

IN THE INCOME TAX APPELLATE TRIBUNAL "A"
BENCH, MUMBAI
BEFORE SHRI R. C. SHARMA, AM AND SHRI AMARJIT SINGH, JM

आयकर अपील सं/ I.T.A. No.659/Mum/2016
(निर्धारण वर्ष / Assessment Year: 2010-11)

Dy. DIT (IT) -1(1) (2) Room No. 117, Scindia House, 1 st Floor, Ballard Estate, N.M. Road, Mumbai-400038	<u>बनाम/</u> Vs.	M/s. ATL Media Limited (Earlier Known as M/s. Asia Today Limited) M/s. MGB & Co LLP Peninsula Business Park, Tower B, 19 th Floor, Lower Parel, Mumbai-400013
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CO. No.50/Mum/2018

(Arising out of ITA. No. 659/Mum/2016)
(निर्धारण वर्ष / Assessment Year: 2010-11)

M/s. ATL Media Limited (Earlier Known as M/s. Asia Today Limited) M/s. MGB & Co LLP Peninsula Business Park, Tower B, 19 th Floor, Lower Parel, Mumbai-400013	<u>बनाम/</u> Vs.	Dy. DIT (IT) -1(1) (2) Room No. 117, Scindia House, 1 st Floor, Ballard Estate, N.M. Road, Mumbai-400038
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAGCA5649G		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

Revenue by:	Shri V. Vidyadhar (DR)
Assessee by:	Shri Niraj Sheth & Jay Bhansali (AR)

सुनवाई की तारीख / Date of Hearing: 01.03.2018
घोषणा की तारीख /Date of Pronouncement: 31.05.2018

आदेश / ORDER

PER AMARJIT SINGH, JM:

The Revenue as well as assessee have filed the above mentioned appeals against the order dated 15.10.2015 passed by the Commissioner of Income Tax (Appeals)-55, Mumbai [hereinafter referred to as the "CIT(A)"] relevant to the A.Y.2010-11.

2. The Revenue has raised the following grounds: -

“1. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in holding the Zee Entertainment Enterprises Ltd. (ZEEL)/ Zee Turner Ltd. (ZTL) is no a dependent agent and hence it does not constitute a permanent Establishment(PE) of the assessee in India.

2. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in holding that in the absence of permanent establishment (PE) as defined in Article 5 of the treaty, the business income of the assessee is not taxable in India as per Article 7 of the DTAA.”

3. Without prejudice to ground 1 & 2 and in the facts and the circumstances of the case and in law, whether the Ld. CIT(A) erred in relying the orders of his predecessors for AYs. 2001-02 to 2006-07 in light of the fact that for and from the FY. 2009-10 a new agreement was signed between the assessee and its agent in India, ZEEL, which materially altered the terms of engagement between the two, thus reinforcing that ZEEL was a PE of ATL, in India under Article 5(4) of the India-Mauritius Tax Treaty.”

3. The brief facts of the case are that the Assessee filed its return of income on 15.10.2010 declaring total income to the tune of Rs.Nil. Thereafter, the return was revised on 31.03.2012 declaring

income to the tune of Rs.4,53,766/-. The case was selected for scrutiny and notice u/s 143(2) and notice u/s 142(1) of the Act were issued and served upon the assessee. The assessee is a foreign telecasting company incorporated in Mauritius. The assessee received the advertising revenue of Rs.41,34,92,366/- and subscription revenue of Rs.45,99,72,752/- during the relevant assessment year. The assessee claimed the said income as exempt on the basis of this fact that the assessee has no business in India nor it has any permanent established in India. Notice was given and after getting the reply, the 10% of the said income i.e., to the tune of Rs.8,73,46,512/- was assessed as income. Thereafter, the assessee filed an appeal before the CIT(A) who allowed the claim of the assessee, therefore, the revenue has filed the present appeal before us.

