आयकर अपीलीय अधिकरण, मुंबई "एल " खंडपीठ

Income-tax Appellate Tribunal "L"Bench Mumbai

सर्वश्री राजेन्द्र, लेखा सदस्य एवं रविश सूद, न्यायिक सदस्य

Before S/Sh. Rajendra,Accountant Member & Ravish Sood, Judicial Member

आयकर अपील सं./I.T.A./652/Mum/2014, निर्धारण वर्ष /Assessment Year: 2010-11

आयकर अपील सं./I.T.A./6294/Mum/2012, निर्धारण वर्ष /Assessment Year: 2009-10

आयकर अपील सं./I.T.A./5566/Mum/2011, निर्धारण वर्ष /Assessment Year: 2008-09

आयकर अपील सं./I.T.A./8276/Mum/2010, निर्धारण वर्ष /Assessment Year: 2007-08

आयकर अपील सं./I.T.A./523/Mum/2013, निर्धारण वर्ष /Assessment Year: 2006-07

आयकर अपील सं./I.T.A./522/Mum/2013, निर्धारण वर्ष /Assessment Year: 2005-06

SPE Networks India Inc. Sony Pictures Networks India Pvt. Ltd.(SPNI) (as a successor to SPE Networks India Inc.(SPENI),which has merged into SPNI with effect from an appointed date of 1 April 2015) Interface Building No.7, 4th Floor, Off Malad Link Road Malad (West),Mumbai **PAN of SPENI AAJCS 3592 B** **PAN of SPNI AABCS 1728 D**	Vs.	DCIT-(Intl. Taxation) Range-2(1) Mumbai (Now assessed under DCIT-Central Circle-3(2) Mumbai.

(अपीलार्थी **/Appellant**) (प्रत्यर्थी **/ Respondent**)

आयकर अपील सं./I.T.A./511/Mum/2013, निर्धारण वर्ष /Assessment Year: 2006-07

आयकर अपील सं./I.T.A./510/Mum/2013, निर्धारण वर्ष /Assessment Year: 2005-06

DCIT-(Intl. Taxation) Range-2(1) Mumbai.	Vs.	SPE Networks India Inc. Sony Pictures Networks India Pvt. Ltd. Malad (W),Mumbai.

(अपीलार्थी **/Appellant**) (प्रत्यर्थी **/ Respondent**)

Revenue by: Shri Samuel Darse-DR

Assessee by: Ms. Aarti Sathe-AR

सुनवाई की तारीख **/ Date of Hearing: 07/09/2017**

घोषणा की तारीख **/ Date of Pronouncement: 08 /11/2017**

आयकर अधिनियम,1961 की धारा 254(1)के अन्तर्गत आदेश

Order u/s.254(1)of the Income-tax Act,1961(Act)

लेखा सदस्य राजेन्द्र के अनुसार/ PER RAJENDRA, AM-

Challenging the orders of CIT (A)-11, Mumbai,and the orders of the Assessing Officer(AO), passed in pursuance of directions of the Dispute Resolution Panel (DRP)-II,Mumbai the assessee has filed appeals for the above-mentioned assessment years (AY.s).The AO has filed appeals for two AY.s.As most of the issues in the appeals are similar,so, we are adjudicating all the appeals

together. The details of dates of filing of returns,returned incomes, dates of assessments, assessed incomes,dates of orders of the CIT (A)/Directions of DRP can be tabulated as under:

A.Y.	ROI filed on	Returned Income	Asst. dt.	Assessed Income	Order of DRP-II/CIT (A)
10-11	29/03/12	Nil	26/11/13	Rs.7.15crores	29/10/13
09-10	29/09/09	Nil	17/08/12	Rs.5.73 crores	09.07.12
08-09	30/09/08	Nil	19/05/11	Rs.4.97, crores	28/03/11
07-08	26/10/07	Nil	21/10/10	Rs.415, crores	24/09/10
06-07	27/11/06	Nil	01/12/08	Rs.36.02, crores	01.10.12
05-06	31/10/05	Nil	20/12/07	Rs.27.33, crores	01.10.12

ITA/522/Mum/2013-(AY -2005-06):

2.Assessee-company was incorporated in April,2004 and is a resident of USA. It is engaged in the business of operating satellite television channels, marketing and distribution of the television channels and related activities During the year under consideration,it operated two channels namely ANIMAX and AXN.

2.1. First effective ground of appeal is about existence of business connection of the assessee in India and taxability of income received by it,as per the provisions of section 9 (1) of the Act.During the assessment proceedings, the AO found that for the purpose of marketing its channels it had appointed SET India Private Ltd. (Set India) as a non-exclusive advertising and sales agent for canvassing airtime for assessee channel on a principal to principal basis, that it claimed that it did not have a permanent establishment (PE) in India and that income arising to it was not taxable in India under Article 7 of the Indo American tax treaty,that it had granted rights to Set India to distribute TV channels in India for an agreed consideration, being 70% of the revenues collected by Set India from distribution of ANIMAX channel in India with a minimum guarantee of US dollar 2,82,500 and 75% of the revenue collected by Set India and the bonus fee of US dollar 3,08,600 in the case of AXN channel.

2.2. He directed the assessee to file explanation in that regard.After considering the submission of the assessee,dated 4/10/2007,he held that the analysis of the agreements entered into by the assessee proved that the arrangements between it and Set India was not of principal to principal, that it was about sharing the actual revenue collected by Set India from advertisers and the cable operators, that the assessee had business connection in India,that income attributable to business operations of the assessee was taxable in India,that the nature of business operations of the assessee was that of telecasting,that its role did not cease once the program was uplinked from outside India, that it continued until ultimate delivery was made in Indian by way of telecast

