

आयकर अपीलीय अधिकरण, दिल्ली न्यायपीठ “डी”, दिल्ली में

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH ‘D’, NEW DELHI**

सुश्री सुषमा चावला, उपाध्यक्ष, एवं डॉ. बी आर आर कुमार, लेखा सदस्य के समक्ष,

BEFORE MS. SUSHMA CHOWLA, VICE PRESIDENT

&

Dr. B.R.R. KUMAR , ACCOUNTANT MEMBER

आयकर अपील सं. / ITA Nos.3760 & 4542/Del/2016

निर्धारण वर्ष / Assessment Years: 2009-10 & 2011-12

ESPN Star Sports Mauritius
S.N.C et Compagnie
(now known as ESS Advertising (Mauritius)
S.N.C. et Compagnie)
C/o- Price Waterhouse Coopers Pvt. Ltd.
11-A, Sucheta Bhawan,
Vishnu Digamber Marg,
New Delhi-110001
PAN-AABFE6801E

.....अपीलार्थी / Appellant

vs

ACIT,
Circle-1(2)(2),
International Taxation,
Civic centre,
New Delhi

..... प्रत्यर्थी / Respondent

अपीलार्थी की ओर से / Appellant by : Sh. Porus Kaka, Sr. Advocate,
Sh. Divesh Chawla, Advocate,

प्रत्यर्थी की ओर से / Respondent by : Sh. Satpal Gulati, Sr. DR

सुनवाई की तारीख / Date of Hearing: 13.08.2020	घोषणा की तारीख / Date of Pronouncement: 22.10.2020
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आदेश / ORDER**PER SUSHMA CHOWLA, VP**

These two appeals filed by the assessee are against the orders of CIT(A)-42, New Delhi, dated 31.03.2016 and 28.06.2016 relating to Assessment Years 2009-10 & 2011-12 respectively, against the order passed under section 143(3) of the Income-tax Act, 1961 (in short 'the Act').

2. Both appeals relating to Assessment Year 2009-10 and 2010-11 involving similar issue were heard together and are being disposed of by this consolidated order for the sake of convenience.

3. The assessee has raised following grounds of appeal relating to Assessment Year 2009-10:-

1. *That on facts and in law, the appellant denies its liability to be "assessed" under the Income-tax Act, 1961 ('the Act') and the assessment order made under section 143(3) of the Act is bad in law.*
2. *That on the facts and circumstances of the case and in law, Ld. CIT(A) erred in upholding the order of the Learned Assessing Officer ('Ld. AO') that the appellant has a business connection in the form of ESPN Software India (P) Ltd. ('ESPN India') (now known as Star Sports India Private Limited) (now merged with Star India Private Limited) and that the appellant is carrying on its business in India and earning its income from sources in India in terms of Section 9(1)(i) of the Act.*
3. *That on the facts and circumstances of the case and in law, Ld. CIT(A) grossly erred in upholding the order of the Ld. AO that appellant has a Permanent Establishment ('PE') in the form of*

ESPN India under India Mauritius Double Taxation Avoidance Agreement ('DTAA').

4. *That on the facts and circumstances of the case and in law, Ld. CIT(A) grossly erred in upholding the order of the Ld. AO that the appellant has a dependent agent PE in the form of ESPN India under Article 5(4) and 5(5) of the DTAA without appreciating the fact that ESPN India is also engaged in distribution of channels in India under a separate agreement with ESS Distribution (Mauritius) SNC et Compagnie ('ESSD').*
- 5.1. *That without prejudice to the above ground, the ld. CIT(A) grossly erred in rejecting the contention of the appellant that where the purported PE is remunerated on an arm's length basis, no addition profits could be attributed to appellant's income.*
- 5.2. *That without prejudice to the above grounds, on facts and in law, the Ld. CIT(A) erred in upholding the action of the Ld. Assessing Officer in not applying the Circular No.23 dated July, 23, 1969 issued by the Central Board of Direct Taxes, where the transactions with ESPN India Have been held at arm's length by Transfer Pricing Officer.*
6. *That, without prejudice to the above and in the alternative, Ld. CIT(A) has grossly erred on the facts and circumstances of the case and in law in attributing 50% of the net profits of the appellant as the profits of the appellant from its Indian operations.*
7. *The Ld. CIT(A) erred in holding that interest under section 234B of the Act is consequential in nature, whereas the entire amount received by the respondent being subject to TDS, interest under section 234B is not leviable on it.*

4. The Ld. AR for the assessee before us pointed out that in case ground of appeal No.5.1 is decided then all other grounds of appeal raised by the

assessee would become academic in nature. The issue raised by way of ground of appeal no.5.1 is that where the purported PE is remunerated on an arm's length basis, no additional profits could be attributed to assessee's income. Another issue which is raised vide ground of appeal no.7 is against charging of interest under section 234B of the Act.