ISSUE NOS. 1 TO 3:-

4. Issue nos. 1 to 3 are inter-connected, therefore, are being taken up together for adjudication. In brief, the revenue has challenged the deletion of addition by the CIT(A) raised by the AO @ 10% upon the advertisement revenue to the tune of Rs.41,34,92,366/- and subscription revenue of Rs.45,99,72,752/- total to the tune of Rs.8,73,46,512/-. Before going further, we deemed it necessary to advert the finding of the CIT(A) on record.:-

“Decision:

5. I have considered the arguments of the AR, findings of the AO and facts of the case. The appellant company is registered in Mauritius as a company and is a tax resident of Mauritius. In view of the provisions of the section 90 (2) the appellant is therefore entitled to the benefits of the DTAA, if the provisions of the DTAA are more beneficial to it than the provisions of the Income-tax Act. Section 9 of the Income-tax Act provides the scope of income of non-resident being taxable in India. On the other hand, the DTAA also contains provisions regarding the manner of chargeability of nonresident. Indo-Mauritius DTAA provides the scope of convention in Article-1 and the taxes covered in Article-2. Article-3(e) defines the person including a company who is treated as a taxable unit. Article-4(J) defines the residence of any person. The appellant has filed the Tax Resident Certificate from Mauritius. The AO has accepted that the appellant is a tax resident of Mauritius.

6. I find that the issue of constituting a PE of appellant has been examined by my predecessor in detail in A.Y, 2001-02 to AY 2006-07 wherein it has been held after examination of the facts that ZEEL/ZTL are not authorized to conclude contracts and on the contrary prohibited to conclude contracts on behalf of the agent and not habitually concluded contracts as also its activities are not exclusively devoted to the assessee and hence is not a dependent agent and does not constitute a PE of appellant as per Article 5(4) of the DTAA, The facts of the case and the agreement with ZEEL/ZTL in substance continue to remain almost same as that applicable to earlier years, It is further seen that the AO has not any fresh evidence on record during the year to support his finding appellant has a fixed place of business and PE in India in the form of ZEEL/ZTL as agents. Accordingly, it is held that the findings recorded predecessor in above mentioned orders are also applicable Lo AY. 2009-10- It is seen that in the appellant's own case, my predecessors had held that on the basis of identical fact that appellant does not have PE in India, I find that no fresh material evidence has been brought on record to deviate from the finding recorded by my predecessor in earlier asst. years as discussed above, that the appellant has no PE as per Article 5(1) and Article 5(4) of the treaty. In view of this it is held that appellant has no Fixed Place of business and its agents

Zeel/ZTL are not dependent agents hence it has no PE in India. Finding of the AO in this regard is deleted. In the absence of PE as defined in Article 5 of the treaty, the business income of the appellant is not taxable in India as per Article 7 of the DTAA. Accordingly, income of Rs.8,73,46,512/- estimated and taxed by the AO is deleted. Appeal on ground no. 1 is allowed.”

5. On appraisal of the order, we noticed that the CIT(A) has decided the matter of controversy on the basis of the decision in earlier years for the A.Y. 2001-02 & 2006-07. It is specifically held that in the absence of permanent establishment as defined in Article-5 of the treaty, the business income of the appellant is not taxable in India as per Article 7 of the DTAA. At the time of the argument, the Ld. Representative of the assessee has argued that now this issue has been decided in his favour by the Hon’ble ITAT in the assessee’s own case in ITA. No. 4346/M/2009 for the A.Y. 2006-07 along with other ITA. No. 4237, 4238 & 4239/M/2014 for the A.Y. 2007-08 to A.Y. 2009-10 and cross-objection of the assessee Bearing No.51/M/2017 for the A.Y. 2005-06 and other cross-objection 2005-06 & 2006-07. The relevant finding has been given in para no.4 which is hereby reproduced as under.:-

“4.. We have heard counsels for both the parties at length and after considering the material placed on record as well as orders passed by the revenue authorities, we find force in Ld. AR’s submission that in case the cross objections of the assessee are accepted then no further income chargeable to tax in India can be said to be attributable to the assessee for the reason that the

transaction between the assessee and its AE has been found at arms length price on the issue of agent for space selling. Then there is no requirement for dealing with the issue of, whether there is PE or not and no addition on this count can be made in the case of assessee. When these submissions were confronted to the Ld. DR, he fairly conceded the position as regards to the cross objections filed by the assessee. Keeping in view the above facts, we have decided to deal with the cross objection filed by the assessee. In this respect, Ld. AR appearing on behalf of the assessee submitted that identical issue has already been decided by the Coordinate Bench of Hon'ble ITAT in ITA No. 8862/Mum/10 for AY 2007-08. The operative portion of the order of Hon'ble ITAT is contained in para no. 4 to 8 which is reproduced below:-