being made available on the TV screen of the ultimate viewers, that the delivery of advertisement airtime was made in India, that the sale was concluded in India,that what was agreed and concluded outside India was the sale in a conceptual state, that what was delivered and executed in India was the actual sale,that services/entertainment provided by the general companies through the telecasting was metallised, crystallised, delivered and used in India, that the assessee had depended PE in India as per article 5 (4) of the Double Tax Avoidance Agreement (DTAA), that the income of the assessee was attributable to such PE and was subject to tax in India, that due to the encompassing nature of Article 5(4)(b) of the Article of the tax treaty the activities of the assessee would be liable for taxation purposes in India, that Set India was maintaining stock of goods/merchandise in India, that the same was advertisement space belonging to the assessee, that set India would enter into contract with the parties on be of the assessee and would also market and book all available airtime, that Set India was an exclusive agent of the assessee, that apart from Set India no one had authority to work for the assessee, that entire activities of the assessee was wholly carried out by Set India in India,, that Set India was dependent agent of the assessee and constituted its PE as per Article 5 (8) of the tax treaty, that Set India habitually exercise its authority to conclude the contract, that such authority proved existence of a PE of the assessee in India. Referring to the provisions of Article 5 (5) of the agreement, he held that the activities of Set India were devoted wholly or almost wholly on be of the assessee, that the transactions between the assessee and Set India were not at arm's length, that there existed agency PE, that Set India was a dependent present of the assessee and constituted its PE in India, that it had planned its affair in a manner to avoid payment of taxes in India.

2.3. He directed the assessee to prepare and India specific profit and loss account so that its income from operations India could be determined and a location could be made to profits attributable to Indian operations.As per the AO,the assessee did not produce India specific accounts.- rather it furnished global audited accounts of the parent company.He held that he had no other option but to estimate the income of the assessee as per Rule 10 (i) read with rule 10 (iii) of the Income Tax Rules, 1962 (Rules).He estimated the income of the assessee at 10% of gross advertisements as well as subscription revenue received by Set India on behalf of the assessee in India.He relied upon the case of Satellite Television Asia Region Ltd (98 ITD 91)and finally held that Set India had received Rs. 27,33,67,830/-(Rs. 6.45 crores from advertisements plus Rs. 20.88 corrodes from subscription) during the year under consideration, that Rs. 2.73

corrodes (10% of the total revenue) had to be taxed in the hands of the assessee. While estimating the income of the assessee, the AO also applied the provisions of clauses (i) and (ia) of section 40(a) of the Act to the payments made by the assessee.

3.Aggrieved by the order of the AO,the assessee preferred an appeal before the First Appellate Authority(FAA)and made elaborate submissions.After considering the available material,he held that the arrangement between the assessee and Set India was not on principal to principal basis,that it was an arrangement of sharing the actual revenue collected by Set India,with the assessee,from the advertisers and the cable operators,that it shared the advertisement and distribution revenue collected by Set India as per the agreements, that it retained its financial interest in the final sale of advertisement airtime and distribution of channels, that sale of airtime and distribution of channel was dependent on final sale of both items by Set India, that it was the responsibility of the assessee to arrange for the delivery of general and to be carriage fee,that Set India was responsible to maintain stock of IRDs as well as successful installation of each IRD, that Set India head to maintain the IRD in term of the agreement,that assessee conducted quarterly meetings with Set India and their subcontractors for growth of business, that rate card of the assessee was determined in consultation with Set India,that set India provided regular collection updates,finance and accounting reports to the assessee on monthly basis, that it had the right to audit the accounts of Set India and reconcile the accounts, that assessee had retained its commercial interests in the activities of Set India.Referring to the order of Satellite Television Asia Region Ltd. (supra), the FAA held that assessee was a resident of treaty country, that existence of a business connection was a question of fact,that it was dependent on the real nature and activity of the non-resident in India and the manner in which the business was conducted by the non-resident entity, that the facts of the case under consideration were similar to the facts of the case of Satellite Television Asia Region Ltd.(supra),that the assessee had a business connec - tion in India.

3.1. The FAA directed the assessee to explain the details of other activities of Set India to decide the issue of PE. After considering the submission of the assessee, dated 17/07/2012,he held that assessee was 100% subsidiary of Sony group, that 60.5% of the shares of Set India were held by Sony group, that the details of holding of remaining 39.5% shares of Set India were not furnished, that assessee as well as MSM India were subsidiary companies of Sony USA, that it

was not justified on part of the assessee to submit the balance sheet of MSM India claiming that same was not available, that the assessee had not furnished the balance sheet of MSM India as well as the details of revenue of MSM India from HBO channel despite the fact that it was available to the assessee through its holding company, that non-furnishing of document had to be go against the assessee. He referred to the judgment of the honorable Bombay High Court in the case of Vodafone International Holdings BV (311 ITR 46) and held that the assessee was selling advertisement airtime and distributing channels of Sony group through Set India, that share of revenue from HBO channel was very nominal (less than 5%) as compared to the gross revenue of MSM India, that the assessee had, vide submission dated 16/04/2012, furnished details of revenue of MSM India from assessee and other channels namely Sony Max, HBO etc., that there was apparent contradiction in the submissions made by the assessee, that the assessee had an arrangement with Set India for downlinking of channels and distribution of the same to cable operates, that unless the channels were downlinked and distributed the assessee would not be able to conduct any business and earn any revenue, that down linking of channels and distribu - tion of the same through the cable operators was precondition for telecasting business of the assessee,that there was no real sale of advertisement airtime inventory, that gross revenue of the assessee from Set India was dependent upon net advertisement revenue and also net distribution revenue actually collected by Set India that assessee was factually incorrect argued that risks and rewards under the sale and purchase agreement between it and Set India got transferred on acquisition of advertisement inventory by MSM India, that the sale price of the items realised by Set India for both the items would have been fixed irrespective of the sale price of these items realised by Set India, that the sale price was decided by the assessee in consultation with Set India, that the bad debts were to be borne by both the parties, that arguments of the assessee were not tenable on facts, that the assessee was utilizing the services of SET India extensively for monitoring and controlling of sale of advertisements and distribution of channels, that activities of both the entities were inter-laced, inter-connected , inter-dependent and inter-linked, that the agreement was not for purchase and sale of advertisement air time, that it was a revenue sharing arrangement depending upon the gross advertisement airtime revenue, that the relationship between the assessee and SET India was that of a principal and an agent. He also referred to the case of ARMEX International Logistics Pvt. Ltd. and held that facts of both the cases were similar. The appellant had a PE in India in terms of Article -5 of the treaty. He further held that

the rate of 10% applied on gross collection to estimate the taxable income was in effect rate of 16.67% of net advertisement and distribution revenue, that rate of 15% on the net revenue, received by the assessee from SET India was to be taxed in India.

