IN THE INCOME TAX APPELLATE TRIBUNAL

DELHI BENCH "D" NEW DELHI

BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
&
SHRI O.P. KANT, ACCOUNTANT MEMBER

I.T.A. Nos. 8683/DEL/2019
Assessment Year: 2015-16

Fox Network Group Singapore Pte Ltd., C/O Star India Private Limited, Urmi Estate, 95,	v.	ACIT Circle (International Taxation)- 1(3)(1), New Delhi.
TAN/PAN: AACCF5237D		
(Appellant)		(Respondent)

Appellant by:	Shri Porus Kaka, Sr. Adv. & Shri Devesh Chawla, Adv.		
Respondent by:	Shri Satpal Gulati, Sr.D.R.		
Date of hearing:	14	01	2020
Date of pronouncement:	20	03	2020

O R D E R

PER AMIT SHUKLA, JM:

The aforesaid appeal has been filed by the assessee against the final order dated 20.09.2019, passed by ld. ACIT-Circle, International Taxation, 1-(3)(1) u/s. 143(3) r.w.s. 144C (13) for the Assessment Year 2015-16, in pursuance of direction given by the Dispute Resolution Panel-I vide order dated 26.08.2019. In various grounds of appeal, the assessee has raised the following grounds:

"On the facts and in the circumstances of the case and in law, the learned DRP and the learned AO has

Ground number 1

erred in determining the total income of the Appellant at Rs 11,81,68,93,675 instead of Rs 65,77,75,300, as declared by the Appellant in its return of income;

Ground number 2

erred in characterizing the income earned by the Appellant from sub-licensing of 'Designated Rights' pertaining to 'live' transmissions of sporting events amounting to Rs 11,15,91,18,375 as 'Royalty' under the Act as well as under the India-Singapore Tax Treaty;

Ground number 3

the learned AO erred in holding that receipts from sub-licensing of 'Designated Rights' pertaining to 'live' transmissions of sporting event involves transfer of rights in respect of a 'Process' as per Explanation 6 to Section 9(l)(vi) of the Act as well as under Article 12 of India-Singapore Tax Treaty;

Ground number 4

the learned AO erred in holding that a unilateral amendment of the term 'process' under the Act would get imported into the definition of 'royalty ' given under Article 12 of India-Singapore tax treaty;

Ground number 5

the learned AO erred in holding that 'Designated Rights' sub-licensed by the Appellant is a 'bouquet of rights' and does not comprise of 'broadcasting rights' alone without appreciating the fact that the 'Designated Rights' sub-licensed by the Appellant under the Master Right Agreement ('MRA') are, in substance, the 'broadcasting rights' in relation to 'Live' sporting events and 'broadcasting' and 'other rights' in relation to 'non-live' sporting events;

Ground Number 6

erred in holding that the agreements entered into between the appellant and the International Sporting Bodies does not provide for bifurcation of license fees into fees for 'live transmission' and 'non-live

transmission'

Ground number 7

Finding of the learned AO/ DRP that the bifurcation of license fees into fees for 'live transmission' and 'non-live transmission is not provided in the agreements entered into between the appellant and the International Sporting Bodies is not justified, erroneous, perverse and contrary to the records

Ground number 8

erred in not following the ratio laid down by the decision of jurisdictional High Court in the case of CIT vs. Delhi Race Club (1940) Ltd. [2014] 51 taxmann.com 550 (Delhi)

Ground number 9

erred in levying interest under section 234B of the Act Ground number 10

erred in initiating penalty proceedings under Section 271(1)(c) of the Act without appreciating the fact that the Appellant has not concealed any income nor furnished any inaccurate particulars of its income;"

2. The facts in brief are that, assessee, Fox Networks Group Singapore Pte. Ltd., is a company incorporated under the laws of Singapore and is a tax resident of Singapore. The assessee company entered into a tripartite agreement (Novation Agreement) dated 31.12.2014 with ESS Singapore (ESS) and Star India Pvt. Ltd. (SIPL) by way of various existing agreements which included agreement for distribution of channels, advertisement sales, various license agreements, etc. between SIPL and ESS, which were novated to the assessee w.e.f. 1.1.2015, i.e., during the date of agreement. In the return of income for the Assessment Year 2015-16, the

assessee had offered an income of Rs. 66,77,75,300/- to tax in India which consisted of following incomes.

i. Royalty income from sub-licensing of broadcasting Non-live' rights amounting to Rs. 65,44,67,199 as per the Master Rights Agreement ('MRA') dated 31 October 2013 (forming part of novated agreements);

ii. Fees for technical services amounting to Rs. 3,92,269 as per Transitional Services Agreement ('TSA') dated 21 November 2013 (forming part of novated agreements); and

iii. Fees for technical services amounting to Rs. 29,15,832 as per the Master Production & Content Delivery Agreement effective from 01 February 2015).