5. Briefly in the facts of the case, the assessee is a partnership firm established under the laws of Mauritius on March 29, 2002 and is engaged in the business of selling advertisement time and programme sponsorship in connection with programming via non-standard television from Mauritius on ESPN, Star Sports and Star Cricket Programming services. ESPN Software India (P.) Ltd. (in short 'ESPN India') a company incorporated under the laws of India is engaged in the business of acquiring Ad time from assessee and allotting it to various Indian advertisers and advertising agencies in India. The sale of Ad time by assessee to ESPN India is outside India and assessee also receives the sale consideration outside India. The assessee does not have any office in India nor does it have any agency or operation in India. For the year under consideration, the assessee filed return of income declaring nil income. The assessee claimed that revenue earned by it was in the nature of business profits, which were not subjected to tax in India in view of Article -7 of the India Mauritius Double Tax Avoidance Agreement (in short 'DTAA'). The case of the assessee was picked up for scrutiny. During the course of

assessment proceeding, the assessee was asked to show cause as to why the assessment for the current year be not concluded on the same basis as that for Assessment Year 2007-08 wherein it had been held that the assessee has a dependent agent PE in the form of ESPN India as per article 5(4) and 5(5) of the DTAA and also that the income of the assessee is deemed to accrue or arise in India. The Assessing Officer also attributed 30% of gross revenue to the deemed PE which were held to be taxable in India.

6. The assessee in reply submitted that ESPN India cannot be considered as a dependent agent of the assessee as the conditions laid down in Article 5(5) of the DTAA are not satisfied. It was also submitted that besides carrying out the activity of acquisition and allotment of ad time for the assessee, ESPN India is also engaged in distribution of channel services in terms of its agreement with ESS Distribution (Mauritius) SNC 'et Compagnie ('ESSD') and also production services for ESPN Star Sports, Singapore CESS'). Thus, ESPN India is an agent of independent status under Article 5(5) of the DTAA and is acting in the ordinary course of business while dealing with the assessee. The Assessing Officer relied on the assessment orders for Assessment Years 2003-04, 2004-05 and 2007-08 and rejected the contention of the assessee alleging that the assessee and ESPN India belonging to the same group and the business operations were intimately incorporated and interlinked; being part of same group they

have common interest/goal. ESPN India is exclusively working for the assessee and the Assessing Officer held that the assessee had a dependent agent PE in the form of ESPN India under Articles 5(4) and 5(5) of the DTAA. The alternative plea of the assessee on without prejudice to its submission that there does not exist PE in India was submitted before the Ld. Assessing Officer that even if a PE is deemed to exist, no profit are attributable to such PE as the agent (ESPN India) has been remunerated on an arm's length basis. The Assessing Officer rejected this plea of the assessee and attributed 30% of gross revenue from India as Profits to assessee's India PE alleging as under:-

- While the arm's length service fee paid by foreign company to subsidiary company may be an arm's length reward for the Agency's FAR, it does not follow that it also constitutes the arm's length reward for the dependent agent PE's FAR;
- No substantial functions are performed in Mauritius, therefore, it is possible to attribute lesser profits to the entity in Mauritius and the major profits would be attributable to operations in India performed by dependent agent;
- It is not demonstrated that the purchase of airtime from ESS is on arm's length and therefore, accounts maintained by the Appellant in Mauritius are not considered for working out the profits.

7. The relevant findings of the Assessing Officer are in paras 8.1 and 8.2 with conclusion in para -13 of the assessment order. The same are referred but not being reproduced for the sake of brevity.

8. The Ld. CIT(A) relied upon the reasoning of the appellate orders for Assessment Years 2003-04 and 2004-05 and held that there was existence of business connection of assessee in India on identical facts. Then the Ld. CIT(A) decided the next issue of dependent agent permanent establishment (in short 'DAPE') in view of Article 5(4)/5(5) of the India Mauritius Double Tax Avoidance Agreement. The Ld. CIT(A), after noting the arguments of the assessee vide para-6.8 of the appellate order, further noted that the issue relating to existence of DAPE in the form of ESPN India had been examined in assessee own case by the CIT(A) in order dated 31.03.2010 and relying on said reasoning dismissed the appeal of the assessee. Further, plea of the assessee was that once the profits attributable to activities of PE are determined in accordance with arm's length principle in its dealings with the enterprise of which it constitutes a PE, then no further hypothetical profits can be attributed to such PE. Reliance was placed by the assessee on various Circulars issued by CBDT and the decision of the Hon'ble Supreme Court in DCIT(IT) vs Morgan Stanley & Co. Inc. (2007) 292 ITR 416(SC) in this regard. The assessee submitted that in its case, ESPN India is remunerated on arm's length basis and the transfer pricing assessment for relevant year have been completed, both in the hands of the

assessee and ESPN India. Thus, the value of attributable income of the assessee in India would be restricted to the amount ESPN India receives from the assessee, being the arm's length value of the services performed in India in view of the aforesaid circulars and the decision of the Hon'ble Supreme Court. Further, it was submitted that the Hon'ble Supreme Court, in the above decision has laid down that if the PE is remunerated at an arm's length basis, taking into consideration all the risks, taking functions of the enterprises, then, there would be no further attribution of profits to the PE. Attention was invited to the concluding para 33 of the Morgan Stanley judgment. Further reliance was placed on BBC Worldwide Limited [2011] 203 taxman 54 (Del. HC) and other decisions. The CIT(A) vide para 7.12 observed that the issue of attribution of profit to the PE in India was decided in assessee's own case for Assessment Years 2003-04 and 2004-05 and relying on the same, he directed attribution of 50% of the net profits to the PE in assessee's hand as taxable profits attributable to the assessee's PE.

9. The assessee is in appeal before us against the order of the CIT(A).

10. We have heard the rival contention and perused the records. The assessee is in appeal before us for Assessment Years 2009-10 and 2011-12. The Ld. AR for the assessee pointed out that the appeals for Assessment Years 2003-04 and 2004-05 have been decided by the Tribunal in ITA Nos.3410 and 3411/Del/2010, vide order dated 20.08.2018. It was

further pointed out that the appeals for Assessment Years 2005-06 and 2007-08 were dismissed on technical issue. Similarly, reassessment proceedings for Assessment Years 2008-09 and 2010-11 were quashed. He stressed that the Assessing Officer and the CIT(A) had extensively relied upon respective orders relating to Assessment Years 2003-04 and 2004-05, which has been decided by the Tribunal. It was also pointed out that the factual aspects in those years were at variance; the assessee had appointed the Indian company as agent to sell air time for advertising. Subsequently, it changed the agreements and made Indian company as principal which purchased air time and sold it to different customers. This fact of Principal to Principal arrangement was argued before the Assessing Officer and it was pointed out that agency concept will not apply. In view of article 5(5) of the DTAA between India and Maritius, there were no DAPE. However, the Assessing Officer and the CIT(A) rejected this arguments and treated the transaction to be same as in Assessment Year 2003-04, though the terms of the agreement had changed and the roles of the parties had also changed. The Ld. AR for the assessee took us through the various paras of the assessment order and the appellate order and stressed that firstly, the assessee was not dependent agent PE; it was an independent agent as per article 5(5) of the DTAA. Another point raised by the Ld. AR for the assessee was that Revenue Department had taxed @17% of PLI which was higher than normal rate of agency commission of 10%. The Ld. AR for the assessee further pointed out that the TPO of Indian entity accepted the transaction

to be at arm's length. Where the tax departments had gone through FAR analysis and find the same to be at arm's length, then the question which arises whether, even, if dependent agent PE is there but still no further attributions of profit can be made in the hands of the assessee. He then took us through the decision of the Tribunal in assessee's own case relating to Assessment Years 2003-04 & 2004-05. He further placed reliance on the decision of the Hon'ble Supreme Court DCIT(IT) vs Morgan Stanley & Co. Inc. (Supra), BBC Worldwide Limited (supra) and various other decisions of the Hon'ble Supreme Court, for the proposition that once the transactions are as per the arm's length principle then revenue cannot assess more in hands of the non-resident entities. He stated that if Indian entity was remunerated at arm's length, then no further attribution of profits can be made. He concluded this argument by saying that there were following proposition to be decided:-

- a. The plea of the assessee of Principal to Principal transaction was rejected by Assessing Officer/CIT(A). If the same is at Principal to Principal basis then no income can be assessed in India under garb of DAPE;
- b. On without prejudice basis, where Assessing Officer and CIT(A) had accepted the transaction to be at arm's length price, then no further attribution of profit is possible; and

- c. Under article 5(5) of Indo- Mauritius DTAA, if an agent is not wholly dependent on non-resident, it cannot be treated as dependent agent under the article 4 of DTAA.

11. The Ld. DR for the Revenue referred to the written submission filed by him and pointed out that the case of the assessee of Principal to Principal has not been accepted by the Department. He stressed that it was an arrangement between the parties under which they were not only soliciting, but, conclusion part of the agreement was also on the part of the Indian company. Under the FAR analysis, one of the item is conclusion of contract to be done by the Indian entities and concluding the contract can be held to be act of dependent agent PE. He further stated that Air streams are from AE which are interconnected, so these should not be segregated. He then placed reliance on the orders of the CIT(A) with special reference to para 6.8 and his written submission.

12. The Ld. AR for the assessee in rejoinder stated that though the assessee has raised several grounds of appeal, but there is no need to decide the same as alternate plea raised by the assessee is covered by the decision of the Hon'ble Supreme Court. He stressed that conclusion of contract or authority to conclude the contract, is there in the agreement between the parties. He also submitted that in earlier years this was disputed based on the various decisions.

12. We have heard the rival contentions and perused the record. The assessee is a partnership firm established under the laws of Mauritius on March 29, 2002. The assessee is engaged in the business of acquiring and allotting advertisement time ('Airtime') and programme sponsorship in connection with programming via non-standard television from Mauritius on ESPN, Star Sports and Star Cricket Programming services. The assessee had entered into agreement with ESPN Software India (P) Ltd., incorporated under the laws of India which was engaged in the business of acquiring the airtime from assessee and allotting it to various Indian advertisers and advertising agencies. The sale of airtime by the assessee to ESPN India is outside India. Further, the assessee has no office in India and/or any operations in India. The plea of the assessee before the lower authorities was that ESPN India purchased airtime from the assessee on Principal to Principal basis. The assessee claimed that the income arising from advertisement airtime is business income and in the absence of a PE of the assessee in India, the same is not taxable. The Assessing Officer relying upon the orders of Assessment Years 2003-04 and 2004-05 held the transaction to be principal to agent and not on Principal to Principal basis. Further, ESPN India was constituted to be dependent agent as per Article-5(4) and not an independent agent as defined by Article 5(5) of the India-Mauritius DTAA. The Assessing Officer attributed part of the gross profits to the PE. The CIT(A) also held that ESPN India constitutes PE under the

India-Mauritius DTAA. However, he allowed partial relief to the assessee on the attribution of income to the DAPE in India.

13. The case of the assessee before us is that without prejudice to its contention on there being PE or dependent agent PE or not, when ESPN India is remunerated at arm's length basis then no further attribution of profits can be made in the hands of the assessee in India. The TPO in the order relating to Assessment Years 2009-10 and 2011-12 has held that the international transaction of payment of advertising sales inventory cost to be at arm's length price. Copies of the orders of the TPO in the case of the assessee and also ESPN India have been filed during the course of hearing. Once, the transactions are demonstrated to be in accordance with arm's length principle then the question which arises is whether there can be any attribution of profits, even if, assessee has PE in India. We are not going in to the aspect of whether the assessee has PE or dependent agent PE in ESPN India for deciding the present issue raised before us. We are limiting our decision to further attribution of profits, in case, where once arm's length principle has been decided then, the Hon'ble Supreme Court has laid down the proposition that there can be no further profit attribution to a person, even if, it has a PE in India. The Hon'ble Supreme Court in Honda Motors Co. Ltd. vs ADIT in Civil Appeal Nos.2833 to 2840 of 2018, judgement dated 14.03.2018, reported in [2018] 92 taxmann.com 353 (SC) held as under:-

3. *In the judgement of this Court dated 24.10.2017 in Asstt. DIT vs E-funds IT Solutions Inc. [2017] 86 taxmann.com 240/251 Taxman 280/399 ITR 34 (SC) and connected matters, it has been held that once arm's length principle has been satisfied, there can be no further profit attributable to a person even if it has a permanent establishment in India.*

4. *Since, the impugned notice for the reassessment is based only on the allegation that the appellant(s) has permanent establishment in India, the notice cannot be sustained once arm's length price procedure has been followed.*

5. *Accordingly, the impugned order(s) is set aside and the appeals are allowed."*

14. Similar proposition has been laid down by the Hon'ble Apex Court in Asstt. DIT vs E-funds IT Solutions Inc. [2017] 86 taxmann.com 240/251 Taxman 280/399 ITR 34 (SC) as in Honda Motors Co. Ltd. vs ADIT (Supra). The Hon'ble Supreme Court in DIT vs Morgan Stanley and Co. (supra) have also held as under

