MAHARASHTRA NATIONAL LAW UNIVERSITY, MUMBAI INCOME TAX APPELLATE TRIBUNAL BAR ASSOCIATION, MUMBAI & ALL INDIA FEDERATION OF TAX PRACTITIONERS (WEST ZONE)

PRESENT

15TH PADMA VIBHUSHAN N.A. PALKHIVALA MEMORIAL NATIONAL (VIRTUAL) MOOT COURT COMPETITION & RESEARCH PAPER COMPETITION, 2026

1. Skyberry Plc, is a company incorporated in and resident of the United Kingdom and forms part of a multinational technology group engaged globally in the manufacture and commercial exploitation of electronic devices such as mobile phones, laptops and tablets, proprietary operating systems and a wide range of information-technology based applications for document editing, electronic communication, audio-video conferencing, browsing, accounting, computing, etc.

2. Among the suite of applications developed and marketed by Skyberry Plc, its document-editing software branded “Skydoc” commands an overwhelming market presence and a very large global subscriber base, rendering it a dominant and near-essential tool for both individual and enterprise users.

3. Skyberry Plc also operates an integrated cloud-computing platform branded as “SkyCloud”, under which customers are permitted to remotely store and process data, access applications hosted on servers, synchronise content across devices and utilise document-editing, communication and accounting tools bundled in subscription-based service packages.

4. Hardware products marketed by Skyberry Plc such as Skyphone, Skylap and Skytab are supplied with pre-installed operating systems and limited-functionality versions of several applications. Customers desirous of accessing full functionality are required to purchase / download / upgrade & install the advanced licences from Skyberry Plc’s proprietary e-application store. Such devices are further supplied with limited cloud storage which can be enhanced through monthly or annual subscription plans. Skyberry Plc’s applications are closely inter-woven with SkyCloud services for seamless data storage and synchronisation, which in turn independently drives significant global demand for cloud subscriptions.

5. SkyCloud services are marketed as standardised and automated cloud-based offerings delivered over the internet on a pay-as-you-go basis. Customers select storage volumes, application bundles and numbers of user licences through online portals without direct human interface. The services are not customised for particular customers and are projected as requiring minimal or no human intervention during delivery. SkyCloud services are used by variety of customers. Many individual electronic devices users use

SkyCloud to store their personal data. Large companies use SkyCloud to store and / or process their valuable data using computing capabilities of SkyCloud.

6. In India, Skyberry Plc's hardware products and SkyCloud subscriptions are distributed by Skyberry India Private Limited ("SIPL"), a company incorporated and resident in India. SIPL is wholly owned by Skyberry Holding Pte Ltd ("SHPL"), incorporated in Singapore, which in turn is ultimately held by ABC Ltd. (UK), a foreign company also holding majority stake in Skyberry Plc.

7. Skyberry Plc has entered into a reseller agreement with SIPL, appointing it as a non-exclusive distributor / reseller of SkyCloud services in India. The agreement stipulates that the arrangement is on a principal-to-principal basis and that SIPL has no authority to conclude contracts on behalf of Skyberry Plc. SIPL has to pay Notwithstanding the said clauses, SIPL is actively engaged in marketing and offering Skyberry Plc's products and services in India, including SkyCloud subscriptions, to a wide customer base. SkyCloud customers in India enter into a standard online customer contract, by click of a button and thereafter an invoice gets generated and delivered to the customer's registered email address. SIPL is obligated to pay Skyberry Plc the distribution / reseller fee of 75 per cent of its revenue from sale of SkyCloud services in India, under the reseller agreement.

8. In the aftermath of the decision of the Supreme Court of India in *Justice K.S. Puttaswamy (Retd.) v. Union of India* recognising privacy as a fundamental right under Article 21 of the Constitution, India initiated the process of framing a comprehensive data-protection regime mandating localisation of certain categories of data. Anticipating such regulatory developments, several cloud-service providers, including Skyberry Plc, made arrangements for establishing data-centre infrastructure within India.

9. In this backdrop, Skycloud Servers Private Limited ("SSPL"), an Indian company jointly and equally owned by SHPL and Cloud Services India Private Limited ("CSIPL" - part of a diversified Indian conglomerate group), was incorporated. SSPL has established and operates multiple data centres in India. It has entered into a non-exclusive hosting agreement with Skyberry Plc for providing server-hosting services. During FY 2022-23, however, one hundred per cent of SSPL's revenue was derived solely from hosting services rendered to Skyberry Plc. Skyberry Plc pays the hosting fee at Cost plus 15 per

cent to SSPL for the hosting services provided by SSPL. The servers in India are owned and maintained by SSPL and its customers have no right to access its premises except for the limited purpose of survey.

10. Skyberry Plc further provided its customers with an option to choose the geographical location of data storage. During FY 2022-23, approximately seventy per cent of Indian customers opted for storage on India-based servers, while around two per cent of customers located outside India also selected Indian data centres for redundancy and latency considerations.

11. With effect from 1 April 2022, Rule 11UD of the Income-tax Rules introduced monetary thresholds for Significant Economic Presence ("SEP"), thereby expanding the scope of "business connection" under Section 9 of the Act. Skyberry Plc's receipts from India exceeded ₹2 crore during FY 2022-23. Acting upon professional advice, Skyberry Plc applied for a Permanent Account Number and filed its return of income in India for AY 2023-24 declaring NIL taxable income, asserting that its receipts constituted business profits not chargeable to tax in India in the absence of a PE.

12. The return was selected for scrutiny and notices under Sections 143(2) and 142(1) of the Act were issued. During the course of assessment proceedings, the Assessing Officer conducted an extensive inquiry into the nature of SkyCloud services, the ownership and control of Indian data centres, the role and authority of SIPL under the reseller agreement. The Assessing Officer also sought details regarding purpose of travel by employees of Skyberry Plc to India who were cumulatively present in India for more than 90 days. Skyberry Plc submitted that its employees travelled to India for meeting various enterprise customers, government officials, etc however no services were provided by such employees while travelling to India.

13. In the Draft Assessment Order, the Assessing Officer concluded that:

   a) SIPL constituted a dependent agency PE of Skyberry Plc in India under Article 5(4) of the India–UK DTAA;

b) SSPL constituted a fixed place PE under Article 5, on the ground that the servers located in India were at the disposal of and under the effective control of Skyberry Plc; and

c) Skyberry Plc had a service PE under Article 5(2)(k) owing to visits of its employees to India for meeting and interacting with large corporate SkyCloud customers, rejecting the contention that no services were provided by such employees while travelling to India.

14. The Dispute Resolution Panel affirmed the aforesaid findings. A Final Assessment Order was thereafter passed attributing seventy per cent of Skyberry Plc's India-sourced revenue to the alleged PE.

15. Skyberry Plc carried the matter in appeal before the Income-tax Appellate Tribunal, Mumbai, contending that it did not have any PE in India and, without prejudice, that even if a PE were to be assumed, no further attribution was permissible as the transactions with SIPL and SSPL were at arm's length.

16. The Tribunal, by the impugned Order, accepted Skyberry Plc's contentions and held as under –

- SIPL does not constitute an dependent agency PE of Skyberry Plc in India under Article 5(4) of India – UK DTAA as the reseller agreement is on principal to principal basis and SIPL does not have any authority to conclude contract on behalf of Skyberry Plc;

- SSPL does not constitute a fixed place PE of Skyberry Plc in India under Article 5 of India – UK DTAA as the servers are owned and controlled by SSPL only;

- There is no evidence that the employees of Skyberry Plc were involved in providing any services in India and therefore Skyberry Plc does not have any Service PE in India under Article 5 of India – UK DTAA;

- In any event, the Hon'ble tribunal noted that no order making any adjustment has been made by the Transfer Pricing Officer in hands of SIPL & SSPL and therefore the transaction between Skyberry Plc and its associated enterprises are at arm's length. Therefore, no further income is attributable in the hands of Skyberry Plc for AY 2023-24.

17. Aggrieved thereby, the Revenue has filed an appeal before the Hon'ble Bombay High Court on the following issues (Questions of Law) –

A. Whether on the facts and circumstances of the case and in law, the Hon'ble ITAT has erred in holding that SIPL does not constitute a dependent agency PE of Skyberry Plc in India under Article 5(4) of India – UK DTAA?
B. Whether on the facts and circumstances of the case and in law, the Hon'ble ITAT has erred in holding that SSPL does not constitute a fixed place PE of Skyberry Plc in India under Article 5 of India – UK DTAA?

C. Whether on the facts and circumstances of the case and in law, the Hon'ble ITAT has erred in holding that Skyberry Plc does not have any Service PE in India under Article 5 of India – UK DTAA?

D. Whether on the facts and circumstances of the case and in law, the Hon'ble ITAT has erred in holding that no income is attributable in the hands of Skyberry Plc for AY 2023-24?

18. The Hon'ble High Court has listed the appeal for final disposal at the admission stage at the joint request of both parties and both parties have been directed to place its propositions / submissions on record in advance before the date of hearing.