4.Before us, the Authorised Representative (AR) contended that assessee was as US resident for tax purposes, that it had appointed SET India for advertisement airtime and distribution work, that there was no partnership between the assessee and SET India, that before AY 04-05 the arrangement was of principal to principal, later on it was principal to agency, that the TPO did not doubt the arms length nature of the transactions, that the departmental authorities have wrongly interpreted the agreements,that the SET India was carrying out business on its own, that it was doing job for other entities in addition to the work done for the assessee, that it had not allowed SET India to represent itself as agent of the assessee. He referred to pg no.133, 135,138 140, 145 of the PB .He further stated that facts of the IGN BV were totally different from the facts of the case under consideration.

The Departmental Representative (DR) supported the order of the FAA and argued that the issue is covered in favour of the revenue. He referred to the cases of NGC Asia Network LLC(45CCH335-AY.2007-08 and 2008-09 dtd. 16/12/2015), DHL Operations, Satellite Asia Reason Ltd, (supra) and Vishakapattanam Port Trust (144ITR146)

5.We have heard the rival submissions and perused the material before us.We find that the assessee had entered into two agreements with Set India, that the revenue of the assessee comprised of two elements i.e. advertisement revenue and distribution revenue,that the first was generated from the advertisements broadcasted on the channels,that the distribution revenue was generated by distributing the rights to view the channels to the customers/viewers through the cable operators,that it had entered into two agreements with an Indian company namely Set India (now known as MSM India),that the agreements were called sales and purchase agreement for sale of advertisement airtime and distribution agreement for distribution of the two channels, that the consideration for sale of advertisement airtime receivable by it was not fixed,that the same depended on net advertising revenue collected by Set India that in the case of AXN channel the assessee was entitled to receive 50% of night advertising revenue collected by Set India over and above USD 33,44,288 in addition to initial share in advertising revenue of USD 14,88,000, that in case of ANIMAX channel the initial advertisement revenue receivable by the assessee was

USD 7,65,000 determined by a resale price minus method and adjustable on the basis of final net advertisement sales, that additional 50% of net advertisement sales was paid to the appellant in addition to forecasted advertisement sales of USD 9 lakhs,that the monthly distribution fee receivable by the assessee was 75% of gross distortion revenue collected by Set India in respect of AXN channel, that in addition to it a sum of USD 3,08,660 was also payable as bonus fee,that in the case of ANIMAX channel Set India had to pay USD 2,32,500 as per resale price minus method, that the sum payable to the assessee was restricted to 75% of final achieved gross distribution revenue by Set India, that the bad debts of Set India up to 3% was to be borne by the assessee for determination of its revenue recoverable, that the final revenue from sale of advertisement airtime and distribution of channels collected by Set India was relevant for the assessee to determine its tax liability,that the AO applied of Rule 10 of the Rules and determining the income of the assessee at Rs. 2.37 Crores,that the FAA upheld the order of the AO,that he held that the assessee had business connection in India as well as the PE in India in terms of article 5 of the DTAA,that Set India (MSM India)was dependent agent.

5.1. In our opinion,the two basic issues to be decided in the case under consideration are as to whether the assessee had business connection in India and as to whether it had any PE in India. Answer to these questions would determine the taxability of income for the year under considera -tion.From the perusal of the agreements it becomes clear that the assessee was carrying out its operation from USA and not from India, that both the activities i.e. sale of advertisement inventory and distribution of AXN and ANIMAX channels were not carried out in India, that it did not have any office premises or a fixed place of business in India at its disposal, that none of its employees were based in India through whom it could render the services in India.Thus, it can safely be held there was neither fixed base PE nor service PE in India,of the assessee,for the year under appeal.Though the FAA has endorsed the view of the AO that the assessee had Agency PE,but nothing has been brought on record to prove that the agreements between the assessee and Set India was not on Principal to Principal basis.Set India had no authority to conclude any contract on behalf of the assessee in India.On the other hand,while selling the airtime inventory distributing AXN and ANIMAX channels in India,Set India would act on its own right and not on behalf of the assessee.It was not dependent on the assessee economically or legally.It is also a fact that Set India also carried out significant marketing and estimation activities for other channels namely Set, Set Max and HBO (till 31/12/2004).Therefore, set India has to be treated as

an independent entity which carried out its own business employing its own capital and bearing connected risks. It cannot be treated an agent,a dependent agent,of the assessee.Set India would purchase airtime from the assessee and would sell the same in India in its own right and the assessee had no control over it.We find that the revenue earned by Set India was not on behalf of the assessee,that it was making payment to the assessee for the purchases made by it,that it was not subject to any control of the assessee as far as conducting of business in India was concerned,that the activities of Set India were not devoted wholly or almost wholly for the assessee.We have also taken note of the facts that the revenue of the assessee was not entirely dependent on the earning of set India,that the employees of set India would work only for Set India and not for any other entity of the group,that the departmental authorities have not alleged that the transaction between the assessee and Set India were not at arm's length,that in the TP orders the TPO.s(AY.s.2005-06,2006-07,2007-08,2008-09 and 2010-11)have held that no TP adjustments were required to be made to the income of the assessee on account of advertisement revenue or distribution revenue.

5.2. Regarding applicability of the provisions of section 40(a)(ia) of the Act,we want to state that we have already held that assessee did not have any PE in India and that it had no business income arising India. It is also a fact that it has not claimed any deduction for expenses incurred in India.Therefore, the FAA was not justified in holding that provisions of section 40 (a) were applicable in the case under consideration.As the assessee did not have business connection India as well as Agency PE/Base BE and Set India was not agent of the assessee,so,we hold that the AO had wrongly invoked the provisions of Rule 10 of the Rules.