3. During the course of assessment proceedings, the assessee was asked to provide complete details of receipt from sub-licensing of broadcasting right to SIPL under the Master Rights Agreement (MRA). From the details provided by the assessee, the Assessing Officer observed that assessee had received license fee during the year at Rs.11,81,35,85,574/- from SIPL under the MRA. The Assessing Officer inquired the assessee as to why out of total license fee, only Rs. 65,44,67,199/- has been offered to tax as 'royalty'. In response, the assessee submitted that it has received gross consideration amounting to Rs.1181.63 crore on account of sub-licensing of sports broadcasting rights in relation to **'Live'** as well as **'Non Live'** Feeds from SIPL for the period between 1st January, 2015 to 31st March, 2015. It was further

submitted that, only income arising from sub-licensing of 'Non Live' feeds is taxable as 'royalty' under the provisions of the Act as well as under Article 12 of the India-Singapore DTAA. With respect to the remaining amount of Rs.1115.91 crore, it was in relation to 'Live' feeds for which the assessee's explanation was that the consideration received on account of 'Live' feeds is not liable for tax in India, because it neither fall within the ambit of 'royalty' as defined under the Act nor under the treaty. The assessee also referred to the definition of Copyright as given in *Section 13 of the Copyright Act* and also referred certain commentaries to rely upon the definition of live events, that the 'Live' feed of the events cannot be regarded as literary, musical, dramatic, musical or artistic work. Under the copyright, the requirement is that there should be a sound recording and images must be reduced to some tangible form, whereupon the work would enjoy copyright protection. It was clarified that the right granted by the assessee to SIPL involves mere transmission of live feed through satellite and in fact neither there is a recording by way of cinematographic film nor by sound recording is involved, therefore, there is no existence of any 'work' in which copyright is said to subsist under the Copyright Act. Whence, there is no copyright in the live feed then there is no question of transfer of any copyright by the assessee to SIPL and therefore, the definition of royalty does not attract on the grants of 'Live' rights. Further, it was submitted that even in the India-Singapore DTAA the definition of royalty under the

Act will not be applicable on 'Live' rights. Thereafter, the assessee placed very strong reliance upon the judgment of Hon'ble Jurisdictional High Court in the case of **CIT vs. Delhi Race Club (1940) Ltd. as reported in (2015) 228 taxman.com 185**, wherein the Hon'ble Delhi High Court have categorically held that the payment made for 'Live' telecast of horse races is not 'royalty' as per *Explanation 2 to Section 9(1)(vi)* and hence no TDS is required to be deducted u/s. 194J of the Act. The Hon'ble Court held that there is a distinction between the copyright and the broadcasting right and the broadcasting of live coverage does not have a copyright. Apart from that, reliance was also placed on the decision of Hon'ble ITAT Mumbai Bench decision in the case of **Neo Sports Broadcast Pvt. Ltd. as reported in 133 ITD 468,** wherein grant on license of live broadcast for the cricket match was held that there is no copyright in the live event. The Assessing Officer has summarized the assessee's submission in the following manner:

> *"1. Live transmission rights do not get covered in the definition of royalty given in section 9(1)(vi) of the Income Tax Act;*
>
> *2. Live transmission rights are also not covered under the scope of copyright as provided in the Copyright Act. 1957:*
>
> *3. Live transmission rights are not covered under the definition of royalty as per the India Singapore DTAA also; and*
>
> *4. There are judicial decisions such as in the case of Delhi Race Club (ITA Nos. 6 & 241 of 2014, Del. HC) and Neo Sports broadcast Pvt. Ltd. 133 ITD 468 (ITAT, Mumbai).*

5. The proposed Direct Tax Code in its definition of royalty had expressly covered 'Live coverage of any event' within the definition of royalty, therefore, it is presumed that the definition in the existing Act excludes live transmission."

4. The Assessing Officer did not agree with the contentions raised by the assessee and observed that, in terms of Master Rights Agreement under which the said license fees have been received, through MRA there are integrated bundle of rights licensed by third party including, several national and international governing bodies for various sporting events. He has quoted the following clauses from the said agreement.

"Pursuant to the contracts executed by ESS with third parties including, without limitation, several national and international governing bodies for various sporting events ("ISBs") such as Cricket Australia, Tennis Australia, English and Wales Cricket Board Limited, Football Association Premier League Limited etc., ESS is entitled to exploit media rights pertaining to various sporting events organized under the auspices of ISBs in the Designated Territory (as such term is defined hereinafter in this Agreement). ESS has offered to make available these rights, more specifically defined as the "Designated Rights", to SIPL only as an integrated bundle by way of novation or sub-license, as set out in this Agreement.

SIPL is primarily engaged in the business of broadcasting of entertainment television channels in India and is desirous of expanding its broadcasting operations by setting up, operating and managing a sports business

and sports channels and including such channels within its bouquet of offerings.

SIPL acknowledges that the integrated bundle represented by the Designated Rights is a key asset which will enable SIPL to set up its sport business including 24x7 sports channels in India and is desirous of acquiring the integrated bundle constituted by the Designated Rights.

