

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI 'I' BENCH, MUMBAI**

**[Coram: Justice P.P. Bhatt (President)
And Pramod Kumar (Vice President)]**

ITA No.7063/Mum/2019
Assessment year: 2016-17

IMG Media Ltd.

608, Western Express Highway
Service Road, Bandra (E),
Mumbai 400051
[PAN:AACCI4811L]

..... Appellant

Vs

Assistant Commissioner of Income Tax (IT)- 2(2)(1)
Mumbai

.....Respondent

Appearances by

Dhanesh Bafna alongwith **Nishant Shah** *for the appellant*
Sanjay Singh *for the respondent*

Date of concluding the hearing : February 19th, 2020
Date of pronouncement : February 24th, 2020

ORDER

Per Pramod Kumar, VP:

1. By way of this appeal, the assessee appellant has challenged correctness of the order dated 27th September 2019, passed by the Dy. Commissioner of Income Tax, International Tax Circle 2(2)(1), Mumbai, in the matter of assessment under section 143(3) r.w.s. 144C (13) of the Income Tax Act 1961, for the assessment year 2016-17.

2. Ground nos. 1 and 2 are general in nature and do not call for any specific adjudication.

3. In ground no 3, the assessee has raised the following grievances:-

3. Royalty

That on the facts and circumstances of the case & in law:

3.1. On the facts and in the circumstances of the case & in law, the Ld. DRP / Ld. AO grossly erred in concluding that the production work undertaken by the appellant qualify as "Royalty" under the provisions of Section 9(i)(vi) of the Act as well as Article 13 of the DTAA.

3.2. On the facts and in the circumstances of the case & in law, the Ld. DRP / Ld. AO, erred in not appreciating that the issue under consideration has authoritatively been decided by the ITAT, Mumbai in favour of the appellant in AY 2009-10 to AY 2012-13, AY 2014-15 and AY 2015-16 observing that the production work undertaken is a live coverage of event and hence the income earned there from would not qualify as "Royalty" under the provisions of the Act and the DTAA.

3.3. On the facts and in the circumstances of the case & in law. The Ld. DRP / Ld. AO erred in not appreciating that the Hon'ble Bombay High Court in Appellant's case for AY 2010-11 has not admitted the substantial question of law with respect to treating the income as "Royalty" under the provisions of the Act and the DTAA.

3.4. On the facts and in the circumstances of the case & in law. The Ld. DRP / Ld. AO erred in alleging that the appellant received consideration for allowing it to use copyright in its scientific work, being the feed, which would qualify as "Royalty" both under the provisions of the Act and the India- UK DTAA.

4. A plain reading of the order passed by the Dispute Resolution Panel shows that the issue in appeal is squarely covered by a decision of the coordinate bench, in assessee's own case for the assessment year 2010-11, in favour of the assessee. The only reason, on account of which the DRP has declined relief to the assessee, is to keep the matter alive for the SLP, if any, before the Hon'ble Supreme Court. This aspect of the matter is evident from the following observations made in the DRP's impugned order:-

5.27 During the course of the proceedings before DRP, it has been brought to the knowledge of the DRP that in the case of the assessee company, the Bombay High Court has refused to admit the appeal of the Department against the order of the ITAT for AY 2010-11 with respect to the issue of 'Royalty' holding that the receipts cannot be held to be in the nature of royalty and that it has admitted only the issue of the amount being in the nature of FTS. The assessee has submitted that in light of the decision of the Hon'ble High Court, the Department ought to delete the addition treating the amount as royalty. (Income Tax Appeal No. 1471 of 2016 before High Court of Bombay, decision dated 05.02.2019).

5.28 In view of the submission filed, the DRP sought a report from the AO on this issue. The AO, vide his letter dated 13.06.2019, has clarified that various questions of law had been field before the Hon'ble High Court Mumbai. By their order dated 5.2.2019, the Hon'ble Court has upheld the order of ITAT that the receipt under discussion was not in the nature of royalty. Consequent to the order of the High Court, the Department has proposed to file an SLP before Apex Court on the issue. The issue related to FTS has been admitted by the Hon'ble High Court for adjudication on merits.