5.3. We find that similar issue had arisen in the case of International Global Networks BV(IGN BV)(supra).Deciding the appeal,the Tribunal had discussed the issues of PE.s,dependent Agents , taxability of airtime revenue,applicability of Circular 742 issued by the CBDT and related issue at length.We are reproducing the relevant portion of the order and it reads as under:

> *"**2.**Assessee-company is incorporated in the Netherlands and is a wholly owned subsidiary of Satellite Television Asia Region Limited (STAR Limited)based in Hong Kong,which in turn is subsidiary of STAR Television Limited.It had been granted the exclusive right for sale of advertising time,in India,on the channels of the STAR TV Network,which was owned by STAR Limited.It engaged STAR India Pvt Ltd.(earlier known as News Television (India) Limited),an Indian entity,to procure business from Indian advertisers,on a commission of 15% of receipts from such business.The revenue,so earned by it,was offered to tax @10% on the basis of CBDT*

Circular 742,dated 02/05/1996.However,the Assessing Officer(AO),held that income in question was to be assessed in the hands of STAR Limited,Hongkong,that the assessee was only a conduit - company,that it was brought into picture only because of India having a favourable tax double tax avoidance treaty(DTAA) with the Netherlands,that the assessee company was located in Hong Kong,that Hong Kong did not have any tax treaty with India,that it was a clear case of treaty shopping.He finally held that the income in question actually belonged to STAR Limited. As a protective measure,he also assessed the income in the hands of the assessee.He declined benefit of Circular 742 to the assessee,on the ground that it was not a telecasting or broadcasting company.Invoking the Rule 10 of the Income Tax Rules,1962(Rules),he estimated profit @ 20% of gross advertising revenues.

3.*Aggrieved by the order of the AO,the assessee preferred an appeal before the FAA,who confirmed the action of the AO.He did not adjudicate the various grounds raised by the assesse,as he had endorsed the view of the AO that the assessee company was only a conduit. The assessee challenged the order of the FAA before the Tribunal and matter was restored back to his file for adjudicating the other grounds also.*

4.*In pursuance of the order of the Tribunal,the FAA initiated appellate proceeding.Before him, the assessee made elaborate submissions about PE,provisions of Indo-Netherland Tax-treaty, Circular 742 issued by the CBDT and levying of interests u/s.234 of the Act etc.*
4.1.*After considering the submissions of the assessee and the original order passed by the AO,the FAA held that STAR Ltd.,IGN BV, STAR India were part of the same group, that STAR India had been incorporated primarily to promote business activities of other entities. He referred to the case of DHL Operations NV(142 taxmann.137)and held that due to close proximity between companies operating in India and outside India if it was found that foreign company was substantially conducted its business in India then it had to be held that Indian company was a PE. Finally,he observed that the AO had rightly held that the assessee had a PE in form of STAR India,in India.With regard to payment of arm's length remuneration to STAR India the assessee had argued that no further attribution of income should be made in the hands of the assessee.The FAA also held that Circular 742 was not applicable,that it was issued in connection with section 195 of the Act,that it was issued for telecasting companies,that the assessee itself had admitted that it was not a telecasting company,that it was not issued to facilitate the complexity of assessments of foreign telecasting companies,that the cases relied upon by the assessee pertained to the case of telecasting companies, that the AO was justified in determining the income of the assessee @ 20% of the profitability.*

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6.*We have heard the rival submissions and perused the material before us.We find that agency agreement was entered into between Star Advertising Sales BV and News Television India Private Ltd on 31/05/1994, that supplement agreement were executed in the months of May, 1995,1996 and 1998 between the same parties.We would like to refer to some of the clauses of the agreement of 31/05/1994.*

"Appointment

The Company hereby appoints the Agent as its non-exclusive independent agent in India to market television advertising for the said channel and the Agent uneqivocally accepts such appointment.

Rate

The Agent shall solicit the advertisements in India for the said channel at such rates as the Company may fix from time to time.

Independent Agent

(a) The Agent shall not have the right to enter into any contract for and on behalf of the Company

and/or bind the Company in any way whatsoever.
xxxxxx
(e) This Agreement shall not restrict the Agent from carrying on other business, including agency business, to the extent that carrying on of such other businesses by the Agent would not be prejudicial to the interest of the Company in India.

Client Requisition

After having solicited the advertisements as above, the Agent shall forward, by facsimile or Telex, each clients requisition for telecast of the advertisement (s) to the Company and the Company reserves the right to accept or reject the aforesaid requisition at its sole discretion.

Commission

The Agent shall be entitled to retain fifteen percent (15%) of the net invoiced amount paid by the clients at commission.

The agent was to follow the company's procedure and standard terms and conditions for soliciting advertisements from the clients in India.

A perusal of the above terms indicates that as per the agreement between SIPL and the assessee, SIPL was required to solicit advertisement in India for Channels,that the agent had to solicit the advertisement at the rates fixed by the assesee,that it could not enter in to any agreement with any client independently,that the even after agreement the assessee was the final and deciding authority to decide the fate of the advertisement,that the agent was to receive fix percentage of the invoiced amount as commission.The agent was free to carry out any other business.If all these facts are considered cumulatively,it becomes clear that the agent had no power to bind the assessee in any legal obligation.

6.1. Before proceeding further,we would like to refer to paragraph(v)and(vi)of Article 5 of the India-Holland DTAA and same read as under:

"5.Notwithstanding the provisions of paragraphs 1 and 2, where a person-other than an agent of an independent status to whom paragraph 6 applies-is acting in one of the States on behalf of an enterprise of the other State, that enterprise shall be deemed to have a permanent establishment in the first State if,

6.An enterprise of one of the States shall not be deemed to have a permanent establishment in the other State merely because it carries on business in that other State through a broker, general commission agent or any other agent of an independent status, provided that such persons are acting in the ordinary course of their business. However, when the activities of such an agent are devoted wholly or almost on behalf of that enterprise, he will not be considered an agent of an independent status within the meaning of this paragraph if it is shown that the transactions between the agent and the enterprise were not made under at arm's-length conditions."