Accordingly, both SIPL and ESS are entering into this Agreement to record the terms and conditions on which the Designated Rights will be made available to SIPL by ESS with effect from the Effective Date". (ref. page 2 of MRA)

5. Thus, he held that these rights have been named as 'media rights pertaining to various sporting events', and the inclusions or components of the integrated bundle of rights have been collectively phrased as 'Designated Rights' which has been incorporated in the following manner:

"Designated Rights" shall collectively mean: (a) Sports Media Rights; (b) Cricket & Hockey Media Rights; and (c) the Archive Rights;"

"Sports Media Rights" shall mean the Media Rights with respect to Sporting Events that ESS is entitled to itself; or authorise another party to, use and exploit in the Designated Territory under and pursuant to the relevant Designated Rights Contracts, excluding the Cricket & Hockey Media Rights and the Archive Rights "Cricket & Hockey Media Rights" shall mean the Media Rights with

respect to cricket and hockey that ESS is entitled to itself, or authorise another party to, use and exploit in the Designated Territory under and pursuant to the relevant Designated Rights Contracts;"

"Archive Rights" means ESS' right, pursuant to the relevant Designated Rights Contracts, to exploit in the Designated Territory certain Media Rights with respect to archival content relating to Sporting Events that occurred before the Effective Date and those which will occur on or after the Effective Date"

5.3 The term "Media Rights" used in the definition of "Sports Media Rights" and "Cricket & Hockey Media Rights" is defined as below in the MRA.

"Media Rights" shall mean any or all of the following rights of exploitation with respect to Sporting Events,: Including but not limited to, broadcasting rights (whether terrestrial, cable, satellite, DSL, broadband, Internet, wireless or wireline, or any other technology which may be known now or may come into existence in the future), theatrical and public screening rights, home video rights, exhibition rights, reproduction rights, interactive gaming rights, licensing and sublicensing rights, syndication rights, sponsorship rights, right to sell advertisement time, distribution rights, publishing rights, promotional and merchandising rights, right to attend venues, and other subsidiary, incidental and ancillary rights;" (ref page 4 of MRA)"

6. Assessing Officer thus held that, from these agreements, the rights which are transferred are the entire bouquet of rights, ranging from right of

broadcasting, reproduction, public screening, interactive gaming, sponsorship, promoting and merchandise and others. Thus, these rights by no means are only for broadcasting. He further observed that the MRA indicates that SIPL intends to use the license in the widest possible commercial ambit by using as many embedded rights as it sees would bring it economic benefits. Running a sports business and operation of sports channels open a wide scope of exploitation of the license in many different ways. Therefore, assessee's contention is not correct that the license is solely for broadcasting rights and therefore deserves to be rejected. The assessee was further required to provide copies of all contracts executed with the third parties from whom it has derived the designated right which has been transferred to SIPL vide MRA. Thus, from these contracts, he observed that in none of the contracts a license fee has been bifurcated in the fee of 'live' and 'Non live' transmission.

7. Apart from the aforesaid observation, ld. Assessing Officer also held that Live transmission of sports events is not purely a process of streaming an event from the venue to the television set of the viewer. There is a huge value addition in live transmission also, for instance, there are studios

having hosts speaking vernacular languages, intervening experts and celebrity guests, and playing short bites of replay of important moments in the game/match even as the games continues. There are running commentaries etc. It is a part and partial of live broadcasting and is actually utilization of the bundle of designated rights by SIPL through MRA. He further held that entire license fee is taxable under the Income Tax in terms of *Explanation 2,* because it is covered by the expression 'process' which includes and shall deemed to have always included transmission by satellite (including up-linking, amplification, conversion for down-linking of any signal), cable, optic fibre or by any other similar technology, whether or not such process is secret. He further held that entire license fee is license under the India-Singapore DTAA under Article 12 also. Accordingly, he taxed 10% of the gross receipt as royalty.

8. The Ld. DRP has by and large has endorsed the view taken by the Assessing Officer and in so far as assessee's contention and strong objection that the agreement itself provided that 95% of the payment would be for live events, and therefore, any fee for live events will not constitute royalty, the DRP observed that when assessee had received the fees/money for

live and repeat telecast, is nothing but part of bundle of license given for sports events, therefore, entire right has to be seen as they are arising in a similar manner from similar set of users in India, and therefore, to be taxed in the similar manner, that is, both live and non-live has to be seen in same way. The assessee cannot bifurcate the whole bundle of rights into live or non live transmissions.

9. Before us, ld. Senior Counsel, Mr. Porus Kaka after explaining the entire facts and background of the case submitted that, one very important fact permeating from the records which has to be borne in mind here in this case is that the assessee has not done any transmission *albeit* it is Star India Pvt. Ltd. doing the transmission and broadcasting. Thereafter, he drew our attention to various agreements with various sporting bodies which were filed before the authorities below to point out that the agreement itself acknowledges that the value of the commercial live fee was attributable to 95% to live transmission and 5% to non live transmissions. He submitted in all the agreement there was a clear cut agreement and specific clause that the value of the license fee was attributable to 95% to live transmission and 5% to non-live. The copies of these agreements have been placed before us from pages 33 to 295 of the paper

book. Thus, he submitted that it was erroneous on the part of the Assessing Officer and the Ld. DRP to hold that there was a same kind of bundle of rights and there was no such bifurcation or distinction between fees attributable to live transmission and non live transmission. This is also evident from various submissions placed on record before the Assessing Officer and DRP along with copy of agreement and other evidences. Once, it is an admitted fact that if 95% of the licensing fee was on account of live transmission, then the main issue remain is, whether live transmission constitutes any copyright so as to fall within the ambit and scope of 'royalty' either under the Act or in terms of Article 12 of India-Singapore DTAA. He submitted that this issue now stands squarely covered by the judgment of Hon'ble Jurisdictional High Court in the case of **Delhi Race Club (940) Ltd. (supra)** wherein in the context of *Section 9(1)(vi)* only the Hon'ble Delhi High Court has clearly held that live telecast does not fall in the category of 'royalty', because, it does not have any copyright. He further submitted that it is Star India who pays the Asia Satellite for broadcasting and transmission, and therefore, so far as assessee is concern, there cannot be any applicability of *Explanation 6* of Section 9(1)(vi) where 'process' includes transmission by satellite etc., because the

transmission has not been done by the assessee but by SIPL, therefore, in no manner the payment received by the assessee will fall within the scope of 'royalty' as defined in *Explanation 2* or *Explanation 6*. He further relied upon the decision of ITAT Mumbai Bench in the case of **New Sports Broadcast Pvt. Ltd. (supra)** and **Nimbus Communication Ltd., 32 Taxman.com 53** wherein on exactly similar issue matter has been decided in favour of the assessee.

10. On the other hand, ld. CIT-DR strongly relied upon the direction and observation of the DRP and the order of the Assessing Officer. Apart from that after referring to Section 13 and Section 14 of the Copyright Act, he submitted that as per this definition in case of cinematograph film, right to communicate to the public, constitutes a copyright if the appellant receives any consideration for exploiting this right, i.e., for communicating the cinematograph film to the public, the same shall be the use of the copyright and the consideration received for this shall be taxed as 'royalty' as per the Income Tax Act as defined in Section 9(l)(vi), Explanation 2 (v) and Article 12(3) of the DTAA.

11. He further referred to definition of "Cinematograph film" as been defined in section 2(f) of the Copyright Act, which reads as under:

"2(f) "cinematograph film" means any work of visual recording on any medium produced through a process from which a moving image may be produced by any means and includes a sound recording accompanying such visual recording and "cinematograph" shall be construed as including any work produced by any process analogous to cinematography including video films;"

11. He submitted that, the term "Communication to the public" has been defined in section 2(ff) of the Copyright Act as under;

"2(ff) "communication to the public" means making any work available for being seen or heard or otherwise enjoyed by the public directly or by any means of display or diffusion other that by issuing copies of such work regardless of whether any member of the public actually sees, hears or otherwise enjoys the work so made available.

Explanation.- For the purposes of this clause, communication through satellite or cable or any other means of simultaneous communication to more than one household or place of residence including residential rooms of any hotel or hostel shall be deemed to be coma UniCati017 to the public;".

Another term used for "communicate to the public" used in the Copyright Act is "broadcast" which is defined in section 2 (dd) as under:

"2(dd) "broadcast" means communication to the public by any means of wireless diffusion, whether in any one or

more of the forms of signs, sounds or visual images, or by wire, and includes a re-broadcast."

12. In the context of above definition of cinematograph film, he submitted that, it can be seen that all the events broadcasted / telecasted by the appellant whether telecasted live or in the form of repeat telecast are in the nature of cinematograph film. None of the live events can be telecast without first recording them on a medium with the help of a camera. As per the definition of cinematograph film (supra) 'any work of visual recording on any medium produced through a process from which moving image may be produced' constitutes a cinematograph film. As defined in Section of 13(l)(b), a copyright does subsist in a cinematograph film.

13. The appellant's contention that it does not have any copyright in the telecast content and that the copyright is that of the event manager/owner, is without any merit. Right "to communicate the film to the public" in the case of a "cinematographic film" itself is a copyright as already brought out above from definition of these terms as per the Indian Copyright Act. Section 13(4) of the Copyright specifically takes care of such a situation where it is stated that the copyright in cinematograph film shall not affect the separate copyright in any work in respect which or in respect of a substantial part of which, the film is

made. This can be best understood with the example of a cinematograph film which has its own copyright even though the constituent works like music, story, script etc have their own copyrights. Similarly in the appellant's case, in the case of a live telecast, the broadcast by the appellant consists of not only the feed obtained from the event manager but also the replays of views taken from different angles, comments of the experts hired by the appellant, advertisements inserted in the telecast at regular intervals, editing etc. This value addition constitutes 'work' as per Copyright Act. Thus, final product (work) gets ready for telecast and it is in the nature of a cinematograph film which is composed of several components each of which enjoys copyright but final product which is telecasted by the appellant has its own copyright. Thus the appellant's broadcast of all live events or repeat telecasts is a "cinematograph film" in which it has a copyright. Communication to the public of the cinematograph film through appellant and cable operators means use of the copyright. It is only because the appellant grants rights and then the ultimate viewers in India get to view the appellant's telecast. The consideration paid by viewers for viewing the content of the telecast to the cable operators and ultimately to the appellant is nothing but consideration received by the appellant