5. This issue, as noted above, has been decided in favour of the assessee by co-ordinate bench decision in assessee's own case for the assessment year 2010-11 while doing so the coordinate bench has, inter alia, observed as follows:-

13. We have noticed earlier, the assessee was engaged by BCCI to produce live coverage of audio and video visuals of cricket matches. The assessee shall produce the program content, which is broadcast through the broadcasters appointed by BCCI. The job of the assessee ends upon the production of the „program content“. According to the assessee, the program content shall become the property of the BCCI. We notice that the revenue has not brought any material on record to show that the assessee has kept the ownership rights over the program content. The Ld DRP has noticed that the BCCI is required to supply certain equipments and hence the Ld DRP has held as under:-

“...the assessee would be using equipments to carry out this work which is nothing but equipment royalty as per the Act as well as the DTAA.”

We are unable to understand the rationale behind this observation. If the assessee was using the equipments belonging to BCCI and if that activity is examined in isolation, then the assessee should be paying money to BCCI for using the equipments. In the instant case, the assessee has received the money for producing live coverage of cricket matches. The equipments required for the said purpose may be brought by the assessee itself or it may be provided by the BCCI. Under commercial terms, if the assessee was required to bring the equipments, then the consideration payable for the production of live coverage of cricket matches should go up. Thus, in our view, it was a simple case of commercial agreement entered between the parties with regard to the modalities to be followed and the same is not a determinative factor to decide about the nature of payment received by the assessee.

14. The Ld D.R.P. has further observed that the assessee has developed commercial and scientific experience in the field of commercial and scientific experience. The term “royalty” is defined as under in the IndiaUK DTAA:-

3. For the purposes of this Article, the term “royalties” means:

(a) Payments of any kind received as a consideration for the use of, or the right to use, any copyright of a literary, artistic or scientific work, including cinematography films or work on films, tape or other means of reproduction

for use in connection with radio or television broadcasting, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience; and

(b) Payments of any kind received as consideration for the use of, or the right to use, any industrial, commercial or scientific equipment, other than income derived by an enterprise of a Contracting State from the operation of ships or aircraft in international traffic.”

A careful perusal of the definition of „royalties” extracted above, would show that the payment, in order to constitute royalty, should have been made “for the use of, or the right to use any copyright etc”. In the instant case, we have noticed that the payment was made by BCCI to the assessee for producing the program content consisting of live coverage of cricket matches. Further, we have noticed that there is nothing on record to show that the assessee had retained the ownership of the program content. The Hon“ble Delhi High Court had an occasion to examine an identical issue in the case of CIT Vs. Delhi Race Club (2015)(273 CTR 503) in the context of the provisions of sec. 194J of the Act. In the above said case, the assessee was engaged in the business of conducting of horse races and it made payment for live telecast of races. The AO held that the said payment would fall under the definition of „royalty” falling within the purview of the provisions of sec. 194J of the Act and hence disallowed the payments u/s 40(a)(ia) of the Act. The Hon“ble Delhi High Court observed as under:-

“16. A live T.V coverage of any event is a communication of visual images to the public and would fall within the definition of the word „broadcast” in Section 2(dd) (of the Copyright Act). That apart we note that Section 13 does not contemplate broadcast as a work in which „copyright” subsists as the said Section contemplates „copyright” to subsist in literary, dramatic, musical and artistic work, cinematograph films and sound recording. Similar is the provision of Section 14 of the Copyright Act which stipulates the exclusive right to do certain acts. A reading of Section 14 would reveal that „copyright” means exclusive right to reproduce, issue copies, translate, adapt etc., of a work which is already existing...

18. In view of the aforesaid position of law which brought out a distinction between a copyright and broadcast right, suffice it to state that the broadcast or the live coverage does not have a „copyright”. The aforesaid would meet the submission of Mr. Sawney that the word „Copyright” would encompass all categories of work including musical, dramatic, etc. and also his submission that the Copyright acknowledges the broadcast right as a right as a right similar to „copyright”. In view of the conclusion of this Court in ESPN Star Sports case (supra), such a submission needs to be rejected.”