From the above,it is clear that before examining the question as to whether an agent satisfies conditions laid down in paragraph-5,it has to be examined that whether it satisfies conditions mentioned in paragraph-6.The provisions of paragraph 5 will come into picture only if the agent does not satisfy the conditions in paragraph 6.In short,if the agent satisfies the conditions laid down in paragraph 6(independent agent),it would not constitute a PE in India even if the indepen -dent agent satisfies the condition laid down in paragraph 5.SIPL is an independent agent under Article 5(6)of the DTAA,acting in its ordinary course of business and its activities were not wholly or exclusively devoted to the assessee.SIPL was not economically dependent on the assessee,as it was engaged in a business activities like undertaking agency activities for NGC Network Asia LLC, producing/procuring and supplying program and acting as a licensee in India in respect of certain channels.The activity of media agent for channel was within the ordinary course of business activity of SIPL.We find force in the argument advanced by the assessee that activities of SIPL were no different from other agents of foreign telecasting companies operating in India.The India-Netherlands DTAA provides that when the activities of the agent are devoted

wholly or almost wholly on behalf of the enterprise it would not be considered to be an agent of an independent status unless it was shown that the transactions between the agent and the principal were made on arms length conditions.We would like to discuss the arm's length payment issue in the succeeding paragraph.We had gone through the chart submitted by the assessee showing the percentage of revenue earned by SIPL from the assessee (Pg.196 of the PB).On perusal of the same is clear that SIPL had received the highest percentage of revenue from the assessee for the AY.1999-2000 which was 13.59%,whereas in the assessment year 2004-05 the percentage was as low as 0.003%. Clearly,SIPL has to be treated as an independent agent, acting in its ordinary course of business.

6.2. One more aspect in this regard has to be considered and that is the payment made by the assessee to SIPL are at arm's length.The assessee had paid commission to SIPL at the rate of 15% and the rate was as per the norms of the industry.Therefore,there cannot be further attribution of income in the hands of the assessee.From the AY.s 1998-99 to 2001-02 transfer pricing provisions were not applicable to the international transactions entered in to by the assessees with their AE.s.Besides,industry specific competitive data were not available in the public domain.Therefore,what is to be seen is the commission rate considered normal for the industry.It is a settled position that where the Indian agent is remunerated on an arm's length basis by foreign principal there would not be any further attribution of profits in the hands of the foreign principal.Circular 5 of 28/09/2004 stipulates that amount of profits attributable to a PE should be determined based on arm's length principle.It has to be remembered that circular dated 23/07/1969(Circular Number 23)had provided that the amount of profits attributable to PE should be determined as on the arm's length remuneration and that if transaction between a foreign enterprise and its PE were at arm's length it would extinguish the text liability of the foreign entity.CBDT circular No. 742 had recognised that rate of 15% commission payable to the Indian agents by the foreign telecasting companies was to be considered normal. It is also found that in the case of SIPL,while completing the transfer pricing assessments, for the AY.s 2002-03 to 2004-05,the TPO had held that payment of commission @of 15% by the assessee to its agent i.e. to SIPL was at arm's length.

6.3.*One more issue to be deliberated upon is the applicability of Circular No.742. In our opinion, Circular 742 was introduced to lay down mechanism for determination of tax ability of advertise -ment revenue earned by foreign companies.The assessee had filed original return and later on had revised the return.In both the returns it had offered the tax as per the guidelines of the Circular 742.It is a undisputed fact that the benefit of the said circular was granted by the AO to the assessee in the AY.s 1995-96 and 1997-98 and that the FAA had also endorsed the granting of benefit to the assessee as per the Circular.Paragraph 2 of the assessment order for the AY. 1995-96 reads as under:*

"The assessee has filed both the returns on the basis of presumptive rate of net profit at 10% is laid down in the guidelines contained in Circular No. 742 dated May 2, 1996 issued by the Central Board of Direct Taxes, New Delhi."

Pages 109-111 of the PB are the orders of the AO.s passed u/s.197 of the Act on 08/05/1998, 19/ 05/1999 and 18/04/2000.In all these orders,the they have referred to the Circular 742 and had applied the rates for deduction of tax for advertisement revenue.Thus, it is clear that the AO himself had accepted the applicability of the Circular.Nothing was brought on record to prove that because of substantial and material changes in the facts and circumstances for the year under appeal the Circular had no application. In our opinion,there was no difference in the facts for the earlier year and the year under appeal.Therefore,we hold that the provisions of circular 742 were applicable to the facts of the case under consideration.

6.4.*We find that in the case of Set Satellite Singapore PTE Ltd.(supra)similar issues have been considered by the Hon'ble High Court.Facts of the case were that the assessee,a resident of Singapore,was having business activities in India,that through its dependent agent,namely SET India (P.)Limited,it carried on marketing activities in India for advertisement slots by canvassing advertisements in India,that it claimed that it did not have any tax liability in India as it did not have a PE in india,that it was also argued that its dependent agent was remunerated on an arm' s length basis,that income from various activities had been assessed to tax in the hands of SET India,that there could not be further assessment of income in the hands of the assessee on account of the said activities. Reliance was placed on Circular No. 23, dated 23/07/1969, issued by the CBDT.While filing revised return on 05/03/2001,it computed its taxable income as per the formula prescribed in the Circular No. 742 without prejudice to its contention that,it did not have any income which was taxable in India.The AO assessed the income of the assesee which included income from marketing fees as also advertisement collected from India and further the subscription fees received from cable operators of its dependent agent.*

The assessee preferred an appeal before the FAA. Before him it was argued that only income attributable to the it's Indian operations viz., marketing of the ad time slots could be taxed in India and that ad revenues earned were not attributable to its Indian operations as the contract to sell were made outside India and the sales were made on principal to principal basis.The FAA held that paragraph 6(c) of Circular No. 23 was applicable to the assessee as the non-resident' s business activities in India where wholly channelled through its agent,that the contracts to sell were made outside India,that the sales were made on a principal to principal basis.Considering the provisions of the India-Singapore DTAA it was held that as the assessee had remunerated SET India on an arm' s length basis and that as pre article 7(2) of the DTAA no further profits should be taxed in the hands of the assessee.The FAA, however, proceeded to hold that as the assessee itself had revised the return of income and offered the income to tax there was no reason to interfere with the order of the AO.In so far as distribution of revenue from AXN channel he held that distribution income belongs to SET India and not to the assessee.The said income had been offered to tax by SET India and had already been taxed in its hands.With regard to distribution rights it was held that same were commercial right and were distinct and different from a copyright and consequently there was no question of payment of royalty.

Cross appeals were filed by the AO and the assessee before the Tribunal.After considering the rival submissions,the Tribunal held SET India was a dependent agent and as such the assessee was deemed to have a permanent establishment,that in addition to the taxability of the dependent agent in respect of the remuneration earned by it, which was in accordance with the domestic law and which had nothing to do with the taxability of the foreign enterprise of which it was a dependent agent, the foreign enterprise was also taxable in India in terms of the provisions of Article 7 of the tax treaty,in respect of the profits attributable to the dependent agent permanent establishment.

Deciding the matter the Hon'ble High Court held as under:

"…..in the matter of tax what has to be considered and more so in international transactions if there be a treaty,are the provisions of the treaty and if the provisions of the treaty are more advantageous to an assessee, then that construction will have to be given which is advantageous to the assessee. Circular No. 23, dated July 23, 1969, sets out that where a non-resident's sales to Indian customers are secured through the services of an agent in India, the assessment in India of the income arising out of the transaction will be limited to the amount of profit which is attributable to the agent's services, provided that (i) the non-resident principal's business activities in India are wholly channelled through his agent ; (ii) the contracts to sell are made outside India ; and (iii) the sales are made on a principal-to-principal basis. The Commissioner of Income-tax (Appeals) had recorded a specific finding in favour of the appellant in the affirmative on all the three counts. Circular No. 23 would be binding on the Assessing Officer and had to be considered while assessing the tax liability of the assessee. Considering Circular No. 742 it would

be fair and reasonable that the taxable income is computed at 10 per cent. of the gross profits. In the instant case in so far as marketing services were concerned by the arm's length principle what had been paid was more than 10 per cent. as could be seen from the order of the Commissioner of Income-tax (Appeals). This was not disputed by the Revenue in its appeal before the Income-tax Appellate Tribunal. Circular No. 23 of 1969 read with article 7(1) would result in holding that the advertisement revenue received by the appellant was not taxable in India as long as the treaty and the Circular stood."

"15.From a reading of article 7(1) of the DTAA it is clear that the profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. The profits of the enterprise may be taxed in the other State but only so much of them as is directly or indirectly attributable to that permanent establishment. In paragraph (2) while determining the profits attributable to the permanent establishment the expression used is " estimated on a reasonable basis" . The DTAA does not refer to the arm' s length payment. The principles contained in the matter of income from international transaction on an arm' s length price are contained in section 92 of the Income-tax Act. The principles have been clarified by the Finance Act, 2001 as also the Finance Act, 2002. From the order of the Commissioner of Income-tax, which has been accepted it is clear that the appellant herein has paid to its permanent establishment on the arm' s length principle. It recorded a finding of fact that the appellant had paid service fees at the rate of 15 per cent. of gross ad revenue to its agent, SET India, for procuring advertisements during the period April 1998 to October, 1998. The fact that 15 per cent. service fee is an arm' s length remuneration is supported by Circular No. 742 which recognizes that the Indian agents of foreign telecasting companies generally retain 15 per cent. of the ad revenues as service charges. Effective November 1998, a revised arrangement was entered into between the parties whereby the aforesaid amount was reduced to 12.5 per cent. of net ad revenue (i.e., gross ad revenue less agency commission). Simultaneously, the appellant also entered into an arrangement entitling SET India to enter into agreements, collect and retain all subscription revenue. Considering all these aspects and the fact that the agent has a good profitability record, it held that the appellant has remunerated the agent on an arm' s length basis.

16. This finding of the Tribunal has not been disputed by the Revenue. The entire contention of the Revenue is that the advertisement revenue pertaining to its own channel and AXN channel are also taxable in India.

17. We may firstly point out that the Commissioner of Income-tax has dealt with the issue as to why the advertisements received by the appellant were not liable for being taxed in India based on the Central Board of Direct Taxes Circular No. 23, dated July 23, 1969, which clearly sets out that where a non-resident' s sales to Indian customers are secured through the services of an agent in India, the assessment in India of the income arising out of the transaction will be limited to the amount of profit which is attributable to the agent' s services, provided that (i) the non-resident principal' s business activities in India are wholly channelled through his agent ; (ii) the contracts to sell are made outside India ; and (iii) the sales are made on a principal-to-principal basis. The Commissioner of Income-tax (Appeals) had recorded a specific finding in favour of the appellant in the affirmative on all the three counts. It is in these circumstances that it was held that the advertisement revenue received by the appellant may be from the customers in India is not liable for tax in India. That Central Board of Direct Taxes Circulars are binding needs no repetition. If authorities need be cited, we may now refer to the judgment of the Supreme Court in UCO Bank v. CIT [1999ANIMAX 237 ITR 889 . In that judgment the issue was whether Circular of October 9, 1984, was inconsistent or whether there was contradiction in the circular and section 145 of the Income-tax Act. The Supreme Court observed that (page 901) :

" In fact, the circular clarifies the way in which these amounts are to be treated under the accounting practice followed by the lender. The circular, therefore, cannot be treated as contrary to section 145 of the Income-tax Act or illegal in any form. It is meant for a uniform

administration of law by all the Income-tax authorities in a specific situation and, therefore, validly issued under section 119 of the Income-tax Act. As such, the circular would be binding on the Department."

18. See also CIT v. Hero Cycles P. Ltd. [1997ANIMAX 228 ITR 463 (SC). It would thus be clear that Circular No. 23 would be binding on the Assessing Officer and had to be considered while assessing the tax liability of an assessee.

19. The Tribunal in its judgment has not considered the effect of the finding recorded by the Commissioner of Income-tax (Appeals) based on the Circular and which circular was relevant for the purpose of deciding the controversy in issue. This circular read with article 7(1) of the DTAA would result in holding that the income from advertisement if neither directly nor indirectly attributable to that of the permanent establishment, would not be taxable in India. The Tribunal in fact in paragraph 10 has recorded a finding that article 7(2) provides that the arm' s length price is the criterion for computation of these hypothetical profits. In our opinion the entire rational or reasoning given by the Tribunal has to be set aside. In matters of tax what has to be considered and more so in international transactions if there be a treaty, the provisions of the treaty and if the provisions of the treaty are more advantageous to an assessee, then the construction will have to be given which is advantageous to the assessee. At this stage we may note that on behalf of the assessee learned counsel has produced an order passed by the Additional Commissioner of Income-tax (Transfer Pricing-II), Mumbai in the matter of determination of arm' s length price with reference to all the transactions reported in Form No. 3CEB filed by the assessee. The assessee is SET India, the depending agent. The order records that the assessee is engaged in the business of providing audiovisual television content and also acts as an advertising agent of SET Satellite Singapore Pvt. Ltd. The assessee distributes these channels to the Indian cable operators and that the assessee has applied the TNM method to determine the arm' s length price for its international transaction. It, however, clarified that the order is in respect of reference received for the assessment year 2002-03 and not for the subsequent assessment years.

20. We may now consider the judgment in DIT (International Taxation) v. Morgan Stanley and Co. Inc. [2007ANIMAX 292 ITR 416 (SC). The appeals dealt with the Double Tax Avoidance Agreement (DTAA) between India and United States. That treaty advocated application of the arm' s length principle or provided a mechanism for avoiding double taxation on income. The issue involved, Morgan Stanley and Company (for short, " the MSCo.") and one of the group companies of Morgan Stanley, Morgan Stanley Advantages Services Pvt. Ltd. (for short " the MSAS"). An agreement was entered into for providing certain support services to MSCo. MSCo. outsourced some of its activities to MSAS. MSAS was set up to support the main office functions in equity and fixed income research, account reconciliation and providing IT enabled services such as back office operations, data processing and support centre to MSCo. On May 5, 2005, MSCo. filed its advance ruling application . The basic question related to the transaction between the MSCo. and MSAS. The advance ruling was sought on two counts (i) whether the applicant was having permanent establishment in India under article 5(1) of the DTAA on account of the services rendered by MSAS under the services agreement dated April 14, 2005, and if so (ii) the amount of income attributable to such permanent establishment. It was ruled that MSAS should be regarded as constituting a service permanent establishment under article 5(2)(1). On the second question the Authority for Advance Rulings ruled that the transactional net margin method (TNMM) was the most appropriate method for the determination of the arm' s length price (ALP) in respect of the service agreement dated April 14, 2005, and it meets the test of arm' s length as prescribed under section 92C of the 1961 Act and no further income was attributable in the hands of MSAS in India. The said ruling of Authority for Advance Ruling on the question of income attributable to the permanent establishment was the subject-matter of challenge by the Department. In so far as the issue of permanent establishment is concerned the Supreme Court was pleased to hold that it agreed with the Ruling of the Authority for Advance Ruling that stewardship activities would fall under article 5(2)(l). Dealing with the question of deputation, the

court held that on the facts that there is a service permanent establishment under article 5(2)(l) and as such held that the Department was right in its contention that there exists a permanent establishment in India. Considering Article 7 of that treaty the court observed that what is to be taxed under article 7 is income of the MNE attributable to the permanent establishment in India and what is taxable under article 7 is profits earned by the MNE. Under the Income-tax Act the taxable unit is the foreign company, though the quantum of income taxable is income attributable to the permanent establishment of the said foreign company in India. The court observed that the important question which arises for determination is whether the Authority for Advance Ruling is right in its ruling when it says that once the transfer pricing analysis is undertaken there is no further need to attribute profits to a permanent establishment. The court further noted that the computation of income arising from international transactions has to be done keeping in mind the principle of arm' s length price. The court further reiterated that the main point for determination is whether the Authority for Advance Rulings was right in ruling that as long as MSAS was remunerated for its services at arm' s length, there should be no additional profits attributable to the applicant or to MSAS in India. After considering the various methods by which arm' s length price can be determined the court observed as under (page 440) :

" As regards determination of profits attributable to a permanent establishment in India (MSAS) is concerned on the basis of arm' s length principle we have quoted article 7(2) of the DTAA. According to the Authority for Advance Ruling where there is an international transaction under which a non-resident compensates a permanent establishment at arm' s length price, no further profits would be attributable in India. In this connection, the Authority for Advance Ruling has relied upon Circular No. 23 of 1969 issued by the Central Board of Direct Taxes . . This is the key question which arises for determination in these civil appeals."

21. After discussing the various issues the Court in its conclusion held as under (page 443) :

" As regards attribution of further profits to the permanent establishment of MSCo. where the transaction between the two are held to be at arm' s length, we hold that the ruling is correct in principle provided that an associated enterprise (that also constitutes a permanent establishment)is remunerated on arm' s length basis taking into account all the risk-taking functions of the multinational enterprise.In such a case nothing further would be left to attribute to the permanent establishment.The situation would be different if the transfer pricing analysis does not adequately reflect the functions performed and the risks assumed by the enterprise. In such a case, there would be need to attribute profits to the permanent establishment for those functions/risks that have not been considered.The entire exercise ultimately is to ascertain whether the service charges payable or paid to the service provider (MSAS in this case) fully represent the value of the profit attributable to his service. In this connection, the Department has also to examine whether the permanent establishment has obtained services from the multinational enterprise at lower than the arm' s length cost."

22. In our opinion considering the judgment, if the correct arm' s length price is applied and paid then nothing further would be left to be taxed in the hands of the foreign enterprise.

23. Considering the above principle as may be discerned from the judgment in DIT (International Taxation) v. Morgan Stanley and Co. Inc. [2007ANIMAX 292 ITR 416 (SC) it would be clear that :

(1)Considering the Central Board of Direct Taxes Circular No. 742 it would be fair and reasonable that the taxable income is computed at 10 per cent. of the gross profits. In the instant case in so far as marketing services are concerned by the arm' s length principle what has been paid is more than 10 per cent. as can be seen from the order of the Commissioner of Income-tax (Appeals). This was not disputed by the Revenue in its appeal before the Income-tax Appellate Tribunal.

(2) The only contention advanced and which found favour with the Tribunal was that the advertisement revenue received by the assessee was also income liable to tax in India. The Commissioner of Income-tax (Appeals) relied upon Circular No. 23 of 1969. That Circular read

with article 7(1) would result in holding that advertisement revenue received by the appellant are not taxable in India as long as the treaty and the Circular stands.
24. In the light of the above appeal filed by the appellant herein is allowed and the order of the Income-tax Appellate Tribunal is set aside."