4. The learned Counsel for the assessee stated that no adjustment on account of ALP of space selling is considered by TPO and once, no transfer pricing adjustment is made, no further income chargeable to tax in India can be attributable to the assessee for the reason that the transaction between the assessee and AE has been found at arms length price. For this the learned Counsel for the assessee relied on the decision of Hon'ble Supreme Court in the case of ADIT vs. EFunds IT Solution Inc. in Civil Appeal No.6082 of 2015 vide order dated 24.10.2017 wherein vide Para 22 reads as under: - "22. Shri Ganesh has referred to and relied upon an order of the Additional Taxation Commissioner, who is the Transfer Pricing Officer. The said order is dated 22nd February, 2006 and states as under: "The taxpayer company filed its return of income with ACIT Circle 11(1), New Delhi. 6 ITA Nos. 4346/Mum/2009 & 7 others & CO No. 32/Mum/10 & 7 others M/s

Asia Today Ltd A reference was received from the Assessing Officer to determine the „arm“s length price“ u/s 92CA(3) in respect of „international transactions“ entered into by the assessee during the F.Y. 2002-03. In response to notice u/s 92CA, Shri Vijay Iyer, CA of S.R. Batliboi & Co. Chartered Accountants, authorized representative of the assessee appeared from time to time. The documentation prescribed under Rule 10D of the Income Tax Rules was submitted and placed on record. The taxpayer company is engaged in providing IT enabled services which include Back office services and Call centre services. It also has a software design center for development of software for call centres. eFunds International (India) Pvt. Ltd. is a wholly owned subsidiary of IDLX Holdings BV, Netherlands. IDLX is a wholly owned subsidiary of eFunds Corp. The major international transactions undertaken by the assessee during the year is given below: S.No Description of transaction Method Value (In Rs.) 1. Financial Shared Services (Back Office) TNMM 33.9 Cr. 2. Call Center Services (Shared Service Centre) TNMM 88.03 Cr. 7 ITA Nos. 4346/Mum/2009 & 7 others & CO No. 32/Mum/10 & 7 others M/s Asia Today Ltd 3. Software Development (Off-shore for call centres) TNMM 57.58 Cr. In addition to the above the assessee has also provided software development services to overseas eFunds group entities. The international transactions undertaken by the assessee were examined vis-a-vis the method applied by the assessee for arriving at the arm“s length price. The assessee has relied on the Transactional Net Margin Method (TNMM) in respect of all the major international transactions. After examination of the documentation and discussion with the

authorized representative of the assessee, no adverse inference is drawn in respect of the Arm's Length Price (ALP) of the international transactions, as declared by the assessee in Form 3CEB, annexed to the return of the Income." Shri Ganesh is correct in stating that as the arm's length principle has been satisfied in the present case, no further profits would be attributable even if there exists a PE in India. This was specifically held in Morgan Stanley (supra) as follows: "32. As regards determination of profits attributable to a PE in India (MSAS) is concerned on the basis of arm's length principle we have quoted Article 7(2) of DTAA. According to AAR where there is an international transaction under which a nonresident compensates a PE at arm's length price, no further profits would be attributable in India. In this connection, AAR 8 ITA Nos. 4346/Mum/2009 & 7 others & CO No. 32/Mum/10 & 7 others M/s Asia Today Ltd has relied upon Circular No. 23 of 1969 issued by CBDT as well as Circular No. 5 of 2004 also issued by CBDT. This is the key question which arises for determination in these civil appeals. (at page 25) 35. The object behind enactment of transfer pricing regulations is to prevent shifting of profits outside India. Under Article 7(2) not all profits of MSCo would be taxable in India but only those which have economic nexus with PE in India. A foreign enterprise is liable to be taxed in India on so much of its business profit as is attributable to the PE in India. The quantum of taxable income is to be determined in accordance with the provisions of the IT Act. All provisions of the IT Act are applicable, including provisions relating to depreciation, investment losses, deductible expenses, carryforward and setoff