Though the above said decision was rendered in the context of provisions of sec. 194J of the Act, yet section imports the definition of the term „royalty” from Explanation 2 to sec. 9(1)(vi) of the Act. Under the definition given in the above said provision also “royalty” means consideration for the transfer of all or any

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

15. In the instant case, we have noticed that the BCCI becomes the owner of the program content produced by the assessee. The job of the assessee ends upon the production of the program content and the broadcasting is carried out by some other entity to which license was given by the BCCI. Hence, in our view, the question of transfer of all or any right does not arise in the facts and circumstances of the instant case. Hence, we are of the view that the payment received by the assessee cannot be considered as „royalty“ in terms of the India-UK DTAA. Though, it is not necessary to examine about the applicability of provisions of sec. 9(1)(vi) of the Act, yet the facts discussed above would show that the payment received by the assessee cannot fall within the purview of sec. 9(1)(vi) of the Act also.

6. The view so taken by the co-ordinate bench has been followed consistently in the assessment year 2011-12, 2012-13, 2014-15 and 2015-16. Hon'ble jurisdictional High Court has declined to entertain appeal against the aforesaid decision, and has observed as follows:-

4 Revenue had raised one more question before us at the time of arguments, which reads as under:-

“ Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in directing the AO not to treat the amount in question received by the assessee as in the nature of “royalty”, without appreciating the facts of the case that the payments received as a consideration by the assessee was for imparting of any information concerning commercial or scientific knowledge, experience or skill within the meaning of Explanation 2(iv) to Section 9(1)(vi) of the Act and also involved transfer of rights in respect of any copyright or scientific works within the meaning of Explanation 2(v) to Section 9(1) (vi) of the Act as well as under the DTAA between India and the UK.”

5 This question arises in following back-ground.

Respondent-Assessee was engaged by Board of Control of Cricket in India (for short “BCCI”) for preparing live feed of cricket matches which would be telecast on TV channels. The Revenue's first contention was that, the payment received by the Assessee from the BCCI for such work, was in the nature of “Fee for technical services”. Revenue's alternate contention was that, following first contention, the payment to the Assessee was in the nature of royalty. The Income Tax Appellate Tribunal (for short “the Tribunal”) rejected both the contentions. The second question argued before us by the Revenue relates to the Tribunal's decision to reject the alternate contention of the Revenue.

6 *Having heard the learned Counsel for the parties on this issue and having perused the documents on record, the Tribunal referred to royalty as defined under India-UK Double Taxation Avoidance Agreement (DTAA) and held that the payment received by the Assessee, cannot be termed as 'royalty'. This definition reads as under:-*

“(a) Payments of any kind received as a consideration for the use of, or the right to use, any copyright of a literary, artistic or scientific work, including cinematography films or work on films, tape or other means of reproduction for use in connection with radio or television broadcasting, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience; and

(b) Payments of any kind received as consideration for the use of, or the right to use, any industrial, commercial or scientific equipment, other than income derived by an enterprise of a Contracting State from the operation of ships or aircraft in international traffic.”

7 *The Tribunal interpreted this definition to hold that to include in the expression royalty, the payment in question should have to be made for the use of or right to use any copyright etc. The Tribunal referred to the decision of the Delhi High Court in the case of CIT v/s. Delhi Race Club Ltd., 273 CTR 503 in support of its conclusions. We are in agreement with the view of the Tribunal. Considering the nature of payments received by the Assessee from BCCI and considering the definition of term royalty contained in DTAA between two countries, it cannot be stated that Assessee received payment from the BCCI by way of royalty. There was no copyright vested in the Assessee for which the payment in question was being made. The Assessee merely prepared a coverage of live cricket matches under the contact, for such purpose, awarded by the BCCI. This question is, therefore, not entertained.*

7. Having heard the rival contentions and having perused the material on record, we see no reasons to take any other view of the matter than the view so consistently taken by the coordinate bench. The mere fact that a binding judicial precedent has been challenged before a higher judicial further, the binding nature of such judicial precedent is not deleted or curtailed. In any case, the action of the Assessing Officer is only to keep the matter alive till, and if, Hon'ble Supreme Court taken a call on the issue. We, therefore, uphold the plea of the assessee and hold that the receipts in question cannot be treated as “royalty”. The assessee succeeds on the issue.

8. Ground no 3 is thus allowed.

9. In ground no 4, the assessee appellant has raised the following grievances:-

4. Fees for Technical Services

4.1. On the facts and in circumstances of the case & in law, the Ld. DRP/ Ld. AO has erred in characterising the services provided by the appellant as "Fee for Technical Services" (FTS) under the provisions of section 9(i)(vii) of the Act as well as Article 13 of DTAA.

4.2. On the facts and in the circumstances of the case & in law, the Ld. DRP / Ld. AO, erred in not appreciating that the issue under consideration has authoritatively been decided by the ITAT, Mumbai in favour of the appellant in AY 2009-10 to AY 2012-13, AY 2014-15 and AY 2015-16.

4.3. On the facts and in circumstances of the case and in law, the Ld. DRP/ Ld. AO has erred in ignoring that the activity of live audio and video coverage of events constitute production of programmes and falls under the definition of "work" provided under Explanation (iv) to Section 194C of the Act and hence the same would not qualify as "service" and consequently will not be taxable as "ITS" under Section 9(i)(vii) of the Act.

4.4. In the facts and in circumstances of the case and in law, the Ld. DRP/ Ld. AO has grossly erred in concluding that the services rendered by the appellant do not make available any technical knowledge, experience, skill, know-how etc. and in doing so, has clearly ignored the true nature of activities carried out by the appellant.

10. This issue, as learned representatives, fairly agree, is also covered, in favour of the assessee, by a co-ordinate bench decision (Supra) in assessee's own case for the assessment year 2010-11, wherein the co-ordinate bench was, inter alia, observed as follows:-

7. Now we shall examine the question on the basis of discussions made in the earlier paragraphs. We notice that the assessee produces the feed (program content) of live coverage of audio-video visuals of the cricket matches by using its technical expertise. After that it delivers the feed (program content) in the form of digitalized signals to the licensees (broadcasters). There should not be any dispute that the licensees (broadcasters) receive the feed on behalf of the BCCI. We notice that what is delivered by the assessee is a "final product in the form of program content" produced by it by using its technical expertise, i.e., the assessee does not deliver or make available any technology/ knowhow to the BCCI. There should not be any dispute that the production of "program content" by using technical expertise is altogether different from the provision of technology itself. In the former case, the recipient would receive only the product and he can use the product according to his convenience, where as in the later case, the recipient would get the technology/knowhow and hence he would be able to use the technology /knowhow

on his own in order to produce any other program content of similar nature. In the later case, the technology/knowhow would be “made available” to the recipient, in which case the payment given would fall under the category of “Fee for technical services”. However, in the former case, there is no question of making available of any technology/knowhow and hence the payment given would be in the nature of payment made for production of “Program content or live feed” and not for supply of technology. 8. The Ld DRP has observed that the agreement entered between the assessee and BCCI prescribes the quality standards in minute details and the same results in total exchange of technical plans and designs between the assessee and the broadcasters. In our view, there is a fallacy in the view taken by Ld DRP. The object of the production of live feed is to offer quality coverage of the live cricket matches to the viewers. The assessee’s job is restricted to production of live coverage and the job of broadcasting the same is undertaken by the BCCI. The BCCI, in turn, has given license to certain companies (called licensees) and they have undertaken the job of broadcasting the live coverage of cricket matches on behalf of BCCI. Since the assessee is supplying the live coverage in the form of digitalized signals, it has to ensure that the broad casters also do have the compatible technology and equipments so that the live coverage can be broadcast without compromising the quality. Thus, in our view, the technical aspects are specified in the agreement in order to ensure that the program content is broadcast at the same quality in which it was produced. The same was sought to be achieved by synchronizing the quality of technical equipments between the assessee and the broadcasters (licensees). Such kind of synchronization of technology would ensure seamless function and complete coordination between the assessee and the broadcasters. Thus, there is a difference between the technology involved in the production of live coverage feed of cricket matches and the technology required to broadcast the same in the required quality. Hence, in order to ensure and maintain quality of live coverage feed, it becomes necessary on the part of the assessee to specify or oversee the technology available with the broadcasters so that the same does not compromise on the quality and compatibility. The specification of the technical requirements does not mean that the assessee has supplied the technology involved in the production of live coverage feed to the broad casters. If that be the case, the broadcasters should be in a position to use the technology in order to produce the live feed on their own. We notice that the revenue has not established that the broadcasters (who are acting on behalf of the BCCI) or the BCCI itself has acquired the technical expertise from the assessee which would enable them to produce the live coverage feeds on their own after the conclusion of IPL 2008 and IPL 2009 cricket matches. In that case the essential condition of “make available” clause fails and hence the amount received by the assessee cannot be considered as “Fee for technical services” in terms of Article 13(4)(c) of the DTAA entered between India and UK.

9. The Ld DRP has observed that the live coverage of cricket matches involve instant and continuous production and broadcasting of live matches. The existing program would keep merging with the new work. Further, the broadcasters are able to split the program content in order to insert advertisements. All these aspects, in our view, would not bring the payment under the category of “Fee for technical services”. It only shows the technical expertise of the assessee to produce a flexible program content to give enhanced quality of viewing the live matches.

10. Before us, the Ld D.R placed reliance on the decision rendered by the Delhi bench of Tribunal in the case of Nimbus Sport International Pte Ltd (2012)(18 taxmann.com 105), wherein the Tribunal had held that the services or production and generation of live television signal were in the nature of technical services. The Ld A.R contended that the Delhi Tribunal did not examine the principle of „make available“. We notice that the case of Nimbus Sport International Pte Ltd is covered by India-Singapore DTAA and it also uses the expression “make available” in the definition of “Fee for technical services”. In the case of Nimbus sports International (supra), the principle or concept of „make available” has not been examined by the Tribunal. Accordingly, we agree with the contentions of the assessee that the said decision is distinguishable.

11. The view so taken by the co-ordinate benches have consistently been followed by several other co-ordinate benches as well. No doubt, Hon’ble Jurisdictional High Court has, vide order dated 05.02.2019, admitted an appeal, against the aforesaid decision of the co-ordinate bench, but that does not dilute binding nature of the judicial precedent.

12. Having heard the rival contentions, and having perused the material on record, we see no reasons to take any other view of the matter than the view taken by the co-ordinate benches. Respectfully following the co-ordinate benches, we uphold the grievances of the assessee. The assessee succeeds as this issue as well.

14. In ground no 5, the assessee has raised the following grievances:-

5. On the facts and circumstances of the case & in the alternative

5.1. The Ld. DRP/ Ld. AO grossly erred in making ad-hoc attribution of total profit of appellant between PE and head office in ratio of 75:25 ignoring the transfer pricing methodology followed by the appellant after due FAR analysis.

5.2. The Ld. DRP/ AO has grossly erred in attributing the additional profit of INR 6,76,308 to the appellant's PK without appreciating the fact that the appellant has followed the same transfer pricing methodology for attributing the income to its PE in the relevant year as followed in earlier years, which was duly accepted by the TPO/Ld. AO in earlier years.

15. Learned representatives fairly agree that the issue may be remitted to the file of the Assessing Officer, as was done, in the same issue, by the co-ordinate bench, vide order dated 12.06.2019, for the assessment year 2010-11 and 2015-16. With the consent of the parties

attribution of additional profits of Rs. 6,76,308/- is remitted to the file of the Assessing Officer, for adjudication denovo in the light of tribunal's order for 2010-11 and 2015-16.

16. Ground no 5 is thus allowed for statistical purposes.

17. In the result, the appeal is allowed in the terms indicated above. Pronounced in the open court today on the 24th day of February, 2020

Sd/-

Justice P.P Bhatt
(President)

Sd/-

Pramod Kumar
(Vice President)

Mumbai, dated the 24th day of February, 2020

Nishant Verma Sr.PS

Copies to:

(1)	<i>The appellant</i>	(2)	<i>The respondent</i>
(3)	<i>CIT</i>	(4)	<i>CIT(A)</i>
(5)	<i>DR</i>	(6)	<i>Guard File</i>

By order

*Assistant Registrar
Income Tax Appellate Tribunal
Mumbai benches, Mumbai*