for allowing the use of it right to communicate to the public. It may be mentioned here that sub-clause (v) of *Explanation 2* to section 9(l)(vi) of the Act specifically excludes consideration for the sale, distribution or exhibition of cinematograph film from the purview of royalty income. However, any literally artistic or scientific work including films or video tapes for use in connection with television is specifically included in the definition of royalty. As already held above, the broadcast by the appellant is in the nature of cinematograph film for use in connection with television, Therefore, the consideration received by the appellant for communicating to the public, a 'film for use in connection with television' and in terms of the DTAA, the consideration received by the appellant for communicating to the public, 'cinematograph film for television broadcasting' is in the nature of royalty and has been rightly assessed by the AO as royalty income. It may be added that during seamless /uninterrupted production and broadcasting of the complete match, a new work is created within a split of few macro seconds and the existing for keeps on merging with the new work being created. The activity which leads generation of revenue is the complete work being taken into consideration and therefore it would be incorrect to state that the payments received

by assessee is only for the live work and not for any work being in existence. Also, the production work being undertaken by the assessee is specialized in nature and the final signals being delivered by the assessee tantamount to use of process by its broadcasters. It is important to note that the capture and transmission of such events might constitute infringement of intellectual property rights in various constituent elements of the event, such as the marks and logos of the team, stadium and leagues or federations (protected by trademark and possibly copyright law); team uniforms (protected by copyright law, with trademark law protection over certain elements); rights of publicity (protected via state statutory and common law); and background music (protected by copyright law).

14. We have heard the rival submissions, perused the relevant findings given in the impugned orders as well as material referred to before us. The assessee-company had received gross consideration amounting to Rs.1181.36 under MRA on account of sub-licensing of sport broadcast right of 'live' and 'non-live' feed to SIPL. It is not in dispute that income arising from sub-licensing of 'non-live' feed has been offered to tax in India as 'royalty'; and it is only with regard to the consideration received in relation to 'live' feeds, the

assessee's contention is that it does not constitute 'royalty' either under the Income Tax Act or under the India-Singapore Treaty. The entire case of the Revenue hinges upon the reason that, the agreement consists of integrated bundle of rights licensed by the third parties like various international governing bodies for various sports events and there cannot be any distinction between the live transmission rights and non live transmission rights and there is no distinction as such in the agreement as part of designated right.

15. We have perused the various agreements placed in the paper book with various sporting and governing bodies of sports and in all the agreements, there are specific clause under the head '*Consideration'* that the *parties hereby acknowledged and agree that value commercial right fee is attributable 95% to live transmissions and 5% to non live transmissions*. This specific clause is permeating in all the agreements between the parties that, 95% of the license fee/commercial right fee is via live transmission and only 5% is for non live transmission. Thus, if the parties to the agreement have clearly stated and agreed that there are two streams of fees, one from live transmission and other from non-live and even payments have been made separately under these

distinctive heads, then to hold that both constitutes one and the same thing will not be correct specifically when the core issue involved in this appeal is, whether the fees from live transmission constitute copyright so as to fall within the ambit of 'royalty' or and whether it is taxable.

16. First of all, we have to examine, whether the payment received for the grant of live broadcast rights are taxable in India, i.e., whether it falls under the definition of 'royalty' in terms of Section 9(1)(vi) and also as per Article 12 of India-Singapore Treaty. **Explanation 2** to Section 9(1)(vi) defines the royalty in the following manner:

> ***Explanation 2.—For the purposes of this clause, "royalty" means consideration (including any lump sum consideration but excluding any consideration which would be the income of the recipient chargeable under the head "Capital gains") for—***
>
> ***(i) 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 ;***
>
> ***(ii) the imparting of any information concerning the working of, or the use of, a patent, invention, model, design, secret formula or process or trade mark or similar property ;***
>
> ***(iii) the use of any patent, invention, model, design, secret formula or process or trade mark or similar property ;***
>
> ***(iv) the imparting of any information concerning technical, industrial, commercial or scientific knowledge, experience or skill ;***

(iva) the use or right to use any industrial, commercial or scientific equipment but not including the amounts referred to in section 44BB;

(v) the transfer of all or any rights (including the granting of a licence) in respect of any copyright, literary, artistic or scientific work including films or video tapes for use in connection with television or tapes for use in connection with radio broadcasting, but not including consideration for the sale, distribution or exhibition of cinematographic films ; or

(vi) the rendering of any services in connection with the activities referred to in sub-clauses (i) to (iv), (iva) and (v).

17. Since, the Ld. DRP has observed that assessee's case is also covered by *Explanation 6* as the receipt are for the transfer of all or any rights given to SIPL by the assessee and also the phrase ***'process'*** is defined in Explanation 6, which reads as under:

> *"Explanation 6.—For the removal of doubts, it is hereby clarified that the expression "process" includes and shall be deemed to have always included transmission by satellite (including up-linking, amplification, conversion for down-linking of any signal), cable, optic fibre or by any other similar technology, whether or not such process is secret;]*

18. Any payment falling within the scope of 'royalty', there has to be some kind of transfer of right as defined in *Explanation 2*. It is not a case where any patent, invention, model, design, secret formula or

process or trade mark or similar property or imparting of any information or use of any patent invention etc. as defined in clauses *(i) to (iva)* has been transferred. Here we have to examine, whether it is a transfer of a right in respect of any copyright, literary, artistic or scientific work including films or video tapes for use in connection with television or tapes for use in connection with radio broadcasting, etc, as defined in clause (v). Since these terms have not been defined in the Income Tax Act, therefore, reference has to be made to '**Indian Copyright Act, 1957'**. Section 14 of Copyright Act defines copyright as the exclusive right to do or authorize a doing of specified Acts; and Section 13 provides that copyright shall subsist in work. Relevant portions of Sections 13 and 14 of the Copyright Act are reproduced herein below.