"33. To conclude, we hold that the AAR was right in ruling that MSAS would be a Service PE in India under Article 5(2)(1), though only on account of the services to be performed by the deputationists deployed by MSCo and not on account of stewardship activities. As regards income attributable to the PE (MSAS) we hold that the Transactional Net Margin Method was the appropriate method for determination of the arm's length price in respect of transaction between MSCo and MSAS. We accept as correct the computation of the remuneration based on cost plus mark-up worked out at 29% on the operating costs of MSAS. This position is also accepted by the Assessing Officer in his order dated 29.12.06 (after the impugned ruling) and also by the transfer pricing officer vide order dated 22.9.06. As regards attribution of further profits to the PE of MSCo where the connection, the department has also to examine whether the PE has obtained services from the multinational 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 PE) 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 PE. 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 PE 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 represents the value of the profit attributable to his service. In this enterprise at lower than the arm's length cost? Therefore, the department has to determine income, expense or cost allocations having regard to arm's length prices to decide the applicability of the transfer pricing regulations" (emphasis supplied)."

15. The said proposition have been also followed by the Hon'ble Delhi High Court in BBC Worldwide Limited (supra) and it has been held that if arm's length remuneration is paid to the dependent agent, nothing further remains to be attributed. In the case before Hon'ble Delhi High Court, the assessee was foreign telecasting company similar to the assessee, which had appointed its subsidiary in India to solicit orders for the sale of advertising airtime to different channels. The Assessing Officer held that the company had a DAPE under Article 5 of the DTAA and attributed 20% of the total advertisement revenue to India. The relevant extract of the decision is as under:-

"16. When the aforesaid factual position is kept in mind, the judgment of the Bombay High Court in Set Satellite (Singapore) Pte. Ltd's. case (supra) is clearly attracted. In that case the High Court has held that if correct ALP is applied and paid, nothing further would be left to be taxed in the hands of the foreign enterprise. In the said case, Morgan Stanley & Co. Inc.'s case (supra) as well as Circular NO.23 issued by the CBDT was taken into consideration. The Court was also pleased to record that the commission paid to the agent was 15% services performed by the Assessee's agent in India was in line with the existing industry standards in India at the prevalent time. Reliance was also placed on Para 3 of Circular NO.742 dated 02.5.1996 issued by the CBDT, which referred to the fact that the agent's commission from foreign telecasting companies is 15% or so of the gross sum, to contend that the CBDT itself had considered 15%

as the normally accepted commission rate payable to agents of the telecasting companies." (emphasis applied)

16. In applying the aforesaid proposition to the issue raised before us and without deciding the issue of whether ESPN India constitutes PE of the assessee in India under DTAA between India and Mauritius on the principle that ESPN India was remunerated at arm's length by the assessee, which has been accepted by the Assessing Officer/TPO of ESPN India and also the assessee, then no further attribution of profits is to be made in the hands of the assessee. Similar proposition has also been laid down by the Tribunal in assessee's own case for Assessment Years 2003-04 and 2004-05. Accordingly, we hold so. Ground of appeal no.5.1 is thus decided and other grounds of appeal become academic.

17. The next issue raised in ground of appeal no. 7 is against the charging of interest under section 234B of the Act. Since, the assessee is foreign company then no interest is to be charged under section 234B of the Act as entire income of the non-resident entity is subject to tax deduction at source. Accordingly, the assessee is not liable to pay any advance tax and consequently no liability to pay interest under section 234B of the Act. In this regard, we find support from the ratio laid down in Hon'ble Delhi High Court in DIT vs Jacobs Civil Incorporated/Mitsubishi Corporation [2011] 330 ITR 578 (Del.) and Hon'ble Bombay High Court in DCIT vs NGC Network Asia LLC [2009] 313 ITR 0187 (Bom.), wherein the Hon'ble High Courts have held that when a duty is cast on the payer to

deduct and pay the tax at source, on payer's failure to do so interest under section 234B of the Act cannot be imposed on payee assessee. Accordingly, we allow the ground no.7, raised by the assessee.

18. The issue raised in Assessment Year 2011-12 is similar to the issue raised in Assessment Year 2009-10. Our finding in the Assessment Year 2009-10 of this order shall apply *mutatis mutandis* to the issue raised in Assessment Year 2011-12.

19. In the result, both appeals of the assessee are allowed.

Order pronounced in the open court 22nd October, 2020.

Sd/-

(Dr. B.R.R. KUMAR)

लेखा सदस्य/ACCOUNTANT MEMBER

Sd/-

(SUSHMA CHOWLA)

उपाध्यक्ष /VICE PRESIDENT

दिल्ली / दिनांक Dated : 22nd October, 2020.

Shekhar,

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

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

आदेशानुसार/ BY ORDER,

सहायक रजिस्ट्रार, आयकर अपीलीय अधिकरण, दिल्ली
Assistant Registrar, ITAT, Delhi