6.4.1.*We would also like to refer to the case of B4U International Holding Ltd (supra). In that matter the tribunal has held as under:*

> "Coming to the alternate argument even if it is held that there is a PE of the assessee in India, then we would hold that the rate of commission of 15% was accepted as ALP by the TPO for the AY 2003-04 to 2004-05, no further profit is attributable to the PE. This is the rate mentioned in the CBDT Circular No.742 of the order 1996. Similar rate is accepted by the Hon'ble Bombay High Court in the case of Set Satellite (Singapore)Pte.Ltd.(supra).Thus we have no agitation in upholding the contention of the assessee that the payment was at arms' length.When the payment is at ALP there is no further need to attribute profit to the PE as held by the Hon'ble Supreme Court in the case of Morgan Stanley &Co.(supra)."

6.4.2.*We would also like to rely upon the matter of BBC Worldwide Limited(supra).In that matter also the Hon'ble Delhi High Court had referred to the case of Sat Satellite (Singapore) Pte.Ltd.(supra) and held that if correct ALP was applied and paid nothing further would be left to be taxed in the hands of the foreign enterprise.It also placed reliance on Circular No.742 and held that CBDT itself had considered 15% commission as normally accepted commission rate payable to the agents of telecasting companies.*

7*.Considering the above discussion,we hold that the assessee did not have a PE in India, that it was not carrying out any business activities in India and therefore no part of its revenue was attributable to India,that SIPL was an independent agent under Article 5(6)of the tax treaty between India and Holland, that the activities of the agent were carried out in its ordinary course of business,that the agent was not wholly and exclusively devoted to the assessee, that payments made to SIPL were at arm's length,that provisions of Circular 742 were applicable for determin - ing the tax liability of the assessee.In short,the assessee was not liable to pay tax in India in any of the AY.s. mentioned above.Effective ground of appeal is decided in favour of the assessee.*

5.4. We have compared the terms of agreements entered in to by the AXN with Set India dated 01/07/2004 and 01/05/2004 (Pg.133 to 154 of the Paper book and the terms of agreement of NGC Network Asia Ltd.We find that ANIMAX Sales and Purchase Agreement under the heading contracting party stipulates as under:

> *"All advertising agreement shall be entered in to by SET,on its own account.In its dealing with third parties,SET shall not represent itself as an agent of SPE"*

The assessee had veto rights over advertisements.(Pg.140 of the PB).Similar arrangements find place in other agreements.A comparison of the agreement of NGC Network Asia Ltd.and the agreements of the assessee reveal that both are similar.

Considering the above,we decide the effective ground of appeal in favour of the assessee.

ITA/510 /Mum/2013-AY.2005-06:

6.Solitary ground of appeal,raised by the AO,deals with profit rate of 15% as against 16.67% adopted by the AO.While deciding the appeal the FAA had directed the AO to tax the assessee at

a lower rate (15%),as stated earlier.While deciding the appeal of the assessee,we have already held that the assessee was not liable to pay tax in India,for the year under consideration.As no income is to taxed,so,question of rate of tax does not arise.We dismiss the ground raised by the AO.

ITA.s/652/M/14; 6294/M/12; 5566/M/11; 8276/M/10 &523/M/13 -AY.s(10-11),(09-10);(08-09); (07-08) and (06-07):

7.Following our orders for the AY.2005-06,we allow the appeals of the assessee for all the above mentioned AY.s,as the facts for that AY.and the facts of the years under consideration are similar.

7.1. For the AY.s 2009-10 and 2010-11 the assessee has raised Grounds with regard to not giving credit on tax deducted at source and self assessment tax paid amounting to Rs.14.27 lakhs (AY. 10-11) and charging interest u/s. 234B of the Act (AY. 10-11). The AO is directed to verify the claim and give credit for the taxes paid,if the claim of the assessee is found genuine. Charging the interest is consequential in nature and is to be decided accordingly.

7.2. For the AY. 2009-10 the assessee has raised the Ground with regard to not granting interest u/s.244A of the Act, from the date of draft assessment order till the date of granting of refund. The AO is directed to verify the claim of the assessee and grant interest in case claim is found as per law.

Grounds raised by the assessee for the above mentioned AY.s stand partly allowed.

ITA/511 /Mum/2013-AY. 06-07 :

8.Following our order for the AY.2005-06,we decide the effective ground of appeal against the AO.

As a result,appeals filed by the assessee for the AY.s 2005-06 to 2008-09 are allowed and for the AY.s 2009-10 and 2010-11 are partly allowed. Both the appeals of the AO stand dismissed.

फलतः निर्धारिती द्वारा नि.व. 2005-06 से 2008-09 के लिए दाखिल की गई अपीलें मंजूर की जाती हैं और नि.व. 2009-10 एवं 2010-11 के लिए दाखिल की गई अपीलें अंशतःमंजूर की जाती है . निर्धारिती अधिकारी द्वारा दाखिल की गई अपीलें नामंजूर की जाती है.

Order pronounced in the open court on 08th November, 2017.
आदेश की घोषणा खुले न्यायालय में दिनांक 08 नवंबर, 2017 को की गई।

Sd/-	**Sd/-**
(Ravish Sood)	**(Rajendra)**
न्यायिक सदस्य **/ JUDICIAL MEMBER**	**लेखा सदस्य / ACCOUNTANT MEMBER**

मुंबई Mumbai; दिनांक/Dated : 08.11.2017.
Jv.Sr.PS.

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1.Appellant /अपीलार्थी **2.** Respondent /प्रत्यर्थी
3.The concerned CIT(A)/संबद्ध अपीलीय आयकर आयुक्त, **4.**The concerned CIT /संबद्ध आयकर आयुक्त
5.DR "L " Bench, ITAT, Mumbai /विभागीय प्रतिनिधि, खंडपीठ,आ.अ.न्याया.मुंबई
6.Guard File/गार्ड फाईल

सत्यापित प्रति //True Copy//

आदेशानुसार/ **BY ORDER,**
उप/सहायक पंजीकार **Dy./Asst. Registrar**
आयकर अपीलीय अधिकरण, मुंबई **/ITAT, Mumbai.**