13. *Works in which copyright subsists.—*

(1) Subject to the provisions of this section and the other provisions of this Act, copyright shall subsist throughout India in the following classes of works, that is to say,—

(a) original literary, dramatic, musical and artistic works;

(b) cinematograph films; and

(c) sound recording.

(2) Copyright shall not subsist in any work specified in sub-section (1), other than a work to which the provisions of section 40 or section 41 apply, unless,—

(i) in the case of a published work, the work is first published in India, or where the work is first published outside India, the author is at the date of such publication, or in a case where the author was dead at that date, was at the time of his death, a citizen of India;

(ii) in the case of an unpublished work other than a work of architecture, the author is at the date of the making of the work a citizen of India or domiciled in India; and

(iii) in the case of work of architecture, the work is located in India.

Explanation — In the case of a work of joint authorship, the conditions conferring copyright specified in this sub-section shall be satisfied by all the authors of the work.

(3) Copyright shall not subsist—

(a) in any cinematograph film if a substantial part of the film is an infringement of the copyright in any other work;

(b) in any sound recording made in respect of a literary, dramatic or musical work, if in making the sound recording, copyright in such work has been infringed.

(4) The copyright in a cinematograph film or a sound recording shall not affect the separate copyright in any work in respect of which or a substantial part of which, the film, or, as the case may be, the sound recording is made.

(5) In the case of work of architecture, copyright shall subsist only in the artistic character and design and shall not extend to processes or methods of construction.

14. Meaning of Copyright.— *For the purposes of this Act, "copyright" means the exclusive right subject to the provisions of this Act, to do or authorise the doing of any of the following acts in respect of a work or any substantial part thereof, namely:—*

(a) in the case of a literary, dramatic or musical work, not being a computer programme,—

(i) to reproduce the work in any material form including the storing of it in any medium by electronic means;

(ii) to issue copies of the work to the public not being copies already in circulation;

(iii) to perform the work in public, or communicate it to the public;

(iv) to make any cinematograph film or sound recording in respect of the work;

(v) to make any translation of the work;

(vi) to make any adaptation of the work;

(vii) to do, in relation to a translation or an adaptation of the work, any of the acts specified in relation to the work in sub-clauses (i) to (vi);

(b) in the case of a computer programme,—

(i) to do any of the acts specified in clause (a);

(ii) to sell or give on commercial rental or offer for sale or for commercial rental any copy of the computer programme:

Provided that such commercial rental does not apply in respect of computer programmes where the programme itself is not the essential object of the rental.

(c) in the case of an artistic work,—

(i) to reproduce the work in any material form including—

(A) the storing of it in any medium by electronic or other means; or

(B) depiction in three-dimensions of a two-dimensional work; or

(C) depiction in two-dimensions of a three-dimensional work;

(ii) to communicate the work to the public;

(iii) to issue copies of the work to the public not being copies already in circulation;

(iv) to include the work in any cinematograph film;

(v) to make any adaptation of the work;

(vi) to do in relation to adaptation of the work any of the acts specified in relation to the work in sub-clauses (i) to (iv);

(d) in the case of a cinematograph film,—

(i) to make a copy of the film, including—

(A) a photograph of any image forming part thereof; or

(B) storing of it in any medium by electronic or other means;

(ii) to sell or give on commercial rental or offer for sale or for such rental, any copy of the film;

(iii) to communicate the film to the public;

(e) in the case of a sound recording,—

(i) to make any other sound recording embodying it including storing of it in any medium by electronic or other means;

(ii) to sell or give on commercial rental or offer for sale or for such rental, any copy of the sound recording;

(iii) to communicate the sound recording to the public.

The terms **'work'** has been defined in Section 2(y) of the Copyright Act to mean;

- a literary dramatic, musical or artistic work;
- a cinematograph film;
- or a sound recording.

19. Now, whether the live feed of event can be regarded as 'work' as defined above, because live feed or transmission to get cover under the terms cinematograph films or sound recording, presupposes some kind of recording, i.e., the images must be reduced to some tangible form whereupon the work would enjoy copyright protection. Here, in this case, the right has been granted by the assessee to SIPL which is mere a transfer of live feed through satellite, the entire transmission otherwise is done by SIPL. There is neither a recording by way of cinematography nor by way of sound recording is involved in live broadcast. Further, there is no artistic work which is being created when the events are captured on cameras for the live transmission, because the right granted by the assessee is only to broadcast the event. Further, no film or tape/CDs/ or any right therein has been given by the assessee to SIPL for live broadcast or events. The nature of right acquired is purely in respect of live feeds (in so far as 95% of the consideration of the receipt is concerned). Further,

live feed is ephemeral in nature that it does not have any lasting time as it is not a film which can constitute a 'work' in which a copyright can be given. A live feed cannot constitute a 'work' in which copyright can subsist. There cannot be copyright on broadcast covering live events of sports. Here the 95% fee is for live transmission which is ephemeral and not for any recording of any event, visual or sound. Live broadcasting of sporting events does not emanate from any pre-recording of images or sound, so there cannot be any 'work' which comes into existence in a live feed or event and hence no right to use can be transferred. Recording for re-telecast or replays is not part of this live transmission fees nor any such event of commentary, etc., as assessee has not granted any such licence to conduct such activity, atleast nothing is borne out that live transmission fees consist of such activity also. So such an argument of the revenue cannot be accepted.

20. This precise issue had come up for consideration before the Hon'ble Jurisdictional High Court in the case of **CIT vs. Delhi Race Club (supra)** that, whether any payment for broadcast or live coverage will constitute copyright, and therefore, is taxable under the ambit of royalty in terms of *Explanation 2 to Section 9(1)(vi).* The fact of that case was that

assessee had made payment to other clubs/centers on account of live telecast of horse racing. The Assessing Officer has made the disallowance u/s. 40(a)(ia) on account of royalty paid to other centers for live telecast. According to him, the same was covered under Section 194J. The contention of the Revenue before the Hon'ble High Court was:

(i) Clause (v) to Explanation 2 to clause (vi) of sub-section (1) of section 9 is not restricted to Copyright and the use of the words 'literary' and artistic' under clause (v) of Explanation 2 could not have been used for excluding 'copyrights' in areas of drama, music, etc.

(ii) Further, the live telecast of an event is outcome of 'scientific work' which makes telecast of event possible at a distant place over television and the transaction in the instant case covered.

(iii) The 'rights of broadcasting' was akin to 'copyright'.

The substantial question of law involved before the Hon'ble High Court was; *"Whether payment for live telecast of horse race is a payment for transfer of any 'copyright' and as such 'royalty' or in the alternative whether the live telecast of the horse race would be termed as a 'scientific work' and payment thereof would be 'royalty'?*

21. After considering the definition of 'Royalty' as

given in Section 9(1)(vi) and relying upon various sections of Copyright Act, Their Lordships held that:-.

- *It is not in dispute that the payment has been made by the respondent assessee to other clubs/centres on account of live telecast of races. The payment of 'royalty' is covered under section 194J which was inserted with effect from 13-7-2006. The said section, contemplates that in the eventuality a payment is made towards 'royalty', an amount equal to 10 per cent of such sum needs to be deducted as income- tax on income comprised therein.* Explanation *(ba) to the section stipulates 'royalty' shall have the same meaning as in* Explanation *2 to clause (vi) of sub-section (1) of section 9. [Para 7]*

- *A perusal of clause (v) would reveal that consideration for transfer of all or any rights in respect of any 'copyright' and the word 'copyright' is followed by the words 'literary', 'artistic' or 'scientific work'. It also exists in other works like dramatic, musical etc. It is not in dispute that 'copyright' exists in literary and artistic work. It also exists in other works like dramatic, musical etc. If the intention of the legislature was to include other works like dramatic, musical etc. the legislature would have said so or would , not have qualified the word 'copyright' with the words 'literary' and 'artistic' as the word 'copyright' encompasses in itself all the categories of work. Having not done, it is a case of 'Expressio Unis'. (The mention of one thing is the exclusion of the other). It was also noted that the word 'copyright' does not synchronize with the word 'literary', 'artistic' as they are the works in which 'copyright' exists. The provision if read as suggested by the revenue to that extent would be meaningless.*

Thus, the provision would be more meaningful if the word 'in' is read by implication in - between the words-'copyright' and 'literary'.[Para 8]

- *There is limitation on the Court in adding and rejecting a word in the provision and the statute. Presumption is there that the legislature inserted every part of the statute for a purpose with an intention that every part thereof should have effect. At the same time, it is also a settled law that a construction which attracts redundancy, will not be accepted except for compelling reasons. Where alternative lies between either supplying by implication, words which appear to have been accidentally omitted or adopting a construction depriving certain existing words of all meaning, it is permissible to supply the words. It is also settled position of law that a purposive construction may also enable reading of words by implication when there is doubt about the meaning and ambiguity persists. In such circumstances, the purpose which the Parliament intended to achieve should be examined. [Para 9]*

- *Accordingly in provision (v) the words 'in respect of any copyright in literary, artistic or scientific work' were read to,* inter alia, *hold that 'royalty' is payable only on 'transfer of all or any rights (including granting of licence) in respect of any copyright in literary, artistic or scientific work including films or video tapes for use in connection with television or tapes were used in connection with radio broadcasting but not including consideration for the sale, distribution or exhibition of cinematographic films'. [Para 14]*

- *Now the question which arises is whether live telecast of horse*

race is a work to have a 'copyright'. [Para 15]

- *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). That apart it was noted 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. [Para 16]*

- *Adverting to the facts of the instant case, it was noted that the assessee was engaged in the business of : inducting horse races and derived income from betting, commission, entry fee etc. and had made payment to other centres whose races were displayed in Delhi. It is not known whether such races had my commentary or analysis of the event simultaneously. It is not the case of the revenue that the live broadcast recorded for rebroadcast purposes. Having held that the broadcast/live telecast is not a work within the definition of 2(y) of the Copyright Act and also that broadcast/ live telecast doesn't fall within the ambit of section 13 of the Copyright Act, it would suffice to state that a live telecast/broadcast would have no 'copyright'. This issue is well settled in view of the position of law as laid down by this Court in case of ESPN Star Sports v. Global Broadcast News Ltd. 2008 (38) PTC -"7, wherein this*

Court after analysing the provisions of the Copyright Act was of the view that legislature itself by terming broadcast rights as those akin to 'copyright' clearly brought out the distinction between two rights in Copyright Act, 1957. According to the Court, it was a clear manifestation of legislative intent to treat copyright and broadcasting reproduction rights as distinct and separate rights. It also held that the amendment of the Act in 1994 not only extended such rights to all broadcasting organizations but also clearly crystallized the nature of such rights. The Court did not accept the contention of the respondent that the two rights are not mutually exclusive by holding that the two rights though akin are nevertheless separate and distinct. [Para 17]

- *In view of the aforesaid position of law which brought out a distinction between a copyright and broadcast right, suffice would it be to state that the broadcast or the live coverage does not have a 'copyright.' Thus, in view of the conclusion of this Court in ESPN Star Sports case (supra), the submission of the revenue that the word 'Copyright' would encompass all categories of work including musical, dramatic, etc. and also his submission that the Copyright Act acknowledges the broadcast right as a right similar to 'copyright' needs to be rejected.[Para 18]*
- *Insofar as the submission of revenue that the live telecast of an event is the outcome of 'scientific work' and payment thereof would be covered under the definition of 'royalty' is concerned, the said submission is also liable to be rejected first it runs contrary to his earlier submission and also for the simple reason the clause (v) to Explanation 2 to clause (vi) or sub-section (1) of*

section 9 would relate to work which includes films or video tapes for use in connection with television or tapes for use in connection with radio broadcasting. It is to be seen whether consideration for transfer of all or any rights of 'scientific work' including films or video tapes would include a live telecast. The clause is an inclusive provision for films or video tapes for use in connection with television or tapes for use in connection with radio broadcasting. It was noted that such a case was not set up by the revenue before the authorities below. It was held by the Assessing Officer that when any person pays any amount for getting rights/licence to telecast any event (which is a copyright of particular person i.e. no one can copy it for direct telecast or deferred telecast) then amount so paid is to be treated as 'royalty' and very much covered under section 9(l)(vi). In other words, the ground of the revenue was limited to the aspect of copyright. That apart we find, no such ground has been taken by the revenue even in this appeal. The 'scientific work' has not been defined in the Act nor in the Copyright Act. It is not necessary that because the live telecast of an event is being done at a distant place, the same would be a 'scientific work'. Even otherwise, even by stretching this meaning, it is difficult to include a live broadcast within 'scientific work'. Clause (v) expressly uses the words 'including films or video tapes for use in connection with television or tapes for use in connection with radio broadcasting'. These words become relevant to understand the scope of this part of the provision. Suffice to state, when reference is made to films or video tapes, then the intent of the provision is related to work of visual recording on any medium or video tape and can be seen on the television. Surely such a work

does not include a live telecast. This submission is also need to be rejected. Insofar as the submission of revenue that analysis, commentary and use of technology to live feed make the broadcast a subject matter of distant copyright is concerned, again neither such a case was set up before the authorities, nor in this appeal. In fact it is not known nor pleaded that the live telecast, in this case, was accompanied by commentary, analysis etc. It is an issue of fact, which cannot be gone into or raised at this stage.[Para 19]

22. The aforesaid principle and sequitur of the judgment of the Hon'ble Jurisdictional High Court clearly clinches the issue in favour of the assessee, wherein it has been categorically held that there is a clear distinction between a copyright and a broadcasting right, broadcast or live coverage which does not have a copyright, and therefore, payment for live telecast is neither payment for transfer of any copyright nor any scientific work so as to fall under the ambit of royalty under *Explanation 2* to Section 9(1)(vi).

23. In so far as reference of phrase *'process'* in *Explanation 6,* the same will not be applicable in the case of the assessee, because admittedly it is SIPL which is doing the transmission and makes the payment to Asia Satellite and it is not a case of transfer of process.

24. Further, on similar set of issues on live broadcast of sporting and cricket events, ITAT Mumbai Bench in the case of **Neo Sports Broadcast Pvt. Ltd. (supra)** and **Nimbus Communication Ltd. (supra)** have held that there is no copyright on live events, and therefore, it is not taxable as 'royalty'. Thus, we hold that the fee received towards live transmission cannot be taxed as 'royalty' in terms of Section 9(1)(vi) as held by the Hon'ble Jurisdictional High Court and also by the Co-ordinate Bench of ITAT. Accordingly, we decide this issue in favour of the assessee.

26. In view of our aforesaid decision, the other grounds are treated as general in nature. Accordingly, the appeal of the Assessee is allowed.

27. In the result, the appeal of the Assessee is allowed.

Order pronounced in the open Court on 20/03/2020.

Sd/-	Sd/-
[O.P. KANT] ACCOUNTANT MEMBER	[AMIT SHUKLA] JUDICIAL MEMBER

DATED: 20th March, 2020
Pkk