losses, etc. However, deviations are made by DTAA in cases of royalty, interest, etc. Such deviations are also made under the IT Act (for example Sections 44-BB, 44-BBA, etc.). 7 ITA No. 8862/Mum/2010 Zee TV USA Inc (A.Y. 2007-08) 36. Under the impugned ruling delivered by AAR, remuneration to MSAS was justified by a transfer pricing analysis and, therefore, no further income could be attributed to the PE (MSAS). In other words, the said ruling equates an arm's length analysis (ALA) with attribution of profits. It holds that once a transfer pricing analysis is undertaken, there is no further need to attribute profits to a PE. The impugned ruling is correct in principle insofar as an associated enterprise, that also constitutes a PE, has been remunerated on an arm's length basis taking into account all 9 ITA Nos. 4346/Mum/2009 & 7 others & CO No. 32/Mum/10 & 7 others M/s Asia Today Ltd the risk-taking functions of the enterprise. In such cases nothing further would be left to be attributed to PE. The situation would be different if transfer pricing analysis does not adequately reflect the functions performed and the risks assumed by the enterprise. In such a situation, there would be a need to attribute profits to PE for those functions/risks that have not been considered. Therefore, in each case the data placed by the taxpayer has to be examined as to whether the transfer pricing analysis placed by the taxpayer is exhaustive of attribution of profits and that would depend on the functional and factual analysis to be undertaken in each case. Lastly, it may be added that taxing corporates on the basis of the concept of economic nexus is an important feature of attributable profits (profits attributable to PE).” 8 ITA No. 8862/ Mum/2010

Zee TV USA Inc (A.Y. 2007-08) (at pages 27-28)” 5. The learned Counsel also relied in ITAT’s decision in the case of Taj TV Ltd. vs ADIT (international Taxation) (2017) 162 ITD 674 (MumTrib.) “18. As regards ground No.1 of the Revenue’s appeal, it is admitted fact that, similar to ground which has been decided in the assessment year 2007-08. Therefore, in view of the finding given there in, we hold that no further income chargeable to tax in India can be said to be attributable to the assessee for the reasons that the transaction between the assessee and PE has been found at arm’s length price and for this year also the TPO’s order in case of the assessee and 10 ITA Nos. 4346/Mum/2009 & 7 others & CO No. 32/Mum/10 & 7 others M/s Asia Today Ltd Taj India has been placed on record wherein the transaction has been accepted at arm’s length price. Thus, ground No. 1 is dismissed.” 6. In view of the above, the learned Counsel for the assessee argued that in case alternate arguments of the assessee is accepted that no further income chargeable to tax in India can be said to be attributable to the assessee for the reason that the transaction between the assessee and its AE has been found at arms length price in the present case on the issue of agent for space selling, there is no requirement for dealing with the issue of, whether there is PE or not and no addition on this count can be made in the case of assessee. When these facts were confronted to the learned CIT Departmental Representative, he fairly conceded the position as regards to alternative contention of the assessee. 7. After hearing rival contentions and gone through the facts and circumstances of the case. We find that the alternative contention made 9 ITA No. 8862/ Mum/2010 Zee TV USA Inc (A.Y. 2007-08) by the assessee

