view of this Court in the decision reported in The State of Tamil Nadu Vs. Tvl.Essar Shipping Limited No. 7, Chennai House Esplanade Chennai 600108 squarely covers the case on hand, particularly as regards the phrase ''use or right to use'' and hence, when the transaction is one of service in nature, the question of attracting Clause (iva) to Explanation 2 does not arise.

66. We do not agree with the submission of the assessee. On the expression ''use or right to use'' appearing under Explanation 2(iva) to Section 9(1)(vi), the decision of this Court reported in The State of Tamil Nadu Vs. Tvl.Essar Shipping Limited No. 7, Chennai House Esplanade Chennai 600108 is distinguishable. We may note that the decision reported in (2012) 47 VST 209 (State of Tamil Nadu V. Essar Shipping Ltd.,) rests on the scope of the charging provision u/s 3A of the Tamil Nadu General Sales Tax Act. Section 3A, introduced consequent on the 46th amendment, seeks to levy tax on the transfer of right to use in goods. The Section reads as follows:

Section 3-A. Levy of tax on right to use any goods (1) Notwithstanding anything contained in sub-sections (2-A), (2-B), (3), (4), (7) and (8) of Section 3, of section 7-A but subject to the other provisions of this Act including the provisions of sub-section (1) of section 3, every dealer referred to in item (viii) of clause (g) of section 2 shall pay, for each year, a tax on his taxable turnover relating to the business of transfer of the right to use any goods for any purpose at the rates mentioned in sub-section (20 of section 3 or as the case may be, in section 4.

67. The phrase "use or right to use goods" came up for consideration before the Supreme Court in the decisions reported in Rashtriya Ispat Nigam Ltd. Vs. Commercial Tax Officer, Company Circle, Visakhapatnam, (affirmed in the decision reported in (2002) 126 STC 114): (1999) 113 ITR 317 (Aggarwal Brothers V. State of Haryana and another) and 20th Century Finance Corpn. Ltd. and Another Vs. State of Maharashtra, , which are all relied on by the Revenue.

68. In the decision reported in Rashtriya Ispat Nigam Ltd. Vs. Commercial Tax Officer, Company Circle, Visakhapatnam, , the Andhra Pradesh High Court considered a similar phrase in Section 5E of the Andhra Pradesh General Sales Tax Act as in Section 3A of the Tamil Nadu General Sales Tax Act. The said Section related to levy of sales tax on the transfer of right to use any goods. There, the Andhra Pradesh High Court held that even while the machinery was in the use of the contractor who executed the project for Visakhapatnam Steel Project, Rashtriya Ispat Nigam Ltd., who owned the Visakhapatnam Steel Project, had the effective control of the machinery belonging to it. Even while the machinery was in the use of the contractor, the contractor had no more freedom to make use of the same for other works or move it out during the period when the machinery was in his use than to make use of it for the project for which it was given. To facilitate the execution of work by the contractors with the use of sophisticated machinery, the owner, namely, Rashtriya Ispat Nigam Ltd. had undertaken to supply the machinery to the contractors for the purpose of it being used in the execution of the contracted work. Thus the contractor was entitled to make use of the machinery for the purpose of execution of the work of the owner, namely, Rashtriya Ispat Nigam Ltd. and there was no transfer of right to use as such, in favour of the contractor. The High Court pointed out as follows:

An owner of property has a bundle of rights in it, namely, right to possess, right to use and enjoy, right to usufruct, right to consume, to destroy, to alienate or transfer, etc. In law it is not only possible but also permissible that the various rights and interest may be vested in various persons. While remaining the owner of a property, a person may create a charge on the property, mortgage it or lease it. In the transaction of sale, all the rights of the owner are transferred to the purchaser and it is said that the property in the goods passes to the purchaser. In a lease of immovable property, there is a transfer of a right to enjoy such property; "a lease of land and a bailment of chattels are transactions of essentially the same nature."

(Salmond on Jurisprudence - Twelfth Edition at page 424) Section 148 of the Contract Act defines "bailment" in the following terms:

148. ''Bailment'', ''bailor'' and ''bailee'' defined. - A ''bailment'' is the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them. The person delivering the goods is called the ''bailor''. The person to whom they are delivered is called the ''bailee''.

6. Thus in bailment there is transfer of goods for a particular period and thereafter the goods have to be returned to the person delivering them. One of the categories of bailment is hire of chattel. In Halsbury''s Laws of England (Fourth Edition) at paragraph 1551 it is defined as follows:

It is a contract by which the hirer obtains to use the chattel hired in return for the payment to the owner of the price of the hiring.

69. Thus, the High Court Pointed out "it is this category of bailment of goods that is the tax base u/s 5-E of the Act. The taxable event u/s 5-E is the transfer of the right to use any goods. What does this phrase connote? This means that unless there is a transfer of the right to use the goods, no occasion for levying tax arises; providing a facility which involves the use of goods nor even a right to use the goods is not enough, there must be a transfer of that right."

70. The High Court further pointed out that transfer of right to use the goods necessarily involves delivery of possession by the transferor to the transferee. Delivery of possession of a thing must be distinguished from its custody. Referring to a case of hiring a taxi cab, the High Court observed "it is not uncommon to find the transferee of goods in possession while transferor is having custody. When a taxi cab is hired under "rent-a-car" scheme, and a cab is provided, usually driver accompanies the cab; there the driver will have the custody of the car though the hirer will have the possession and effective control of the cab. This may be contrasted with the case when a taxi car is hired for going from one place to another. There the driver will have both the custody as well as possession; what is provided is service on hire."

71. The above-said decision was appealed against by the State and in the decision reported in State of Andhra Pradesh and Another Vs. Rashtriya Ispat Nigam Ltd., , affirming the decision of the High Court, the Apex Court held that the transaction did not involve transfer of right to use the machinery in favour of the contractors and in the absence of satisfying that essential requirement of Section 5-E, the hire charges collected by the assessee from the contractors were not exigible to sales tax.

72. In the decision reported in (1999) 113 ITR 317 (Aggarwal Brothers V. State of Haryana and another), the question of hiring as amounting to transfer of right to

use goods again surfaced with reference to Haryana General Sales Tax Act. This case related to hiring of shuttering materials to builders for use in the course of construction of buildings. The Supreme Court pointed out that the definition of "sale" in the Act includes the "transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration". The provision expressly speaks of "transfer of the right to use goods" and not of transfer of goods, and transfer of right to use goods for consideration is deemed to be sale. Where the transfer of a right to use is for consideration, the requirement of law is satisfied and is deemed to be a sale. The Supreme Court rejected the contention of the assessee and held that, to come under the expression of right to use goods to be a deemed sale, the transaction need not be like a lease. When the assessee transferred the shuttering for consideration to builders for use in the construction of buildings, there can be no doubt that the requirement of a deemed sale was satisfied.

73. In the decision reported in 20th Century Finance Corpn. Ltd. and Another Vs. State of Maharashtra, , the Apex Court pointed out that the definition given under Article 366(29A) in the second limb provided that transfer, delivery or supply of any goods referred to in first limb in Clauses (a) to (f) shall be deemed to be a sale of those goods by the person making the transfer, delivery, or supply and the purchase of those goods by the person to whom such transfer, delivery or supply is made. It further observed with reference to Clause (d), namely, the tax on the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration as follows:

64. A perusal of sub-clause (d) shows that the tax, envisaged therein, is on the transfer of the right to use any goods for any purpose; the period of use may or may not be specified; the consideration (need not necessarily be cash consideration). As the tax is on the transfer of right to use any goods, we shall ascertain the meaning of the word "transfer".

74. Referring to Corpus Juris Secundum, Black''s Law Dictionary and The New Shorter Oxford English Dictionary, it held as follows:

it is explicit that the transfer of right to use any goods involves both passing of a right in as well as domain of the goods in which right to use is transferred.

67. It is a common ground that the transaction mentioned in Sub-clause (d) which is treated as a ''deemed sale'', is in effect leasing hiring of the goods, which implies use of the goods by the hirer.

68. It will be useful to note the following passage in ''Introduction to the Law of property'' by Mr. F.H. Lawson 1958 Edition, Page 117. "In Roman law hire was nothing more than contract. In English law, however, it is much more. Here again we must distinguish between chattels and land. When a chattel is handed over by

way of hire a bailment takes place, and thereby the hirer is put in possession of the thing. For land the corresponding transaction is a lease, and here too there is a transfer of possession. So far the two are very similar, though whereas the lessor always retains what is misleadingly called ''possession'', a bailor who bails goods for a fixed term loses possession...

69. The Halsbury''s Laws of England describes ''Hire of chattels'' Fourth Edition, Volume 2, Para 1551 thus: "Hire is a class of bailment. It is a contract by which the hirer obtains a right to use the chattel hired in return for the payment to the owner of the price of the hiring. The proprietary interest in the chattel is not changed, but remains in the owner, although upon delivery the hirer becomes legally possessed of the chattel hired, so that if it is lent for a time certain, even the true owner is debarred during that time from resuming possession against the hirer''s will and, should he do so, becomes liable in damages for the wrongful seizure.

70. We can with advantage refer to ''Bailment by Palmer''. The learned author refers to the classification of bailment made by Holt C.J. in Coggs v. Bernard 1703 (92) ER 107 into six categories of which the third is relevant on the facts in the case of the appellant. Here the equipment, on being received from the manufacturer/supplier, is left with the hirer for being used for hire. The material extract of that book reads thus: And there are six sorts of bailments....

The third sort is, when goods are left with the bailee to be used by him for hire; this is called location et conduction, and the lender is called locator and the borrower conductor.

71. Be that as it may, what is the contractual nature of the transaction specified in Sub-clause (d) of Clause (29A)? Whether it is a specie of bailment or not? These questions should not detain us because we are concerned here not with the contractual nature of the transaction but with the substance and content of Sub-clause (d). Suffice it to mention that the Parliament itself has not named the transaction and for purposes of the present discussion relating to tax on the transaction of the nature in Sub-clause (d) of Clause (29A), brought into the fold of deemed sale, it is not necessary to give a nomen juris to it. It may, however, be mentioned that various High Courts in India treated the transaction in Sub-clause (d) as bailment; among them are the High Court of Andhra Pradesh in Rashtriya Ispat Nigam Ltd. v. Commercial Tax Officer, Company Circle, Visakhapatnam (1990) 77 STC 182 I. T. C. Classic Finance and Services Vs. Commissioner of Commercial Taxes, the High Court at Bombay in 20th Century Finance Corporation Limited and another Vs. State of Maharashtra the High Court of Punjab and Haryana (the Tamil Nadu Taxation Special Tribunal) in Upasana Finance Ltd. v. State of Tamil Nadu (1999) 113 STC 403 the High Court of Orissa in Krushna Chandra Behera v. State of Orissa (1991) 83 STC 325.

72. Reverting to Sub-clause (d) of Clause (29A), a perusal of the Statement of Objects and Reasons appended to The Constitution (Forty-Sixth Amendment) Act, 1982, shows that the Parliament has taken note of the fact that the main right in regard to films relates to its exploitation and after exploitation for a certain period of time, in most cases, the film ceases to have any value, so instead of resorting to the outright sale of a film, only a lease or transfer of the right to exploit the film is made. The device by way of lease of films has been resulting in avoidance of sales tax so to curb that device, Sub-clause (d) is inserted in Clause (29A). Even so, Sub-clause (d) is wider import than a mere leasing of films. It applies to all kinds of leasing/hiring of goods, for example, leases of plants, machinery, computers, cars, planes, furniture etc.,

73. A sale of any goods is complete when the property in the goods passes to the purchaser pursuant to a contract of sale of those goods. So also, a deemed sale of goods under Sub-clause (d), as has been pointed out above, will be complete when the control of the goods in which the right to use is transferred, passes to the transferee under the contract of transfer.

75. Thus a reading of the decisions of the Apex Court shows that for the purpose of levy of sales tax on a deemed sale, there must be a transfer of right to use goods, which contemplates delivery of possession, so that, the transferee has a control over the economic benefits over the property. For the purpose of understanding ''royalty'' under Clause (iva), we do not find any such necessity of emerging termination of rights of the owner and so long as the assessee has the custody and has the right for economic exploitation of the ship on payment of charges, we do not find the decision under the Sales Tax Act having relevance to the case on hand. As pointed out in the Supreme Court decision reported in The Union of India Vs. Gosalia Shipping (Pvt.) Ltd., , the charter, though does not have the possession, yet, has the right to give direction to the course that the ship will take, to determine the voyage. Thus even though the ship never leaves the owner, the amount paid by the charterer for the use of the ship by its custody has to be seen in the context of the expression ''use or right to use'' as appearing under Clause (iva). In the decision reported in Bharat Sanchar Nigam Ltd. and Another Vs. Union of India (UOI) and Others, , the Supreme Court pointed out to the decision reported in 20th Century Finance Corpn. Ltd. and Another Vs. State of Maharashtra, and observed as follows:

77. But in the case of Aggarwal Brothers Vs. State of Haryana and Another, when the assessee had hired shuttering to favour of contractors to use it in the course of construction of buildings it was found that possession of the shuttering materials was transferred by the assessee to the customers for their use and therefore, there was a deemed sale within the meaning of Sub-clause (d) of Clause 29-A of article 366. What is noteworthy is that in both the cases there were goods in existence which were delivered to the contractors for their use. In one case there was no intention to transfer the right to use while in the other there was.

76. The Apex Court pointed out that in order to attract the charge under transfer of right to use any goods as deemed sale, the emphasis is the intention to transfer the right to use goods, which, in turn, implies effective control for use. This Court in the decision reported in The State of Tamil Nadu Vs. Tvl.Essar Shipping Limited No. 7, Chennai House Esplanade Chennai 600108 pointed out that without the transfer of right to use, the transaction in question cannot fall under the charging position. This Court further referred to the decision reported in Bharat Sanchar Nigam Ltd. and Another Vs. Union of India (UOI) and Others, and held what is contemplated as held in the Apex Court decision to attract the charge under the Sales Tax Act on the transfer of right to use goods was that the possession given unaccompanied by transfer of right to use, in the sense of there being no effective control, would not bring the transaction within the four corners of the charging provision. Thus the decision reported in The State of Tamil Nadu Vs. Tvl.Essar Shipping Limited No. 7, Chennai House Esplanade Chennai 600108 rested on the scheme, the charging Section and the decisions of the Apex Court on the similarly worded charging position.

77. As far as the present case is concerned, ''royalty'' means the consideration paid for "the use or right to use". Irrespective of whether there is any transfer or not, the consideration paid for use or right to use simpliciter is sufficient for the consideration being called as ''royalty''. The presence or absence of possession effective/general control and custody with the assessee, even though may be matters of agreement, are not of any relevance to decide the character of payment. The assessee, as per the agreement, had the right to use the ship, selecting the time and the decided route as per its requirement, for which it paid the foreign enterprise, the consideration and we have no hesitation in holding that the character of payment is nothing but royalty.

78. Mr. Arvind P. Datar, learned senior counsel appearing for the assessee, submitted that world over, payment for time charter is never recognised as ''royalty'', for, use or right to use must necessarily take within its fold, possession and control. Going by the well understood meaning given to a time charter, particularly to the terms used therein on hire, delivery and re-delivery, the consideration paid could only be taken as one for taking the services of the Vessel for transport of coal. Thus, he supports by further contending that ship is not an equipment; consequently, there is no question of use or right to use.

79. Placing reliance on the decision reported in The Union of India Vs. Gosalia Shipping (Pvt.) Ltd., as well as (1942) 2 KB 65 : (1942) 1 All ER 503 (Sea and Land Securities, Limited V. William Dickinson and Company, Limited), he submitted that the decision as to the employment rested only with the Master, although the decision as to the navigation rested with the charterer.

80. Dealing with the time charter in the decision reported in The Union of India Vs. Gosalia Shipping (Pvt.) Ltd., , the Supreme Court pointed out that it is a case of use

of the ship for consideration and it is not one of affreightment. Thus, if the payment is for carriage of goods or for transportation of services, the payment could be called as one for services. However, when the payment is one for the use or right to use of the ship as an equipment, the payment could not be treated as ''royalty''.

81. The decision reported in (1942) 2 KB 65 : (1942) 1 All ER 503 (Sea and Land Securities, Limited V. William Dickinson and Company, Limited) related to the claim of a time charterer against the owner of the Vessel, alleging breach of contract by reason of idleness of the Vessel. The English Court pointed out that under the charter, like any other contract, if the ship owners fail to render the charterers the service which they had agreed to render, the charterers would be entitled for damages for that breach. The Court further pointed out that when the Vessel was waiting with the cargo, the ship owners turned the crew on to chipping rusty plates or to painting the vessel, the charterers could not object that if the ship were loaded or to be sailing the seas instead of being chipped, or painted, in dock. The ship was in enforced idleness, which was solely on account of the charterers and it was clear during that time that the ship owners were only doing that, which the charterers had themselves suggested that they should do and the charterers approved of what the ship owners did, in fitting the degaussing apparatus. Thus, the Court held that the claim of the charterers could be saved of paying the hire during this period, was rejected. The Court pointed out that when the ship arrived at the Blyth, the ship could not be loaded immediately and the ship owner suggested fitting of degaussing apparatus. In the circumstances, the Court held that there was no breach of contract by the ship owners. The reference to the observation therein, hence, has to be understood in the context of the facts therein. Hence, we find that the judgment is not of any assistance to the assessee.

82. Both sides placed heavy reliance on the commentary on Article 12 on the meaning of the expression ''for the use of or right to use''. Leaving aside the arguments on ''equipment'' for a moment, when we look at the commentary on Article 12, one would note in paragraph 8.2, taking the view that where a payment is for consideration for transfer of full ownership of an element of property referred to in the definition, the payment is not in consideration ''for the use of, or the right to use'' that property and cannot, therefore, represent a royalty. It further pointed out to the changes brought to the model convention that the expression ''for the use of, or right to use'' industrial, commercial or scientific equipment was subsequently deleted by using the expression ''for the use of, or right to use'' industrial, commercial and scientific experience. It was observed that given the nature of income from leasing of industrial, commercial, scientific equipment including the leasing of containers, the Committee on Fiscal Affairs decided to exclude the income from such leasing from the definition of ''royalty'' and to consequently remove it from the application of Article 12, in order to make sure that it would fall under the Rules for the taxation of business profits, as defined in Articles 5 and 7. The decision and the background of the decision leading to the removal of the equipment to be

replaced by experience in OECD model, cannot be pressed into service, to contend that the payment under time charter cannot come under the definition of ''royalty''. As already pointed out, the payment herein is for ''use or right to use''. As the expression stands in the Section, we do not find any assistance on this aspect from the OECD model post 1992. Thus, even in a case where physical possession is not with the transferee or the lessee or the hirer, the payment made for the use of or right to use of an equipment, would fall under the head of ''royalty''. In the commentary on Article 12, in paragraph 9.1, it was observed "as regards treaties that include the leasing of industrial, commercial or scientific (ICS) equipment in the definition of royalties, the characterization of the payment will depend to a large extent on the relevant contractual arrangements."

83. The reference to this commentary thus indicates that the meaning of the word "Use" must take its colour from the context in which it is used read in the background of the explanation and on its own the expression deserves to receive a wider meaning given to it. It may be noted that in the decision reported in Commissioner of Income Tax Vs. Vr. S.R.M. Firm and others, affirmed by the Supreme Court in the decision reported in Commissioner of Income Tax Vs. P.V.A.L. Kulandagan Chettiar (dead) through L.Rs., in the context of the term "direct use or use in any other form" viewed that the disposal of the property or the capital asset itself is as much a form or method of use of the immovable property and that the expression ''direct use or use in any form'' are sufficiently wide enough to include within its scope the transfer, sale or exchange of the property. Even though the said decision is in the context of the DTAA with Malaysia, the judgment gives a guidance as to how the phrases used in the DTAA should be understood in the absence of words of limitation. Thus the scope of the expression cannot be curtailed by the decisions under the provisions of the General Sales Tax Act.

84. As pointed out in the decision reported in Rashtriya Ispat Nigam Ltd. Vs. Commercial Tax Officer, Company Circle, Visakhapatnam, , delivery of possession of a thing must be distinguished from its custody; if on giving possession to the transferee, the transferor still has its control and custody, then certainly, the expression ''use or right to use'' for the purpose of attracting charge on transfer of right to use will have its significance for the purpose of attracting levy under the Income Tax Act. As pointed out in the commentary, so long as the assessee is given the right to its usage (with a right to put it into beneficial use for itself or to keep it idle, the right to sublet) and the lessee has access to the use of the Vessel to its advantage economically, we have no hesitation in holding that the expression ''use or right to use'' cannot be read in a narrow campus, to hold that the consideration paid for would not be ''royalty''.

85. On the expression ''use or right to use'' industrial, commercial and scientific equipment, the Australian Ruling in TR92/197/1, TR2003/2 dated 14.05.2003 pointed out that the term ''industrial, commercial and scientific equipment'' is not defined in

the DTAAs or in the OECD model. In paragraph Nos. 85 and 86, it observed "the term ''ICS equipment'' is also not defined in Australia''s DTAs or in the OECD Model. However, there are sufficient indications in the text and context of Australia''s DTAs as well as the OECD Model and Commentary to suggest that ''ICS equipment'' has a broad meaning and includes ships, aircraft, drilling rigs, apparatus, machinery, containers, motor cars, wax figures and so on. The Report on the leasing of ICS equipment, at paragraph 5, states that ''in the field of transport an enterprise may prefer leasing a container, a truck or a ship rather than asking the services of a transportation enterprise''. At paragraph 9, the Report considers the legal aspects of lease contracts and states that ''lease contracts are based on the separation of the ownership of an asset and its usage''." It further pointed out that the Committee on Fiscal Affairs Reports on Treaty characterisation issues arising from e-commerce (The Treaty Characterization Report) at paragraph 25 referred to the following three factors in helping to distinguish between equipment rental and service contract:

a) Customer is in physical possession of the property;

b) the customer controls the property;

c) the provider does not use the property concurrently to provide significant services to entities unrelated to the service recipient.

86. The term ''use or right to use'' in the Act, is thus intended to take its ordinary meaning and applied in the broader sense, meaning, employing for any purpose. It is truism that the word ''use'' is not having a single precise meaning. It is a word of wide import and its meaning in any particular case depends on the context in which it is employed (Refer Taylor J. in City of Newcastle v. Royal Newcastle Hospital (1957) 96 CLR 493 at 515 as referred to by Stephen J. in Ryde Municipal Council vs. Macquire University reported in (1978) 139 CLR 633).

87. This takes us to the consideration on Article 12 under DTAA. Article 12 of the Australian DTAA deals with the jurisdiction of the State on the taxability of royalty. It states that ARTICLE VIII-Ships and aircraft-1. Profits from the operation of ships or aircraft, including interest on funds connected with that operation, derived by a resident of one of the Contracting States shall be taxable only in that State. The definition of ''royalty'' as given under Article 12(3) of the DTAA with Australia is the same as in the definition in the DTAA with France in Article 13, with Germany in Article 12; with Norway in Article 13; with Singapore in Article 12; with Switzerland in Article 12 and with U.S.A. in Article 12.

88. The U.S.A. DTAA specifically reads that ''royalty'' would mean payments of any kind, as follows:

ARTICLE 12-Royalties and fees for included services-1. Royalties and fees for included services arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.

.....

3. The term royalties as used in this Article 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 cinematograph films or work on film, tape or 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, including gains derived from the alienation of any such right or property which are contingent on the productivity, use, or disposition thereof; 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 than payments derived by an enterprise described in paragraph 1 of Article 8 (Shipping and Air Transport) from activities described in paragraph 2(c) or 3 of Article 8.

89. Thus, while some of the DTAAs include payment for use of or right to use of industrial, commercial and scientific experience as a heading under royalty, invariably, in all the DTAAs, payment for use of or right to use of industrial, commercial and scientific equipment, is included in the meaning of ''royalty''. The provision contained in Section 9(1)(vi), Explanation 2(iva) is modelled after U.N. Model and is different from what one has in the OECD model at present.

90. Thus, while the OECD Model got amended to bring payment for use of or right to use of the industrial, commercial scientific experience as ''royalty'', all the DTAAs under consideration contain the Clauses on consideration for use of or right to use of industrial, commercial and scientific equipment as well as experience as ''royalty''.

91. Thus, when the use or right to use the ship for an economic benefit is given to the assessee, the consideration for the use of the industrial, commercial and scientific equipment is ''royalty'', assessable under Explanation 2(iva) to Section 9(1)(vi) of the Income Tax Act. Thus, for the purposes of Income Tax Act, under the time charter, the payment made being for the use of the ship, the same comes within the meaning of the word "royalty".

92. This takes us to the second question as to whether ''Ship'' could be considered as an equipment at all. Mr. P.S. Raman, learned senior counsel appearing for the assessee placed reliance on the meaning of the word "equipment" under the Merchant Shipping Act as well as tried to draw inspiration from the Schedule of rates for depreciation under Rule 5 and the schedule read with Section 32, only to emphasize the difference maintained between plant and machinery on the one hand and ship on the other hand under the said table and submitted that read in the context of the other sub-clauses, the expression "industrial, commercial and scientific equipment", must be in relation to what is enunciated under Clauses (i) to (iv) and (v) of Explanation 2 to Section 9(1)(vi) of the Income Tax Act. Thus, according

to him, where ever the expression is intended to cover more than the common parlance meaning, the Section gave a very wide expansive meaning. In the absence thereof, "equipment" cannot be held to include a ship. He also referred to Section 43(3) of the Income Tax Act, where the plant included ship. Thus going by the scope of the expression, we reject the arguments of the assessee based on the decision reported in The State of Tamil Nadu Vs. Tvl.Essar Shipping Limited No. 7, Chennai House Esplanade Chennai 600108 and we do not find any good reason to read the expression in a narrow manner.

93. Mr. Arvind P. Datar, learned senior counsel appearing for the assessee submitted that there is no provision in the Act wherein plant and machinery is defined to include ship. He relied on the decision reported in Commissioner of Income Tax, Bangalore Vs. Venkateswara Hatcheries (P) Ltd. etc. etc., that one cannot understand the expression "equipment" with the help of a dictionary meaning. In common parlance, "equipment" is not understood to include a ship; hence, even assuming that the payment is for use of or right to use, yet, ship not being an equipment, the consideration could not be treated so. He pointed out to the specific exclusion of the amounts referred to in Section 44BB from Explanation 2 to Section 9(1)(vi) of the Income Tax Act.

94. As far as the resort to dictionary meaning of a term, in the absence of definition thereof is concerned, in the decision reported in State of Orissa and Others Vs. Titaghur Paper Mills Company Limited and Another, , the Supreme Court held that where the term is statutorily defined or judicially interpreted, the Court may not look at the dictionary meaning. But when there is no such definition or interpretation, Courts may take the aid of dictionaries in such cases, to ascertain its meaning in common parlance. However, keeping in mind that a word is used in different senses according to its context and a dictionary gives all the meanings of a word, it was observed that the Court would have to select the particular meaning which would be relevant to the context in which it has to interpret that word. Thus, in the decision reported in Commissioner of Income Tax, Orissa and Others Vs. N.C. Budharaja and Company and Others, , the Apex Court held that regard must also be had to the scheme, context and the legislative history of the provision.

95. In the decision reported in Commissioner of Income Tax, Bangalore Vs. Venkateswara Hatcheries (P) Ltd. etc. etc., , the Apex Court pointed out "When the word is not so defined in the Act it may be permissible to refer to the dictionary to find out the meaning of that word as it is understood in the common parlance. But where the dictionary gives divergent or more than one meaning of a word, in that case it is not safe to construe the said word according to the suggested dictionary meaning of that word. In such a situation, the word has to be construed in the context of the provisions of the Act and regard must also be had to the legislative history of the provisions of the Act and the scheme of the Act. It is a settled principle of interpretation that the meaning of the words, occurring in the provisions of the

Act must take their colour from the context in which they are so used. In other words, for arriving at the true meaning of a word, the said word should not be detached from the context. Thus, when the word read in the context conveys a meaning, that meaning would be the appropriate meaning of that word and in that case we need not rely upon the dictionary meaning of that word."

96. Keeping this in the background, we find that u/s 9, we do not have the definition of ''equipment''. We find the definition of ''plant'' only u/s 43(3), which has relevance to Sections 28 to 41 relating to profits and gains of business or profession and Section 44BB. When we look at the depreciation granted u/s 32 of the Income Tax Act, we find that the same is granted in respect of a capital asset, which also includes intangible assets. Depreciation is held as nothing but the annual loss in the value of the property due to wear and tear and obsolescence and such several factors that ultimately lead to the "retrieval" of the property. Depreciation is granted in respect of such assets as are used in the business and is calculated on the Written Down Value. Ship, as a capital asset, is also granted depreciation at such rate as are prescribed under the Rules. The Taxation Laws (Amendment and Miscellaneous Provisions) Act, 1986 introduced a new scheme of granting depreciation in respect of block of assets in the place of earlier system of depreciation on industrial assets. The expression of block of assets is defined in Section 2(11) of the Income Tax Act as group of assets, falling within a class of assets comprising tangible assets, being buildings, machinery, plant or furniture etc. Block of asset, as a concept, under which a group of assets falling within the block, are given the same rate of depreciation. The significant effect of this is stated to be that a sale of an asset comprised in the block may get matched by acquisition of a new asset, so that the need for ascertaining the terminal profits or loss would not arise and the re-rolling benefit as between capital assets, entitled to the same rate of depreciation becomes possible.

97. Thus the categorisation under different heading is based on the concept of block of assets. Thus the amendment under the Taxation Laws (Amendment and Miscellaneous Provisions) Act, 1986, introduced to replace the earlier system of depreciation on industrial assets, with the varying percentage of depreciation as applicable to the block of assets, has no relevance in understanding whether "ship" would fall within the meaning of "plant". On the other hand, for understanding such a question, the one and only relevant definition is Section 43(3) under which the definition of ''plant'' includes Ships. u/s 43 of the Income Tax Act, we have the definition of certain terms relevant to income from profits and gains of business with reference to Sections 28 to 41 of the Income Tax Act. Section 43(3) of the Income Tax Act defines "plant" to include ships, vehicles, books, scientific apparatus and surgical equipment used for the purposes of the business or profession, but does not include tea bushes or livestock or buildings or furniture and fittings. We have a separate provision relating to income of shipping companies under Chapter XIIG of the Income Tax Act. Section 115V of the Income Tax Act defines various

terms like bare boat charter, bare boat charter-cum-demise, Director-General of Shipping, factory ship, fishing Vessel, etc. Thus, with reference to Sections 28 to 41 of the Income Tax Act as is evident from the inclusive definition in Section 43(3), the word ''plant'' is widely defined to include a ship. The relevant test that is to be applied in finding out as to whether a particular thing is a plant or not, would be, to find out the operation that a particular thing performs in the business, as to whether it is a tool of the tax payer''s trade and fulfils the function of the plant in the trading activity in the earning of income or profits or gains out of its operation in the business or profession.

98. Section 32(1) specifically states that depreciation is allowable in respect of building, machinery, plant or furniture, being tangible assets (2) know-how patents, copyrights, trade marks, licences, franchises or any other business or commercial rights of similar nature, being intangible assets acquired on or after 1st day of April, 1998. Sub-section (i) further states that the depreciation to be given "in the case of assets of an undertaking engaged in generation or generation and distribution of power, such percentage on the actual cost thereof to the assessee as may be prescribed and (ii) in the case of any block of assets, such percentage on the written down value thereof as may be prescribed." Explanation 3 gives the meaning of ''assets''. Thus, going by the above and the definition u/s 43(3), the fact that in the depreciation table, ship is given a different percentage or treated as a different block of asset separate from rest of the plant, does not mean that ''ship'' is not a ''plant''. We have sufficient instances under the table giving different depreciation rates to ''building'' as ''plant'' depending on the user. This would only show that classification for different rate of depreciation is a matter of administrative decision within the framework of those falling within the meaning of "asset", which term includes plant and machinery, and it is totally unsafe for one to understand the width of the meaning of ''plant'' from the depreciation table and this is more so in the context of the definition u/s 43(3) also.

99. Thus, even going by the assessee''s contention, with the definition available on plant, it is difficult to accept the assessee''s case that the term ''equipment'' does not include a ''ship''. In the computation of income, we have a special provision relating to income of shipping companies. Chapter XIIG of the Income Tax Act is a special provision relating to the income of an Indian company in the shipping business. Section 9 is the specific provision on all types of income from all sources which a non-resident may have in this Country. This Section defines what is accrual of income, particularly with reference to a non-resident and when it is deemed to accrue or arise in India to be included in the total income of the non-resident. Section 43 containing the definition of the terms thus has relevance to the computation of income under the head ''profits and gains of business or profession''. Thus, in the absence of any definition of equipment under the DTA and considering the business of the foreign enterprise, the definition of "plant", as including ''ship'' will be the appropriate definition for the understanding on the

scope of the expression "equipment".

100. There is no definition of what "plant" is. The term ''plant'' is judicially understood as meaning and referring to whatever apparatus is used by a business man for carrying on his business, including all goods and chattels, fixed or movable, which he keeps for permanent employment in his business but not including his stock-in-trade which he buys or makes for sale. In the decision reported in Commissioner of Income Tax, Andhra Pradesh Vs. Taj Mahal Hotel, Secunderabad, , the Supreme Court pointed out that "the word plant must be given a wide meaning having regard to the fact that articles like books and surgical instruments are expressly included in the definition of plant".

101. After tracing the Indian and English law, in the decisions reported in Commissioner of Income Tax Vs. Sri Krishna Bottlers Pvt. Ltd., and Commissioner of Income Tax Vs. Margadarsi Chit Fund (P.) Ltd., , the Andhra Pradesh High Court summed up the principles evolved in construing as to what constitutes plant, as follows:

31. From the aforesaid rulings, the following principles can be gathered; (1) "Plant" in section 43(3) of the Act is to be construed in the popular sense, namely, in the sense in which people conversant with the subject-matter with which the section is dealing, would attribute to it. The word "plant" is to be given a "very wide" meaning. In its ordinary sense, it includes whatever "apparatus" is used by a businessman for carrying on his business but it does not include his stock-in-trade which he buys or makes for sale. It, however, includes all goods and chattels, fixed or movable, live or dead which the tradesman keeps for permanent employment in his business. (2) But the building or the "setting" in which the business is carried on cannot be plant. (3) The thing need not be part of the machine used in the manufacturing process but could be merely an apparatus used in carrying on the business but having a "degree of durability". (4) Merely because the asset has a passive function in the carrying on of the business, it cannot be said that it is not plant. It may have a passive operation and if it has, it is prima facie a plant unless there was good reason to exclude it from that category. It must be a "tool in the trade" of the businessman. (6) Gross materiality or tangibility is not necessary and, in fact, intangible things like ideas and designs contained in a book could be "plant". They fall under the category of "intellectual storehouse". (7) In considering whether a structure is plant or premises. One must look at the finished product and not at the bits and pieces as they arrive from the factory. The fact that a building is part of a building holds the plant in position does not, convert the building into plant. A piecemeal approach is not permissible and the entire matter must be considered as a single unit unless of course, the component parts can be treated as separate units having different purposes. (8) The functional test is a decisive test.

102. Thus, plant would include any article or object fixed or movable, live or dead, used by a business man for carrying on his business and it is not necessarily

confined to an apparatus which is used for mechanical or industrial business. Thus, plant includes every tool, apparatus, equipment or machinery, not limited to machinery used in tool. In fact, even in Section 43(3) of the Income Tax Act, the expression used is "unless the context otherwise requires". Thus, when the context does not require "otherwise", the meaning of the word "plant" as defined u/s 43(3) would be relevant to understand what ''equipment'' would mean. Thus, with the inclusive definition on plant embracing within its fold so diverse a matter from a ship to a book, or medical equipment, every tool, apparatus, ''plant'' includes ''all equipment'' used by a business man for carrying on his business. Thus, we have no hesitation in accepting the plea of the Revenue that ship is an equipment, with which the assessees carried on their business, which they keeps for employment in their business.

103. The word "equipment" construed in the light of Section 9(1)(vi)(c) thus extends the normal meaning of the word, to cover even those specified categories of machinery or plant that would themselves not construed within its plain and ordinary meaning. As rightly pointed out by the Revenue, the only limitation that one may read into the word ''equipment'' would be, that which is specifically excluded.

104. On the question as to whether ''ship is an ''equipment'', and equipment is plant and machinery, the decision of House of Lords merits consideration. In the decision reported in (1988) AC 276 (Coltman and another V. Bibby Tankers Ltd.), the House of Lords considered the question as to whether Vessel is an equipment in the context of the employer''s liability under Employer''s Liability (Defective Equipment) Act, 1969 imposing vicarious liability on the employer for a defective article. On the death of an employee of a oil-bulk ore carrier owned or operated by a company, by name Bibby Tankers Ltd., the dependants of the deceased laid their claim for compensation. The ship sank due to a typhoon off the coast of Japan. The ship broke in half causing her to capsize with no opportunity for those on board to escape or send distress messages. On the allegation that the company failed to take proper steps to ensure that the ship was constructed in accordance with the Lloyd''s Rule in force in 1976 when the vessel was in the course of construction and that by reasons of the provisions of the Employer''s liability (Defective Equipment) Act, 1969, the manufacturers were liable for the negligence and hence liable to pay compensation. The question that arose therein was as to whether ship was an equipment?. Section 1(3) defined "equipment" as including plant, machinery and vehicle. It was observed that the expression "equipment" was enacted to extend the natural meaning of the term equipment to refer to ship as plant and machinery. Before the Appellate Court, Lloyd LJ of Court of Appeal pointed out that "equipment" standing alone might not include an ocean-going vessel capable of carrying 157000 tons of iron ore. But the word "equipment" did not stand alone. It is qualified by the words "provided by his employer for the purposes of the employer''s business". Clearly "business" is not confined to the sort of business that is carried on in a factory. It was pointed out

that indeed, by definition, business includes the activities carried on by any public body. So the business of being a ship owner, or of carrying goods by sea, is plainly included within Section 1(1)(a). What then is the equipment which a ship owner provides for the purposes of his business?. The Court held that answer must surely include his ships. The Court pointed out that word ''equipment'' is certainly capable of including ships as a matter of language. It was further pointed out "that equipment in section 1(1) includes all chattels provided for the purpose of the employer''s business other than materials and work in progress." On appeal by the ship owner, Lord Oliver of Aylmerton with whom other Judges agreed, pointed out that no doubt equipment frequently used may describe the appurtenances of some larger entity, yet, he felt in the background of the object of the legislation and the definition of the word on ''equipment'', "he saw no reason either in logic or as a matter of language why its use should be so confined". The Judgment of the House of Lords appears to be the one and only judgment on the aspect as to whether ship is an equipment at all and in the context of the provisions of the Act, as well as going by the object of the legislation, the House of Lords held that ship is included in the definition of ''equipment''.

105. Section 9(1)(vi)(b) states that income by way of royalty payable by a person who is a resident arising or accruing whether directly or indirectly through or from business connection in India shall be deemed to accrue or arise in India. Sub-clause (b) states that the income by way of royalty is payable by a person who is a resident. The only exception herein is that the royalty is payable in respect of any right, property or information used or services utilised for the purpose of business or profession carried on by such person outside India, or for the purpose of making or earning any income from any source outside India alone is excluded in 9(1)(vi) of the Income Tax Act. In other words, royalty payable by a resident in India to a non-resident in respect of any right, property or information used or services utilised for the purposes of business or profession carried on by him in India would satisfy the definition of ''royalty''. Explanation (2) defines what royalty is. Clause (iva) of Explanation 2 states that consideration paid for use or right to use any industrial, commercial, scientific equipment but not including the amounts referred to in Section 44BB would be royalty. Thus, one has to note that the royalty payment is among other things relates to use or right to use any industrial, commercial or scientific equipment for the purposes of business or profession carried on by the resident herein and the said royalty is payable to a non-resident foreign enterprise. It is no doubt true that Clause (iva) refers use or right to use of any industrial, commercial and scientific equipment and not plant and machinery, nevertheless we may point out that the key word in the Clause herein is the use or right to use any industrial, commercial or scientific equipment. Thus, read in the context of Section 9(1)(vi)(b) and the purport of deeming an income to accrue or arise in India, the presence of the word ''any'' preceding an equipment, clearly points out the need for construing ''equipment'' widely, so as to embrace every article employed by the

employer for the purposes of his business. ''Equipment'', in whatever name called either as an apparatus or as plant or machinery, so long as they are employed for the purposes of one''s income, the same shall stand covered by Clause (iva). Thus a ship is equipment of the business of a ship owner on a natural and ordinary meaning of the word, we do not find any justification to go by the definition under the Merchant Shipping Act.

106. Learned Standing Counsel appearing for the Revenue pointed out that considering the specific exclusion of the cases referred to in Section 44BB (relating to income earned by a non-resident engaged in the business of providing services or facilities in connection with or supplying plant and machinery or hire used, or to be used in the perspective for or extraction or production of mineral oil) in Clause (iva) and ''plant'' defined to include ships, aircraft, vehicle drilling works, scientific apparatus and equipment used for the purposes of the sand business, the construction that one has to give Clause (iva) of Explanation 2 to Section 9(1)(vi) of the Income Tax Act is that other than what is excluded by specific reference namely, to cases falling u/s 44BB, all other ships used in the business would be considered as included within the scope of Clause (iva) of the Act.

107. In this connection, he placed reliance on the decision reported in Daman Singh and Others Vs. State of Punjab and Others, . The said decision related to the challenge as to the provision of Section 13(8) of the Punjab Co-operative Societies Act which provided for the compulsory amalgamation of Co-operative Societies, if it is necessary in the interests of Co-operative Societies. The registration of the Co-operative Society made it a body corporate by the name under which it is registered having perpetual succession and common seal, and with power to hold property, enter into contract, institute and defend suits and other legal proceedings etc. On a question as to whether the Scheme of the Constitution made any difference to this position, the Apex Court referred to Entry 43 List I, namely, Incorporation, regulation and winding up of trading corporations, including banking, insurance and financial corporations but not including co-operative societies and Entry 32 List II, namely, Incorporation, regulation and winding up of corporations, other than those specified in List I and universities incorporated trading, literature, scientific, religious and other societies and associations; co-operative societies and held "the very mention of co-operative societies both in Entry 43 of List I and Entry 32 of List II along with other corporations give an indication that the Constitution makers were of the view that co-operative societies were of the same genus as other corporations and all were corporations. In fact, the very express exclusion of co-operative societies from Entry 43 of List I is indicative of the view that but for such exclusion, co-operative societies would be comprehended within the meaning of expression "corporations".

108. Applying the said decision to the issue on hand, that the express exclusion of Section 44BB of the Income Tax Act is restricted only to those specified therein,

learned standing counsel appearing of the Revenue is right in his submission that if the Legislature wanted the exclusion of all types of transaction on the use or right to use ship as an equipment from Clause (iva), the Legislature would certainly have excluded cases of all ships for the purpose of Clause (iva). Thus, cases falling u/s 44BB stand apart from other kinds of ships, the consideration for the use of which falls under ''royalty''. Thus, the use of the expression "any" before equipment and "but" with which the latter portion of the expression begins are significant by themselves that they clear the doubt as what is included within the meaning of the word ''equipment''. Thus it clearly points out the exception on what is not included as ''royalty'', namely, as income falling u/s 44BB. Read in the context of the decision of the Supreme Court reported in Daman Singh and Others Vs. State of Punjab and Others, , ships, other than those referred to u/s 44BB are included for the purposes of Clause (iva). Thus, as a matter of language, ship, as an apparatus, with which the business is carried on, is an equipment and as held in the decision of the House of Lords, apparatus includes all chattels provided for the purposes of the business of a person other than the stock-in-trade. It is no doubt true that a plain ordinary meaning of the word may be elusive. But when the word has a potentially wider meaning in the context of the provisions, as pointed out in the decisions in the interpretation of the words, to quote, the House of Lords, there is a danger of mistaking the plain and ordinary meaning from the one most frequently used in practice. The question we have to hence ask oneself is what the word means in the context of the provisions therein. Thus, in the context in which the word ''equipment'' appears and the exclusion of those referable to the income u/s 44BB, it is evident, that other than the excluded category, ''ship'', otherwise, would fall as ''equipment''. Thus the word ''equipment'' must receive a meaning in the widest sense in this context even in a sense, etymologically wider than what is popularly understood.

109. Learned senior counsel appearing for the assessee contented that in any event the word ''equipment'' has to be read in the context of the preceding clauses i.e., as referable to those equipment having relevance to Clauses (i) to (iv) and (v) of Explanation 2 to Section 9(1)(vi) of the Income Tax Act. In the Act, there is enough material to show ''ship'' as different from general ''plant and machinery or equipment''. Internationally, ''ship'', under time charter, is not taken as an ''equipment''. In common parlance, equipment is known as something related to industry in manufacture and production; commerce in trade and commerce and scientific relating to research. Thus, equipment that is talked about relates to those having relevance and reference to the preceding Clauses alone.

110. We do not agree with this reasoning. The income earned characterised as ''royalty'' is defined under Explanation to Section 9(1)(vi) of the Income Tax Act. Royalty is defined in Explanation 2 to Section 9(1)(vi) of the Income Tax Act as consideration for (i) transfer of all or any rights including the granting of a licence in respect of a patent, invention, model, design, secret formula or process or trade

mark or similar property; (ii) the imparting of any information concerning the working of, or the use of, a patent, invention, model, design, secret formula or process or trade mark or similar property; (iii) the use of any patent, invention, model, design, secret formula or process or trade mark or similar property; (iv) the imparting of any information concerning technical, industrial, commercial or scientific knowledge, experience or skill; (iva) the use or right to use any industrial, commercial or scientific equipment but not including the amounts referred to in section 44BB and (v) the transfer of all or any rights (including the granting of a licence) in respect of any copyright, literary, artistic or scientific work including films or video tapes for use in connection with television or tapes for use in connection with radio broadcasting, but not including consideration for the sale, distribution or exhibition of cinematographic films.

111. We had already seen that while the OECD model deleted the use or right to use of industrial, commercial and scientific equipment from the definition ''royalty'', the Indian Income tax retained this. The Clauses in Explanation 2 speak on transfer, imparting and use of these intellectual property rights and apart from these, it also includes payment for use of and right to use of any industrial, commercial and scientific equipment and in the DTAAs as well, the use or right to use of any equipment is used. The use of the term ''any equipment'' thus not being specifically restricted in its application to those having relevance to other Clauses. The only inference that one may draw out from this is that quite apart from what is enunciated in other Clauses as having relevance to what is stated as use or right to use of an equipment, there could be yet other categories on the use or right to use of any equipment and the payment for the use or right to use may rightly fall under the category of ''royalty''. This is thus made further clear by the exclusion Clause in Clause (iva) referring to cases falling under Sec 44BB of the Income Tax Act. A payment made for the use or the right to use an equipment thus qualifies as ''royalty'' and in this case, considering the nature of time charter agreement and the rights and obligations of the charterer, for the privilege of using the ship, the fee paid is royalty, falling under Clause (iva) of Explanation (2) to Section 9(1)(vi) of the Income Tax Act.

112. In these circumstances, in the absence of any word of limitation other than what is explicitly provided for, we do not find any legal necessity of reading a limitation on the word equipment; consequently, we reject the arguments of the assessee. We may point out herein that admittedly, the recipient business is to give on hire the ships. Thus ship being a plant, an equipment with which the ship owner operates the business and commercially exploits for earning the income from chartering of ship, rightly, the Revenue assessed this as ''royalty''.

113. This takes us to the second part of the argument on Clause (iva), viz., impact of Explanation 5 of the Act. Learned standing counsel appearing for the Revenue submitted that by the insertion of Explanations 4 and 5, Parliament has not sought

to create a fresh charge. The Explanation merely clarifies what is implicit in Clause (iva). Thus, irrespective of Explanation 5, the case of the assessee would certainly fall under Clause (iva). Placing reliance on the decision reported in (2001) 1 ALL ER 403 : (2001) All ER 403 (Whistler International Limited V. Kawasaki Kisen Kaisha Limited), he submitted that the charterer agrees to pay hire for the Vessel, because he wants to make use of it. Referring to Section 68(105)(zzzzj) of the Income Tax Act levying service tax, he said that the levy under service tax provision is as regards the service in relation to use, whereas under the Income Tax Act, it is the consideration for the use of the equipment, which is taxable under the Income Tax Act.

114. Countering the claim on the applicability of the decision reported in The State of Tamil Nadu Vs. Tvl.Essar Shipping Limited No. 7, Chennai House Esplanade Chennai 600108 , Mr. N.V. Balaji, learned standing counsel appearing for the Revenue submitted that transfer, as a concept though relevant for the purposes of sales tax, is not relevant for the purpose of the Income Tax. So long as there is a use or right to use, irrespective of possession, the consideration would fall for consideration as ''royalty'' and hence the assessee should have deducted the tax at source. Mr. Arvind P. Datar, learned senior counsel appearing for the assessee, however, replied that reading Section 194C, 194I and 194J of the Income Tax Act, one would note that the payments on hire are not treated as ''royalty'', ship is not treated as an equipment and domestic hire is not treated as ''royalty'' u/s 194C of the Income Tax Act. He pointed out that the use of the expression "includes" in Explanation 5 is a word of limitation and it really means as "means and includes".

115. Explanation 5, inserted by Finance Act, 2012, with effect from 01.06.1976, begins with the phrase "for removal of doubts, it is hereby clarified that the royalty includes and has always included." Leaving aside this argument as to whether this is an expression of limitation or not, the Explanation is clear in its intent and clarifies that irrespective of whether the possession and control of right, property or information are with the payer or not, such right, property and information is used directly by the payer or not, whether the location on such rights, property or information is in India or not, ''royalty'' includes and always included consideration in respect of any property, right or information.

116. Thus the Explanation clarifies that irrespective of control or possession or use or location in India such right, property or information with the payer; the payment made on the transfer of all or any rights, or the use of, a patent, invention, model, design, secret formula or process or trade mark or similar property; the use of any patent, invention, model, design, secret formula or process or trade mark or similar property; the imparting of any information concerning technical, industrial, commercial or scientific knowledge, experience or skill; the use or right to use any industrial, commercial or scientific equipment but not including the amounts referred to in section 44BB and the transfer of all or any rights (including the granting of a licence) in respect of any copyright, literary, artistic or scientific work

including films or video tapes for use in connection with television or tapes for use in connection with radio broadcasting, but not including consideration for the sale, distribution or exhibition of cinematographic films, the payment would be considered as ''royalty''. As rightly pointed out by the Revenue, as far as the use or right to use is concerned, even going by the OECD commentary, even with the possession of the ship with the owner, the right to use being part of bundle of rights that the owner has and this parted with for a consideration, the Revenue need not take the assistance of Explanation 5 to substantiate its case. With the Explanation, the case of the Revenue becomes more firm on the issue of ''royalty''.

117. Referring to BC Mitra in his Law of Carriage by Sea in the decision reported in The Union of India Vs. Gosalia Shipping (Pvt.) Ltd., , the Apex Court pointed out that a time charter party is one in which the ownership and also possession of the ship remain with the original owner whose remuneration or hire is generally calculated at a monthly rate on the tonnage of the ship. It further pointed out that sometimes the ship itself, and the control over her working and navigation are transferred for the time being to the persons who use her. In such cases, the contract is really one of letting the ship. The reading of the various time charter in the case on hand shows that hire is payable for the use of the ship for a specific period of time, irrespective of whether the charterer chooses to use it for carrying cargo or lays it up out of use. The ownership and possession of the vessel which remain with the owner are separated from the use of the ship, which is granted to the charterer. The agreement states that the charterer may send the vessel to safe berths, safe ports and safe anchorages, the owners are responsible for the navigation of the vessel and the Master has the obligation to prosecute the voyage with utmost care. The payment is calculated according to the time stated in the agreement rather than the same is performed. The right to remuneration is unaffected by the lay off by the charterer. Thus with the possibility in law and permissible too under law that various rights and interest in a property may be vested in various persons, the Explanation merely recognises what is evident in law and thus clears whatever doubt one may have on the aspect of use or right to use, be it with regard to tangible or intangible property, rights and information. Consequently, we do not find any need for giving Explanation 5 a restrictive application to Clauses (i) to (iv) and (v) alone. In the circumstances, apart from the fact that the case of the Revenue could stand even without Explanation 5, the case of the Revenue stands reinforced with the Explanation, which according to us merely clarifies what is already there in the provision.

118. In the background of the above decision, we hold that ship is an ''equipment''. The consideration paid is for the use of the ship for which the assessee need not have possession and control of the ship. The specific exclusion of the income u/s 44BB clearly shows that what is otherwise includible under equipment, used for industrial, commercial and scientific equipments alone stands excluded. The Explanation has brought in clarity and made it more explicit to the law already in

existence. The payment towards the employment of the vessel is clearly in the nature of ''royalty''. The use or right to use the ship for a consideration means and relates to the economic aspect of the equipment as a business asset, and the exploitation of the earning potential of the Vessel. Hence, we have no hesitation in holding that the consideration paid under the time charter fits in with the definition of ''royalty'' under Clause (iva) of Explanation 2 to Section 9(1)(vi) of the Income Tax Act.

119. As far as BBCD is concerned, Section 115V(b) defines Bare boat charter-cum-demise to mean a bareboat charter where the ownership of the ship is intended to be transferred after a specified period to the company to whom it has been chartered.

120. As far as the present case on BBCD is concerned, parties agreed for payment for hire of the ship and the agreement reserved the right of the assessee to purchase the ship at the end of the contract period or even prior to that date subject to the ballooning payment, which gets reduced as the year roll. Admittedly, the ship in question was sold under the certificate of sale only on 12th January, 2005. Thus, till that time, it was a bare boat charter which as per Section 115V(a) means hiring of ship for a stipulated period on terms which give the charterer the possession and control of the ship, including the right to appoint the master and crew. Thus, admittedly, with possession and custody with the hirer, the consideration paid for the use of the same is liable to be treated as ''royalty''. Learned Senior Counsel, however, submitted that the dominant intention under the agreement was only for purchase of the Vessel and hence the consideration cannot be treated as ''royalty''.

121. We do not agree with this, for, the facts found by the Authorities clearly show that on 14th May, 1999, the assessee entered into a BBCD contract with DMCL fixing the hire charges for 69 months starting from April, 1999 to December, 2004 and the purchase option at the end of each period was also specified. Thus, till the last month of the payment or the option exercised, the assessee was not the owner of the vessel. The assessee opted to make the balloon payment of US $ 2.75 million on 12.1.2005. A sale certificate was issued only on 12.01.2005. The consideration paid periodically was in the nature of hire charges for the use of the Vessel, as described in the agreement and not sale consideration as was contended by the assessee. The Commissioner of Income Tax (Appeals) referred to the correspondence dated 31.03.1999 addressed to Marine Group of ICICI Limited, the financier, evidencing the intention of the assessee to acquire the vessel on BBCD basis. It stated that in addition to the BBCD hire, it had to pay balloon payment of US $ 2.75 million at the end of the charter period, so that, the owner could transfer the Vessel to the assessee. On the ICICI Limited agreeing to pay the hire charges quarterly, the assessee conveyed to DG (Shipping) vide letter dated 13.5.1999 that rental payment reasonableness was approved by ICICI. The assessee also treated the hire charges as revenue expenditure in their return of income. In the light of the above findings,

we do not find any reason to disturb the findings of fact by the Tribunal, which also confirmed the same. On the issue as to whether the ship is an equipment or not, considering the view that we have already taken on this, we reject the contention of the assessee in T.C. (A) Nos. 2629 and 2630 of 2006.

122. This takes us to the next contention raised, particularly by Mr. P.S. Raman, learned senior counsel appearing for the assessee in T.C. (A) Nos. 2629 and 2630 of 2006 questioning the liability under Article 12 of the DTAA. Learned senior counsel submitted that if at all the receipt could be taxed, it could only be under Article 8 and not under Article 12. Mr. Arvind P. Datar, learned senior counsel appearing for the assessee in T.C. (A) Nos. 2206 to 2208 of 2006, however, admitted that the case would not fall under Article 8 of the DTAA. Mr. P.S. Raman, learned senior counsel appearing for the assessee submitted Article 3(h) of the DTAA with the Government of Republic of Cyprus defines "international traffic" to mean any transport by a ship or aircraft operated by an enterprise registered and having its place of effective management in a Contracting State, except when the ship or aircraft is operated solely between places in the other Contracting State. According to Article 8(2) of the DTAA, profits from the operation of ship engaged in international traffic shall be taxable only in the Contracting State, in which, the place of effective management of the enterprise is situated. Thus, according to him, considering the BBCD, Article 8(6) will have relevance to his case. When the paramount intention for purchase is evident, the question of bringing the charge under Article 12 did not arise and the Cyprus company has no right to repossess the vessel. Article 8(6) does not require the test of international traffic. According to the learned senior counsel, the payment made was a deferred payment of the consideration. Hence, to bring it under Article 8(6), international traffic is not of relevance. The pre-dominant consideration under the agreement being one of sale, the question of taxing the income treating it as ''royalty'' under Clause (iva) of Explanation 2 to Section 9(1)(vi) of the Income Tax Act did not arise.

123. We do not agree with the above submission. As rightly pointed out by the Revenue, as far as the exercise of the option to purchase and deferred payment of the consideration is concerned, we have already considered this in the preceding paragraphs, and hence, we reject the reliance on Article 8(6). As for the submission based on Article 8(1), that the profits could be taxed only by the Contracting State where the enterprise is registered, even here, we do not agree with the assessee, given the definition on international traffic and that the vessel was not in international traffic at all as has been understood in the commentary on OECD model.

124. The commentary on OECD model definition on "international traffic" points out that the definition of the term "international traffic" is broader than is normally understood, so as to preserve for the State of the place of effective management the right to tax purely domestic traffic as well as international traffic between third

States, and to allow the other Contracting State to tax traffic solely within its borders. The OECD commentary clarified this through an illustration which may beneficially be quoted herein too. "Suppose an enterprise of a Contracting State or an enterprise that has its place of effective management in a Contracting State, through an agent in the other Contracting State, sell tickets for a passage that is confined wholly within the first-mentioned State or alternatively, within a third State. The Article does not permit the other State to tax the profits of either voyage. The other State is allowed to tax such an enterprise of the first-mentioned State only where the operations are confined solely to places in that other State."

125. The further example gives on what is international traffic is also worth a reference. It reads as follows:

A cruise beginning and ending in that other State without a stop in a foreign port does not constitute a transport of passengers in international traffic. Contracting States wishing to expressly clarify that point in their conventions may agree bilaterally to amend the definition accordingly.

126. As far as the present case is concerned, the assessee had a BBCD with the Cyprus company whose effective management is in Cyprus, a Country with whom India has DTAA. The definition given in DTAA on ''international traffic'' under Article 3(h) and in Article 8 on shipping and air transport shows that income arising from the operation in international traffic are the same as in the OECD model.

127. Thus, going by the commentary and the definition on international traffic and the BBCD, the movement being on the coastal lines of the Indian shore, the assessee fails in the test on international traffic. Therefore, the receipt are taxable only in India. Thus going by the terms of the agreement and the definition on international traffic, we do not agree with the assessees contention based on Article 8 also.

128. This takes us to the other contentions of the assessee that apart from the fact that the income cannot be taxed under Article 12 as ''royalty'', the same cannot be taxed even under Article 7 as ''business profits'', as the recipient has no permanent establishment in India to have business connection in terms of Article 7.

129. Admittedly, the agreement between the Ennore Port and TNEB provided for two berths in Ennore reserved for its use exclusively for the ships chartered by the assessee. Berthing is guaranteed for the foreign ships in coastal waters chartered by the assessee. The Tribunal held that it amounted to permanent establishment of the foreign shipping companies and nothing was placed by the assessee before the Tribunal to refute this contention. Thus, the Tribunal rejected the appeal of the assessee on this aspect too. Although Mr. Arvind P. Datar, learned senior counsel appearing for the assessee pointed out that the questions raised by the Revenue in the T.C. (A) Nos. 56 to 64 of 2013 are different from what had been argued before the Tribunal on the aspect of permanent establishment, when specifically asked by

the court as to whether this demanded a remand, learned senior counsel quickly answered in the negative and requested this Court to consider the questions in all perspective - the issue being legal in character and Section 260A of the Income Tax Act permitted such additional questions to be raised at the direction of the Court for a proper consideration of the issues involved on the admitted facts. Mr. P.S. Raman, learned Senior Counsel appearing for the assessee too expressed that he has no objection to this.

130. The Department''s contention herein is that in the event of this Court not accepting the case of the Department as to the income not falling within the meaning of ''royalty'', the same is liable to be treated as ''business income'' u/s 9(1)(i) of the Income Tax Act, as the company has income arising/accruing through business connection in India, as defined in Explanation 2 to Section 9(1)(i) of the Income Tax Act and a permanent establishment as defined under Article 5 of the DTAA, and hence, would fall for consideration under Article 7 in India.

131. What is business connection is considered in the decision of the Supreme Court reported in Commissioner of Income Tax, Punjab Vs. R.D. Aggarwal and Company, . The Supreme Court pointed out that while business is defined in the Act, there is no definition of the expression ''business connection''. According to the Supreme Court

the expression ''business connection'' undoubtedly means something more than business. A business connection in section 42 involves a relation between a business carried on by a non-resident which yields profits or gains and some activity in the taxable territories which contributes directly or indirectly to the earning of those profits or gains. It predicates an element of continuity between the business of the nonresident and the activity in the taxable territories: a stray or isolated transaction is normally not to be regarded as a business connection. Business connection may take several forms: it may include carrying on a part of the main business or activity incidental to the main business of the nonresident through an agent, or it may merely be a relation between the business of the non-resident and the activity in the taxable territories, which facilitates or assists the carrying on of that business. In each case the question whether there is a business connection from or through which income, profits or gains arise or accrue to a non-resident must be determined upon the facts and circumstances of the case.

The Apex Court pointed out that a connection to be a business connection, it must be real and intimate and through or from which income must accrue or arise whether directly or indirectly to the non-resident. Based on this, the Revenue states that there is continuity between the business of the non-resident and the activity in the taxable territory for earning income; that the non-resident rendered services from within India with its men and there is intimate connection between global business and business in Indian soil. Thus the business activity in India resulted in profit in India. Learned standing counsel appearing for the Revenue, however, contended that allocable profits may be a matter of consideration by the Assessing

Officer, yet, the larger question on business profits and business connection linked to the permanent establishment; being a question of law, the same can be considered by this Court, since facts necessary for considering this is before this Court also and no fresh facts need to be considered.

132. According to the Revenue, the non-resident Indian Company also has permanent establishment to carry on the business which one finds through the berth where the ship docks, waits and on instruction it moves. The ship has the licence to move along the coast granted by the Indian Authority. To have a permanent establishment, it is not necessary it should be a fixed place of business, so long as there is a link between specific geographical point with which it moved. Thus the Port where the ship is docked is also a Permanent Establishment. For the moving ship, a specific geographical point is not necessary, considering the nature of the business.

133. Mr. Arvind P. Datar, learned Senior Counsel appearing for the assessee submitted that to have permanent establishment, the non-resident company must have dominant right of disposal of the place. According to the assessee, berth though fixed, is not a place of business. The berth is for use of the assessee''s ships as well as those chartered by it. As such, the non-resident company has no domain over or exclusive use over it. With berthing in different places, he submitted that there is no such thing as permanent establishment. He submitted that if the Court feels that the receipt is not royalty, then the matter has to be remitted for considering this for deciding the question of allocable profits.

134. Before going into the various aspects of the contentions, we may note that the payments could be taxed as business profits only if the receipts are attributable to the permanent establishment Sub-article (4) of Article 7 states that no profits shall be attributed to that permanent establishment by reason of a mere purchase by that permanent establishment of goods or merchandise for the enterprise. As for bringing a receipt under Article 12 as royalty is concerned, it is the converse of Article 7 in the sense that the profits earned by the foreign enterprise is not attributed to the presence of the permanent establishment. Hence the question as to whether the receipt is to be brought under Article 7 or 12 depends on the attributing of the profits to the permanent establishment.

135. As already seen, the Vessels are designated as coastal vessel by the Chennai Port Trust to mean, exclusively employed in trading between any Port or place in India to any other Port in India having a valid coastal licence issued by the competent authority. The Director General of shipping had given valid licence to the assessee for chartering of the foreign vessels on time charter basis for transporting of coal for Haldia/paradip/vizag to Chennai/Tuticorin/Ennore based on the application filed by the assessee. These Vessels are treated on par with the other Indian Coastal Vessel. The facilities at the Ennore Port by reserving two berths are for the use by ships chartered by the assessee for loading and unloading of the coal

carried from the Ports specified. The details furnished by the assessee for the delivery and re-delivery on the Vessels taken on hire shows that those vessels were put to use for more than 90 days continuously between the named Ports in India. Thus the hiring was not an occasional feature and the hiring was for a continuous period solely at the disposal of the assessee for the entire period of hire. Thus, it is evident that the Vessels sailed along the Indian Coast on the Eastern side on a regular exclusive basis and the Ports are used for berthing of the ships. The agreement between French Company and the assessee and the assessee and the German Company shows that they had local agents employed in India. As per the definition under Article 5, ''permanent establishment'' means a fixed place of business through which the business of the enterprise is wholly or partly carried on. Article 5(2) contains an inclusive definition to include a place of management, a branch, an office, a factory, a workshop and a mine an oil or gas well, a quarry or any other place of extract of natural resources. Sub-clause (3) deems certain places as permanent establishment. As per this Sub-Clause, a building site or construction or installation project constitutes a permanent establishment. Sub-Clause 4 of Article 5 gives the exclusion classes, which reads as follows:
4. Notwithstanding the preceding provisions of this Article, the term "permanent establishment" shall be deemed not to include:

a) the use of facilities solely for the purpose of storage, display or delivery of goods or merchandise belonging to the enterprise;

b) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage, display or delivery;

c) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise;

d) the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise or of collecting information, for the enterprise;

e) the maintenance of a fixed place of business solely for the purpose of carrying on, for the enterprise, any other activity of a preparatory or auxiliary character;

f) the maintenance of a fixed place of business solely for any combination of activities mentioned in subparagraphs a) to e), provided that the overall activity of the fixed place of business resulting from this combination is of a preparatory or auxiliary character.

136. From the commentary on OECD under Article 5, we find a good deal of discussion with examples given to explain when and where the permanent establishment could be found. Since both sides placed heavy reliance on this, we may note some of the relevant passages therein. In paragraph 4 of the commentary under Article 5, it is stated that permanent establishment covers a premises, facilities or installation used for carrying on the business of the enterprise. Thus, the

commentary states, there must be an existence of place of business.

137. Fixed place of business is again explained that the place need not be exclusively for that particular enterprise''s business purpose only and it is enough that there is certain amount of space available at its disposal. It is immaterial that the premises, facilities or installation are owned or rented by or are otherwise at the disposal of the enterprise. Thus, no formal legal right to use the place is required. It is further stated that it may be situated in the business facility of another enterprise. So long as the space is at the disposal of the enterprise for its business activity, it satisfies the expression permanent establishment. In contra distinction to a mere fleeting presence, the intention to use it for its business and in the course of its business is required and the space is available at the disposal of the enterprise for regularly carrying on business The commentary further pointed out that what is meant by a fixed place in the context of permanent establishment. It further clarifies that to call a place a fixed place, there has to be a link or coherence between the place of business and a specific geographical point. This, however, ultimately depended on the nature of the business too. It observed as follows:

single place of business will generally be considered to exist where, in light of the nature of the business, a particular location within which the activities are moved may be identified as constituting a coherent whole commercially and geographically with respect to that business..... By contrast, where there is no commercial coherence, the fact that activities may be carried on within a limited geographic area should not result in that area being considered as a single place of business..... Conversely an area where activities are carried on as part of a single project which constitutes a coherent commercial whole may lack the necessary geographic coherence to be considered as a single place of business.... A place of business may, however, constitute a permanent establishment even though it exists, in practice, only for a very short period of time because the nature of the business is such that it will only be carried on for that short period of time. It is sometimes difficult to determine whether this is the case.....Further more, the activity need not be permanent in the sense that there is no interruption of operation, but operations must be carried out on a regular basis.... Where tangible property such as facilities, industrial, commercial or scientific (ICS) equipment, buildings, or intangible property such as patents, procedures and similar property, are let or leased to third parties through a fixed place of business maintained by an enterprise of a Contracting State in the other State, this activity will, in general, render the place of business a permanent establishment.

138. Thus for permanent establishment, there must be a place for the business to be carried on through that fixed place. The concept of permanent establishment assumes significance in the context of the determination of the rights of the Contracting State to tax the profits of an undertaking of the other Contracting state. In the context of the various business activities, in the case of equipment, a fixed

place can be found to exist even though the equipment by the nature of business may be relocated from one site to another for a single customer under one integrated contract. A movable place of business is thus treated as fixed place of business and most of the equipment is used at fixed points within a proximate area on a repetitive continuous basis for sufficient period of time as required by the business. Thus, when the business activities are peripatetic and the equipment is moved between neighbouring location, a single place of business could be considered to exist where the location to which the equipment is moved, thereby presenting a coherence in commercial and geographical aspect with regard to the conduct of business. When the commercial coherence is not there even if there be business carried on within a limited geographical location, the same would not be considered as a single place of business.

139. Thus the submission of the Revenue that the moving ship has a place of business in the place where the ship is docked and the fact that the ship moved from one point to another is the result of the nature of business contract and the movement is an integrated one having business and geographical coherence leads to the inference that the foreign enterprise has the place of permanent establishment in this Country. The foreign enterprise thus satisfying the presence a permanent establishment, but for the character of the receipt not being attributed as the income earned from the permanent establishment for it, to be assessable as business profits earned by its participation in the economic benefit of this Country, we do not find the case of the assessee could be brought under Article 7 to assess the income as business income.

140. It may be of relevance to note that under Article 12(4), it is specifically pointed out that provisions of paragraph 1 and 2 on Article 12 shall not apply to treat the receipts as royalty, if the person beneficially entitled to royalties carries on business in the other Contracting state, in which the royalties arise through a permanent establishment situated in the other contracting state or performs independent personal services from a fixed base therein and the property, right or service in respect of which royalties are paid or credited are effectively connected with such permanent establishment. In such a case, Article 7 or 14 would apply. Article 5 sub-clause (3)(c) states that an enterprise shall be deemed to have permanent establishment in one of the Contracting States and to carry on business through the permanent establishment, if it furnishes services and those mentioned in Article 12(3)(h) to (k) but not those services in respect of which payments are treated as royalties as defined in Article 12. The substance of the Article 12(4) is that so long as the consideration received by the foreign enterprise does not arise out of the permanent establishment, in the sense of effectively connected or attributed to such permanent establishment, the receipts would be treated as ''royalty''. However, when the receipts paid or credited or effectively connected with such permanent establishment, provisions of Article 7 or Article 14 would be of relevance. Thus, the only difference between Article 7 and 12 is the effective connection between the

amount paid and the permanent establishment.

141. From the discussions that we have had in the preceding paragraphs, even though the berth is a permanent establishment of the foreign enterprise, yet, the royalties paid or credited not being effectively connected with or attributed to such permanent establishment, the payment would fall for consideration only under Article 12 and not under Article 7. In the circumstances it is not necessary for us to consider the aspect of apportionment for Article 7 of the DTAA or for that matter Section 44B of the Income Tax Act.

142. This takes us to the other contention on Sections 201 and 201A of the Income Tax Act that when the amount payable to the non-resident is exigible to tax and no tax was admittedly deducted, the Assessing Officer rightly treated the assessee as one in default in respect of the tax within the meaning of Section 201 of the Income Tax Act and consequently, attracts Section 201(1A) of the Income Tax Act.

143. Apart from this, one of the questions raised in T.C. (A) Nos. 56 to 64 of 2013 relates to the status of the assessee assessed as an agent of the foreign enterprise. Section 163 of the Act defines who is an agent. As an inclusive definition, the Section treats any person in India having business connection with a non-resident as an agent in relation to the non-resident and an agent from whom or through whom the non-resident is in receipt of any income whether directly or indirectly. Section 160 defines who are representative assessees. Sub-section (i) of Section 160(1) states that in respect of the income of a non-resident specified in sub-section (1) of Section 9, the agent of the non-resident including a person treated as an agent u/s 163 would be a representative assessee.

144. Section 195 relates to TDS on payment to a non-resident. The Section states "any person" responsible for paying to a non-resident would has to deduct tax at source. Section 195(2) states that the person responsible for deduction of tax at source can apply to the Assessing Officer for general or special order for determination of appropriate proportion of tax deductible, where the amount paid could not be fully taxable, the assessee responsible for TDS can ask for nil certificate. The non-resident or the agent could make an application for a certificate of ''nil'' deduction at a lesser rate. Thus, as far as Section 160 is concerned, this is a procedural and enabling Section for the determination of the quantum of income of the non-resident assessee and the tax to be demanded.

145. In the decision reported in The Transmission Corporation of A.P. Ltd. and Anr Vs. The Commissioner of Income Tax, A.P., , the Supreme Court pointed out that Section 195 deals with the deduction of tax in cases where the payment is made to a non-resident. It observed as follows:

The scheme of tax deduction at source applies not only to the amount paid which wholly bears "income" character such as salaries, dividends, interest of securities etc., but also to gross sums, the whole of which may not be income or profits of the

recipient, such as payments to contractors and sub-contractors and the payment of insurance commission. The purpose of Sub-section (1) of Section 195 is to see that the sum which is chargeable u/s 4 of the Act for levy and collection of income tax, the payee should deduct income tax thereon at the rates in force, if the amount is to be paid to a nonresident. The said provision is for tentative deduction of income tax thereon subject to regular assessment and by the deduction of income tax, rights of the parties are not, in any manner, adversely affected. Further, the rights of payee or recipient are fully safeguarded under Sections 195(2), 195(3) and 197. Only thing which is required to be done by them is to file an application for determination by the Assessing Officer that such sum would not be chargeable to tax in the case of recipient, or for determination of appropriate proportion of such sum so chargeable, or for grant of certificate authorising recipient to receive the amount without deduction of tax, or deduction of income tax at any lower rates or no deduction. On such determination, tax at appropriate rate could be deducted at the source. If no such application is filed income tax on such sum is to be deducted and it is the statutory obligation of the person responsible for paying such ''sum'' to deduct tax thereon before making payment.

146. Thus the proceedings u/s 201 and 201A of the Income Tax act has nothing to do with the status of the assessee as an agent u/s 160 and 163 which would assume significance only for assessment purposes. Thus so long as the Revenue is able to show the receipt as falling u/s 9 of the Income Tax Act, provisions of Section 160 of the Income Tax Act would stand attracted.

147. One of the objections taken by the assessee to this is that in respect of several of the non-residents, single assessment has been done at the hands of the assessee. As rightly pointed out by the Revenue, this technicality, however, does not cut at the legality of the assessment. It is no doubt true that u/s 160(1) of the Income Tax Act, representative assessee means an agent of the non resident, including a person who is treated as an agent u/s 163 in respect of the income of a non-resident specified in sub-Section (1) of Section 9. The fact herein is that the assessment in respect of each of the non-resident from whom the assessee is to be assessed in a representative capacity has been specifically quantified and that in each of the case of the non-resident, the assessee had been treated as a representative assessee. In the circumstances, we do not find any merit in the contention of the assessee that the order fails on this technical ground.

148. The contention that Sections 163 and 201 of the Income Tax Act cannot go together is not correct for the reason that they operate on different spheres. Section 195 casts an obligation on TDS on any person responsible for paying, whereas Section 163 is for assessment purposes. Therefore, the assessee''s reliance on the decision of the Bombay High Court reported in Commissioner of Income Tax, Bombay City-II Vs. Premier Tyres Ltd., is misplaced and consequently stands rejected. In the circumstances, while dismissing the Tax Case (Appeals) filed by the

assessees in T.C. (A) Nos. 2206 to 2208 of 2006, 2629 and 2630 of 2006 and 598 to 601 of 2013, we allow the Tax Case (Appeals) filed by the Revenue in T.C. (A) Nos. 56 to 64 of 2013. No costs. Consequently, connected miscellaneous petitions are closed.