that once no income chargeable to tax in India is attributable to the assessee for the reason that the transaction between the assessee and its AE has been found at arms length price, no further income chargeable to tax in India can be said to be attributable on account of PE. Accordingly, this issue is squarely covered in favour of assessee by the decision of Hon''ble Supreme Court in the case of 11 ITA Nos. 4346/Mum/2009 & 7 others & CO No. 32/Mum/10 & 7 others M/s Asia Today Ltd EFunds IT Solution Inc. (supra) and also coordinate Bench decision nin the case of Taj TV Ltd. (supra). Respectfully following the same we allow the appeal of the assessee. 8. In the result, the appeal of assessee is allowed. After having gone through the orders passed by the Coordinate Bench of Hon'ble ITAT and the submissions of the assessee and as per the facts and circumstances of the case, we find that once no income chargeable to tax in India is attributable to the assessee for the reason that the transaction between the assessee and its AE has been found at arms length price, no further income chargeable to tax in India can be said to be attributable on account of PE. Accordingly, this issue is squarely covered in favour of assessee by the decision of Hon'ble Supreme Court in the case of E-Funds IT Solution Inc. (supra) and also co-ordinate Bench decision in the case of Taj TV Ltd. (supra) and Z. TV USA INC, ITA No. 8862/Mum/10 for AY 2007-08. Respectfully following the same, we allow the cross objections of the assessee. 12 ITA Nos. 4346/Mum/2009 & 7 others & CO No. 32/Mum/10 & 7 others M/s Asia Today Ltd Since we have allowed the cross objection of the assessee, therefore the ground raised by the department in their appeals become academic."

6. On appraisal of the above said mentioned finding, we noticed that the issue has duly been covered by the decision of Hon'ble ITAT in the assessee's own case for the A.Y. 2006-07 in ITA. No. 4346/M/2009 and other appeals(supra) in which it is specifically held that the transaction between the assessee and the PE was found at arms length price, no further income was chargeable to tax in India which was attributable on account of PE. The issue has been decided on the basis of the decision Hon'ble Supreme Court in the case of **E-Funds IT Solutions Inc. (supra) and Z. TV USA Inc, ITA. No.8862/M/2010 for the A.Y. 2007-8**. The facts are not distinguishable at this appellate stage also. Therefore, in the said circumstances, we are of the view that the CIT(A) has decided the matter of controversy judiciously and correctly which is not liable to be interfere with at this appellate stage. Accordingly, all the issues are decided in favour of the assessee against the revenue.

CROSS-OBJECTION:-

7. The assessee has raised the cross-objection: -

“Without prejudice to the judgment of The Ld. CIT (A), wherein the Ld. CIT (A) held the non-taxability of income from advertising/subscription fees under the Double Taxation Avoidance Agreement (‘DTAA’) between India and Mauritius having regard to the fact that the Respondent-assesses has no Permanent Establishment (PE) in India as specified under Article 5 of the said DTAA, the Respondent raises the following cross-objections.

1. Assuming without admitting Zee Entertainment Enterprise Limited (ZEEL)/ Zee Turner Limited (ZTL) are considered as PE of the Respondent-assessee within the meaning of Article 5 of the DTAA

the Assessing Officer ('AO') on facts and circumstances of the case and in law. failed to appreciate that no further profits can be attributed as ZEEL/ZTL have already been compensated at arm s length price¹

2 The AO erred in holding that the Respondent - assessee has a business connection in India and attributing 10% of the net revenues from advertisement and subscription as taxable for reason which are wrong, contrary to facts and provisions of law.

3 The AO erred m attributing part of the total income earned by the Respondent -assessee from advertising/subscription fees of the alleged PE on adhoc basis without appreciating That the attribution ought to be made on a fair and judicious basis;

4. The above cross objections are without prejudice to each other,

5 The Respondent craves leave to add, amend or alter all or any of the objections raised thereto."

8. The cross-objection of the assessee has been adjudicated in favour of the assessee against the revenue as discussed above while deciding the issue no. 1 to 3 in the appeals of the revenue in ITA. No.659/M/2016. Accordingly, the cross-objection of the assessee is hereby ordered to be allowed.

9. In the result, the appeal filed by the **revenue is hereby ordered to be dismissed and the cross-objection of the assessee is hereby ordered to be allowed.**

Order pronounced in the open court on 31.05.2018.

Sd/-

(R. C. SHARMA)

लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai दिनांक Dated : 31.05.2018

Vijay

Sd/-

(AMARJIT SINGH)

न्यायिक सदस्य/JUDICIAL MEMBER

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

**उप/सहायक पंजीकार / (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai**