IN THE INCOME TAX APPELLATE TRIBUNAL,
DELHI BENCH: 'D' NEW DELHI

BEFORE SHRI G.S. PANNU, HON'BLE PRESIDENT
AND
SHRI SAKTIJIT DEY, JUDICIAL MEMBER

ITA No.3412/Del/2010
Assessment Year: 2003-04
And
ITA No.3413/Del/2010
Assessment Year: 2004-05

ESS Distribution (Mauritius) SNC et Compagnie, 605, St. James Court, St. Denies Street Port Louis, Mauritius	**Vs.**	DDIT, Circle-1(2), International Taxation, New Delhi
PAN :AABFE6800F		
(Appellant)		**(Respondent)**

And
ITA No.4426/Del/2016
Assessment Year: 2009-10
And
ITA No.4543/Del/2016
Assessment Year: 2011-12
And
ITA No.1220/Del/2017
Assessment Year: 2012-13
And
ITA No.6705/Del/2017
Assessment Year: 2012-13
And
ITA No.5084/Del/2018
Assessment Year: 2014-15

ESS Distribution (Mauritius) SNC et Compagnie, 5TH Floor, Ebene Esplanade, 24 Cyber City, Ebene, Mauritius	**Vs.**	ADIT/DCIT/ACIT, Range - 1, International Taxation, New Delhi
PAN :AABFE6800F		
(Appellant)		**(Respondent)**

And
ITA No.3387/Del/2010
Assessment Year: 2003-04
And
ITA No.3388/Del/2010
Assessment Year: 2004-05
And
ITA No.1201/Del/2017
Assessment Year: 2012-13

DCIT, Circle-1(2), International Taxation, New Delhi	**Vs.**	ESS Distribution (Mauritius) SNC et Compagnie, C/o- Price Water House Coopers Pvt. Ltd., Sucheta Bhawan (Gate No. 2, 2^{nd} Floor), Vishnu Digamber Marg, New Delhi
		PAN :AABFE6800F
(Appellant)		**(Respondent)**

And
ITA No.6706/Del/2017
Assessment Year: 2009-10

ACIT, Circle-1(2)(2), International Taxation, New Delhi	**Vs.**	ESS Distribution (Mauritius) SNC et Compagnie, 605, St. James Court, St. Denis Street Port Louis, Mauritius
		PAN :AABFE6800F
(Appellant)		**(Respondent)**

And
ITA No.6578/Del/2016
Assessment Year: 2009-10
And
ITA No.5303/Del/2018
Assessment Year: 2014-15
And
ITA No.6579/Del/2016
Assessment Year: 2011-12

ACIT, Circle-1(2)(2), International Taxation, New Delhi	**Vs.**	ESS Distribution (Mauritius) SNC et Compagnie, 5th Floor, Ebene Esplanade, 24th Cybercity Ebene, Mauritius
		PAN :AABFE6800F
(Appellant)		**(Respondent)**

Assessee by	Sh. Porus Kaka, Sr. Advocate, Sh. Manish Kant, Advocate Sh. Divesh Chawla, Advocate
Department by	Ms. Anupama Anand, CIT(DR) Sh. Sanjay Kumar, Sr. DR

Date of hearing	24.08.2022
Date of pronouncement	21.11.2022

ORDER

PER SAKTIJIT DEY, JM:

Captioned appeals by the assessee and Revenue arise out of separate orders of learned First Appellate Authority pertaining to assessment years 2003-04, 2004-05, 2009-10, 2011-12, 2012-13 and 2014-15. Since, the issues raised in all these appeals are more or less common and overlapping, they have been clubbed together and disposed off in a common order.

ITA No. 3412/Del/2010 (AY: 2003-04)
ITA No. 3413/Del/2010 (AY: 2004-05)
ITA No. 4426/Del/2016 (AY: 2009-10)
ITA No. 4543/Del/2016 (AY: 2011-12)
ITA No. 1220/Del/2017 (AY: 2012-13)
ITA No. 6705/Del/2017 (AY: 2012-13)

ITA No. 5084/Del/2018 (AY: 2014-15)

2. These appeal are by the assessee. Grounds raised by the assessee in these appeals are, more or less, common. The following major issues arise out of the grounds raised by the assessee:-

i. Whether subscription/distribution revenue received by the assessee can be treated as royalty under India – Mauritius Double Taxation Avoidance Agreement (DTAA).

ii. Whether the assessee has a Permanent Establishment (PE) in India under Indian – Mauritius Tax Treaty.

iii. Assuming that there is a PE in India, if the PE is remunerated on arm's length basis, whether further profit can be attributed to the PE.

iv. In case, there is a PE, whether the attribution of income to the PE shall be on the basis of actual profit/loss as per profit and loss account or on estimation basis.

3. Besides these major issues, there are coupe of minor issues, which are assessment year specific and will be dealt with after decision is taken on the major issues.

4. As regards the first issue, whether subscription/distribution revenue received by the assessee is in the nature of royalty under India – Mauritius DTAA, briefly the facts are, the assessee is a non-resident partnership firm established under the laws of Mauritius and a Tax Resident of Mauritius. As accepted by the Assessing Officer, the assessee is engaged in the business of distribution of sports and sports related television program broadcast by ESPN Star Sports, Singapore and of programming service(s) via non-standard television. The assessee has appointed ESPN Software India (P) Ltd. (in short 'ESPN India'), a wholly owned subsidiary of ESPN Mauritius Ltd., as a distributor for distribution of "Star Sports" and "ESPN" channels through the network of Indian cable operators. As per the terms of agreement, ESPN India has to share 60% of the gross revenue to the assessee as consideration for right to distribute the sports channels in the service area. As per the agreement, gross revenue shall mean the amount due to the distributor from distributing the ESPN Service in the Area as reduced by any taxes that are withheld in the Area. Before the Assessing Officer, the assessee pleaded that the transaction between the assessee and ESPN India is on a principal to principal basis without any agency relationship. It

was submitted by the assessee that ESPN India bears the costs and expenses in connection with the distribution activities. Whereas, the assessee does not have any privity of contract or any other type of relationship with cable operators through whom ESPN India distributes Star Sports and ESPN Channels. The Assessing Officer, however, was not convinced with the submissions of the assessee. After analyzing the contract between the assessee and ESPN Star Sports, Singapore, which is the owner of sports channels Star Sports and ESPN, the Assessing Officer observed that the assessee bears commercial risk as it has to pay certain minimum guaranteed amount to ESPN Star Sports, Singapore. The same risk continues with the assessee, even, in relation to the agreement between the assessee and ESPN India. Referring to certain specific clauses in the agreement, the Assessing Officer observed that ESPN India works only for the assessee. The revenue earned by ESPN India arises only by virtue of cable subscription, which it does for the assessee. He observed, the commission earned from soliciting advertisement comes entirely from another Associated Enterprises (AE), M/s. ESPN Star Sports, Mauritius. Thus, he observed, the cable subscription business of ESPN India being entirely dependent upon the assessee, it would simply collapse if the assessee would withdraw its patronage. Thus, he observed, due to such dependency of ESPN India on assessee, it cannot be said to be an agent of independent status under Article 5(5) of the India – Mauritius Tax Treaty. Further, he observed, since ESPN India is a 100% subsidiary of ESPN Mauritius Ltd., which in turn has a controlling stake in the assessee, it cannot be said that ESPN India is enjoying any degree of autonomy in its decision making process. Thus, ultimately, the Assessing Officer held that ESPN India constitutes a dependent agent PE in India. While coming to such conclusion in assessment year 2003-04, the Assessing Officer held that the subscription/distribution revenue earned by the assessee from ESPN India is in the nature of business income and, since, the assessee had a PE in India, through which it has earned the distribution revenue, it is attributable to the PE. Accordingly, after reducing certain expenses, he added income of Rs.4,00,77,345/-. Whereas, in other assessment years under appeal, the Assessing Officer completely changed his stand with regard to the nature of income by treating the subscription/distribution revenue as royalty. Of course, he stuck to his earlier stand that ESPN India constitutes dependent agent PE of the assessee.

5. Against the decision of the Assessing Officer in all these assessment years, the assessee preferred appeals before learned Commissioner (Appeals). While deciding the appeals, learned Commissioner (Appeals) referred to the definition of royalty in Explanation 2(v) of section 9(1)(vi) of the Act and observed that if the assessee transfers all or any rights in respect of any copyright, literary, artistic or scientific work, including, films or video tapes for use in connection with television or radio broadcasting, the consideration received for such transfer shall be taxed as royalty. Further, referring to Article 12(3) of India – Mauritius Tax Treaty, he observed that consideration received for the use of or the right to use, any copyright of literary, artistic or scientific work, including, cinematograph films, and films or tapes for radio or television broadcasting has to be considered as royalty. Further, referring to section 13 of Copyrights Act, 1957 he observed that copyright subsists in respect of cinematograph films. Proceeding further and extensively referring to the provisions contained under the Copyrights Act, he observed that as per section 14(d)(iii), in case of cinematograph films, copyright

also includes communicating the film to the public. Referring to the definition of cinematograph film under section 2(f) of the Copyright Act, he observed that it includes 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. Referring to section 2(ff) of the Copyright Act, he observed, “communication to 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 than 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. Further, referring to Explanation to section 2(ff) of the Copyright Act, he observed that 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 communication to the public. Referring to section 2(dd) of the Act, he observed that communication to the public also includes broadcast 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. Thus, extensively referring to the various provisions of the Copyrights Act, learned Commissioner (Appeals) held that events broadcasted/telecasted by the assessee, whether live or in the form of repeat telecast, are in the nature of cinematograph film. He observed, none of the live events can be telecast without first recording them on a medium with the help of camera. Therefore, he held that assessee's claim 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. He observed, right to communicate to the public in the case of a cinematographic film, itself, is a copyright as per the definition of copyright under the Copyright Act. He observed, only because the assessee grants rights to ESPN India, cable operators and then the ultimate viewers in India get to view assessee's telecast. In the same process, the consideration paid by viewers for viewing the content of the telecast to the cable operators, then to ESPN India and ultimately to the appellant is nothing but consideration received by the assessee for allowing the use of right to communicate to the public. Thus, in the aforesaid premises, learned Commissioner (Appeals) ultimately concluded that the distribution revenue received by the assessee is in the nature of royalty under Article 12(3) of the Tax Treaty and since the assessee has a PE in India, the amount is taxable on net basis as per Article 7 of the Treaty.

6. Having held so, he proceeded to examine the issue, whether ESPN India constitutes dependent upon agent PE of the assessee in India. Ultimately, rejecting assessee's claim that the transaction with ESPN India is on principal to principal basis and the alternative contention that ESPN India is an agent of independent status, learned Commissioner (Appeals) concluded that since, the assessee exercises control over ESPN India, it will constitute a dependent upon agent PE of the assessee. Further, he held that ESPN India can also be considered to be fixed place PE of the assessee in terms of Article 5(2)(a) of the Tax Treaty. Having held so, he modified the attribution of royalty income to PE made on estimate basis by holding that the entire royalty income is attributable to the PE. However, it will be chargeable to tax on net basis.

7. Before us, learned counsel appearing for the assessee drew our attention to the agreement between the assessee and ESPN

India and submitted that the terms of the agreement make it clear that the appointment of ESPN India is limited to the extent of making ESPN services available in the specified area through sub-distributors in accordance with terms and conditions of the agreement. He submitted, as per the condition of the agreement, on termination of the agreement all arrangements with sub-distributor would automatically be assigned to the assessee. He submitted, the agreement clearly specifies that the distributor, i.e., ESPN India will have no rights whatsoever to the ESPN service nor convey, confer, grant, assign or otherwise provide distributor with copyright, title or any other proprietary or ownership interest in or to the ESPN Service or any elements thereof. ESPN India cannot use, authorize or permit the use of the ESPN Service or any element thereof for any purpose other than the purpose expressly specified in the agreement. He submitted, agreement makes it clear that neither assessee nor ESPN India shall have any authority to bind the other or to assume, create or incur any liability or any obligation of any kind, express or implied, against or in the name of or on behalf of the other. He submitted, the agreement also made it clear that the transaction between the assessee and ESPN India is on principal to principal basis. He submitted, as per the terms of the agreement, the assessee only conferred the distribution right upon ESPN India to broadcast/telecast certain specific sports channels. He submitted, while granting such distribution right the assessee had not transferred any right to use of any copyright to the distributor. Drawing our attention to the Copyright Act, he submitted, broadcasting rights are distinct and different from copyright. In this regard, he drew our attention to section 14 and 37 of Copyright Act defining the meaning of copyright and broadcasting right, respectively. He submitted, what the assessee has granted to ESPN India is the broadcast reproduction right, which cannot be equated with copyright as defined under the Copyright Act. He submitted, the distribution/subscription revenue received by the assessee cannot be treated as royalty under Article 12(3) of the India – Mauritius Tax treaty. In any case of the matter, he submitted, the right to distribution of sports channels cannot be equated with cinematograph films as defined under Explanation 2(v) to section 9(1)(vi) of the Copyright Act. He submitted, when the Assessing Officer accepts that all rights associated with the ESPN channels remains with ESPN Star Sports, Singapore and there has been no transfer of such right to the assessee and consequently to ESPN India, then it cannot be said that the subscription/distribution revenue received by the assessee from ESPN India towards distribution right granted to the ESPN India is in the nature of royalty coming within the ambit of Article 12(3) of India-Mauritius Tax Treaty. Thus, he submitted, in absence of PE in India, the amount received towards distribution/subscription revenue, being in the nature of business income is not taxable in India. In support of such contention, learned counsel relied upon the following decisions:

1. *Turner Broadcasting System Asia Pacific Inc. Vs. DDIT [2020] 120 taxmann.com 155 (Delhi-Trib.).*
2. *NGC Network Asia LLC Vs. Dy. Director of Income Tax (International Taxation), ITA No.8671/Mum/2004 and Others (Mumbai – Trib.)*
3. *NGC Network Asia LLC Vs. Joint Director of Income Tax (International Taxation), ITA No. 7994/Mum/2011 (Mumbai – Trib.).*

3. *NGC Network Asia LLC Vs. DCIT (IT), ITA No.1178/Mum/2015, ITA No. 6677 & 6678/Mum/2018 and Others.*
4. *DDIT (IT)-2(1) Vs. M/s. SET Indian Pvt. Ltd., ITA No.4372/Mum/2004, dated 25th April, 2012 (Mumbai-Trib.)]*
5. *The Commissioner of Income Tax (International Taxation)-II Vs. SET India Pvt. Ltd., ITA No. 1347 of 2013 (Bombay High Court)*
6. *Commissioner of Income-tax (IT)-3 Vs. MSM Satellite (Singapore) Pte. Ltd. [2019] 106 taxmann.com 353 (Bombay)*
7. *Sony Pictures Network India Pvt. Ltd. Vs. DCIT, (2020) ITA No. 971/Mum/2016 (Mumbai)*

8. *Set Satellite (Singapore) PTE Ltd. Vs. Deputy Director of Income-tax, International Taxation and Another [2008] 307 ITR 205 (Bombay High Court)*
9. *ESPN Star Sports Vs. Global Broadcast News Ltd. & Ors. [2008] 38 PTC 477 (Delhi High Court)*
10. *ESPN Star Sports Mauritius SNC et Compagnie [Now known as ESS Advertising (Mauritius) SNC et Compagnie] Vs. The Dy. CIT [2021] , ITA No. 1219/Del/2017, dated 20th October, 2021 (Delhi-Trib.)*
11. *Engineering Analysis Centre of Excellence P. Ltd. Vs. Commissioner of India-tax and another [2021] 432 ITR 471 (SC*
12. *Taj TV Limited [TS-202-ITAT-2022 (Mum)]*
13. *Deputy Director of Income Tax, Intl. Taxation Vs. Unocol Bharat Ltd. [2018] 99 taxmann.com 158 (Delhi-Trib.)*
14. *State Bank of Mauritius Ltd. Vs. Deputy Director of Income-tax (International Taxation)-2(1) [2012] 19 ITR (T) 675 (Mumbai – Trib.)*
15. *Joint Commissioner of Income-tax Vs. State Bank of Mauritius Ltd. [2011] 46 SOT 36 (Mumbai).*

8. Strongly relying upon the observations of Assessing Officer and learned Commissioner (Appeals), learned Departmental Representative submitted that along with the distribution right the assessee has transferred the right to broadcast and telecast sports channels, which amounts to transfer of copyright. He submitted, by acquiring the distribution right the assessee is also deriving commission income while procuring advertisement to be shown at the time of broadcasting/telecasting channels. Thus, he submitted, the distribution rights transferred to ESPN Indian brings along with it the copyright in the broadcast/telecast

material/content, which is in the nature of copyright as defined under the Copyright Act read with Explanation 2(v) of section 9(1)(vi) of the Act as well as Article 12(3) of India – Mauritius Tax Treaty. Thus, he submitted, the distribution revenue has been correctly treated as royalty and assessed at the hands of the assessee.

9. We have considered rival submissions in the light of the decisions relied upon and perused the materials on record. The issue we are called upon to decide is, whether the subscription/distribution revenue received by the assessee from ESPN India towards grant of distribution right would amount to royalty as defined under Article 12 of Indian–Mauritius Tax Treaty. Undisputedly, the assessee is a tax resident of Mauritius and holding a valid Tax Residency Certificate (TRC). Therefore, the assessee is entitled to avail the benefit of India – Mauritius Tax Treaty. Before we proceed to deal with the issue, it is necessary to briefly describe the factual backdrop relating to the arrangement between the assessee and ESPN Star Sports, Singapore on one hand and between the assessee and ESPN India on the other. It is an admitted factual position that ESPN Star Sports, Singapore is the owner of ESPN and Star Sports channels. The ESPN Star

Sports, Singapore has entered into an agreement with the assessee to appoint the assessee as a distributor to distribute and make available for sub-distribution ESPN network programming services in India, Pakistan, Bangladesh, Sri lanka and Nepal via cable television system, satellite master antenna television systems and direct to home via satellite. The agreement between ESPN Star Sports, Singapore and assessee makes it clear that the assessee has not been conferred with any rights whatsoever with regard to copyright, title or any other proprietary or ownership interest in or to the ESPN service or any elements thereof. The agreement makes it explicit that all rights in the contents of ESPN service are expressly reserved by ESPN Star Sports, Singapore and the distributor shall not use, authorize or permit the use of ESPN service or any element thereof for any purpose other than the purpose expressly specified in the agreement. The agreement also specifies that the assessee has to distribute the ESPN services in its entirety, without any alteration, editing, dubbing, scrolling or ticker tape, substitution or any other modification, addition, deletion or any other variation whatsoever. The agreement also provides that the names and marks of ESPN Star Sports and ESPN will remain exclusive properties of the ESPN, Inc and subject to agreement the distributor may be given non-exclusive license to use the names and marks on advertising and promotional material, notepapers, stationery and related materials. The assessee shall have the right to approve any of the distributors mentioning or using of such names or marks and publicity about the ESPN service, however, the distributors shall not publish or disseminate any material in violation of any restrictions imposed by ESS or ESPN Inc.

10. Thus, the terms of the agreement between the assessee and ESPN Star Sport, Singapore makes it clear that copyright over the programs of ESPN Star Sports are held by ESPN Star Sports, Singapore and not parted to the assessee. Similarly, on going through the agreement between the assessee and ESPN India it is observed that the assessee has only granted right to distribute ESPN and Star Sports channels in India to ESPN Indian. A reading of the agreement as a whole, as well as, certain specific clauses of the agreement would make it clear that the assessee has not transferred any right to use of any copyright to ESPN India, insofar as it relates to certain sports channels owned by ESPN Star Sports, Singapore. The agreement entered into with ESPN India clearly denotes that the assessee has merely granted

distribution rights of ESPN service through sub-distributors/cable operators. The agreement also makes it clear that the distributor has to distribute the ESPN service provided by the assessee in its entirety, without any alteration, editing, dubbing, scrolling or ticker tape, substitution or any other modification, addition, deletion or any other variation whatsoever.

11. As discussed earlier, in assessment year 2003-04 the Assessing Officer held the distribution revenue received by the assessee as business receipts. However, in subsequent assessment years, the Assessing Officer treated it as royalty. While upholding the decision of the Assessing Officer in subsequent years and to bring the distribution revenue received by the assessee in the ambit of royalty, learned Commissioner (Appeals) has not only referred to Explanation 2(v) to section 9(1)(vi) of the Income Tax Act, but, has extensively referred to certain provisions of the Copyright Act. In this context, learned Commissioner (Appeals) has referred to definition of cinematograph film under section 2(f) of the Copyright Act, definition of broadcast under section 2(dd) of the Act, the meaning of copyright as provided under section 14 of the Copyright Act and section 13 of the Copyright Act, wherein, cinematograph films

has been enlisted as a form of work in which copyright subsists. Referring to all these provisions of the Copyright Act, learned Commissioner (Appeals), in sum and substance, has wanted to convey that by granting the distribution right to ESPN India the assessee has allowed broadcast of cinematograph films to communicate to the public. Thus, there is a transfer of copyright in terms of section 9(1)(vi) read with clause (v) to Explanation 2 there under, Article 12(3) of the India – Mauritius Tax Treaty and the relevant provisions of the Copyright Act, as referred to by him.

12. At this stage, it is necessary to look into the definition of royalty under Article 12(3) of the India–Mauritius DTAA, which reads as under:

> *"12(3) The term "royalties" as used in this Article means payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work (including cinematograph films, and films or tapes for radio or television broadcasting), any patent, trade mark, design or model, plan, secret formula or process or for the use of, or the right to use, industrial, commercial or scientific equipment, or for information concerning industrial, commercial or scientific experience."*

13. A reading of the aforesaid Article would make it clear that the expression royalty means consideration received for the use of or right to use of any copyright of literary, artistic or scientific work (including cinematograph films and films or tapes for radio

or television broadcasting, any patent trade-mark design, model plan, secret formula plan etc. Admittedly, the expression copyright has not been defined either under the Income Tax Act or under the India–Mauritius Tax Treaty. Therefore, we have to find the meaning of copyright in the Copyright Act. As discussed earlier, section 14 of the Copyright Act defines copyright as under:

> *"[**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);

[2]*[(ii) to sell or give on commercial rental or offer for sale or for commercial rental any copy of the computer programmer:*

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,--

[3]*[(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;]

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

[4]*[(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;]

[5]*[(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 [6]*[including storing of it in any medium by electronic or other means];*

[7][(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.

Explanation.--For the purposes of this section, a copy which has been sold once shall be deemed to be a copy already in circulation].”

14. Section 37 of the Copyright Act deals with broadcast, reproduction rights, which reads as under:

“37. Broadcast reproduction right.*-- (1) Every broadcasting organisation shall have a special right to be known as “broadcast reproduction right” in respect of its broadcasts.*

(2) The broadcast reproduction right shall subsist until twenty-five years from the beginning of the calendar year next following the year in which the broadcast is made.

(3) During the continuance of a broadcast reproduction right in relation to any broadcast, any person who, without the licence of the owner of the right does any of the following acts of the broadcast or any substantial part thereof,--

(a) re-broadcast the broadcast; or

(b) causes the broadcast to be heard or seen by the public on payment of any charges; or

(c) makes any sound recording or visual recording of the broadcast; or

(d) makes any reproduction of such sound recording or visual recording where such initial recording was done without licence or, where it was licensed, for any purpose not envisaged by such licence; or

[3][(e) sells or given on commercial rental or offer for sale or for such rental, may such sound recording or visual recording referred to in clause (c) or clause (d).]”

15. It is further relevant to observe, the consequences for infringement of copyright and broadcast reproduction right have been dealt with differently under the Copyright Act. Thus, on a conjoint reading of section 14 and 37 of the Copyright Act, a holistic view can be taken that broadcast reproduction right is distinct and separate from Copyright Act. In case of DDIT Vs. SET India Pvt. Ltd (supra), the Coordinate Bench, while dealing with aforesaid aspect, has held as under:

> *"16. Having heard both the sides, we observe that Id CIT(A) while examining the issue has stated that the Non-resident company has granted non-exclusive distribution rights of the channels to the assessee and has not given any right to use or exploit any copyright. The assessee is no way concerned whether the programs broadcast by the Non-resident company are copyrighted or not. The said distribution is purely a commercial right, which is distinct from the right to use copyright. We observe that Id CIT(A) has considered the provisions of Section 14 and Section 37 of the Copyright Act, 1957. It is observed that Section 37 of the Copyright Act deals with Broadcast Reproduction Rights (BRR) and same is covered under Section 37 of the Copy Right Act and not under section 14 thereof. We observe that Id CIT(A) has also considered Clause 6.3 of the distribution agreement entered into between assessee company and Non-resident company, which states that the right granted to the assessee under the agreement is not and shall not be construed to be a grant of any license or transfer of any right in any copyright. Ld CIT(A) has stated that the assessee submitted before him that the cable operator only retransmits the television signals transmitted to it by a broadcaster without any editing, delays, interruptions, deletions, or additions and, therefore the payment made by the assessee to the Non-resident company is not for use of any copyright and consequently cannot be characterized as Royalty. Ld. CIT (A) has held that Broadcasting Reproduction Right is not covered under the definition of Royalty under section 9(1)(vi) of the Income Tax Act as well as Article 12 of the Treaty. Accordingly, the payment is not in the nature of Royalty but in the nature of business income."*

16. Similar to the case of DDIT Vs. Set India Pvt. Ltd. (supra), referred to above, in assessee's case also there is no transfer of any right to use of any copyright and there is specific restriction imposed upon ESPN India that it has to provide the ESPN services through sub-distributors without any editing, interruption, deletions, additions etc. It is relevant to observe, in case of Set Satellite (Singapore) Pte Ltd. Vs. DDIT (supra), the Hon'ble Bombay High Court while dealing with the issue, whether identical nature of distribution rights granted to an entity in India is in the nature of royalty, has held that consideration received is in respect of a commercial transaction, hence, distinct and different from copyright as defined under Copyright Act. In case of NGC Network Asia LLC Vs. DCIT (supra), the issue involved was whether revenue received by the non-resident company from NGC India from distribution right granted in respect of telecast/broadcast of certain channels in India through cable operators would be in the nature of royalty. While dealing with the issue, the Tribunal, after taking note of the difference between the meaning of copyright and broadcast reproduction right under the Copyright Act has held that the right granted to the Indian

entity is a commercial right and not copyright. Identical view has been expressed by the Coordinate Bench in a catena of decisions cited before us, including, in the case of Turner Broadcasting System Asia Pacific Inc. Vs. DDIT (supra). In case of CIT Vs. MSM Satellite (Singapore) Pte. Ltd. (supra), the Hon'ble Bombay High Court has held as under:

> *"10. In our opinion, the Tribunal has not committed any error. As noted, the assessee would received a part of subscription charges paid by a large number of customers through different agencies. The said subscription charges would enable the customers to view channels operated by such assessee. The assessee was thus not parting with any of the copyrights for which payment can be considered as royalty payment. "copyright" has been defined in Section 14 of the copy right Act, 1957. A glance at the said provision would show that the copyright means exclusive right, subject to the provisions of this Act, to do or authorise the doing of any of the following acts specified in the said provision in respect of a work or any substantial part thereof. Term "work" is defined under Section 2(y) of the Copyright Act, 1957, as to mean any of the works namely a literary, dramatic, musical or artistic work or a cinematograph film and a sound recording. Sub-section (1) of Section 14 of the Copyright Act, 1957 lists several Acts in respect of a work in relation to which exclusive right would be termed as copyright. In the present case, the assessee had not created any literary, dramatic, musical or artistic work or cinematograph film and/or a sound recording.*
>
> *11. Infact, Section 37 of Copyright Act, 1957 separately defines broadcast reproduction right. Sub-section (I) of Section 37 of the said Act provides that every broadcasting organisation shall have special rights to be known as "broadcast reproduction right" in respect of its broadcasts. Sub-section (2) of Section 37 provides that the broadcast reproduction right shall subsist until twenty-five years from the beginning of the calender year next following the year in which the broadcast is made. 1*
>
> *12. Section 9 of the Act pertains to income deemed to accrue or arise in India. Clause (vi) of Section 9(1) pertains to income by way of royalty. Relevant portion reads as under:—'*
>
> *(vi) income by way of royalty payable by —*

(a) the Government; or

(b) a person who is a resident, except where the royalty is payable in respect of any right, property or information used or services utilised for the purposes of a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India; or

(c) a person who is non-resident, where the royalty is payable in respect of any right, property or information used or services utilised for the purposes of a business or profession carried on by such person in India or for the purposes of making or earning any income from any source in India:

Explanation 2 below sub-section (1) of Section 9 describes the term "royalty" for the purpose of said clause, relevant portion of which reads as under:—

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'

13. In our opinion, these provisions would in no manner change the position. Only if the payment in the present case by way of a royalty as explained in explanation (2) below sub-section (1) of Section 9 of the Act, the question of applicability of clause (vi) of sub-section (1) of Section 9 would arise. Learned counsel for the revenue placed considerable tress on clause (v) of explanation (2) by virtue of which the transfer of the rights in respect of copyright of a literary, artistic or scientific wok including cinematograph film or films or tape used for radio or television broadcasting etc. would come within the fold of royalty for the purpose of Section 9(l) of the Act. We do not see how the payment in the present case could be covered within the said expressions. As noted, this is not a case where payment of any copyright in literary, artistic or scientific work was b5ing made.

14. We may also notice that India Singapore Double Taxation Avoidance Agreement contains Article 12 pertaining to royalty and fees for technical service. Paragraph (3) of Article 12 defines the term "Royalty" as under—

'The term "royalties" as used in this Article means payments of any kind received as a consideration for the use of, or the right to use:

(a) any copyright of a literary, artistic or scientific work, including cinematograph film or films or tapes used for 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, including gains derived from the alienation of any such right, property or information;

(b) any industrial, commercial or scientific equipment, other than payments derived by an enterprise from activities described in Paragraph 4(b) or 4 (c of Article 8'

15. Even going by this definition, the payment in question cannot be categorized as royalty."

17. Though, learned Commissioner (Appeals) has extensively referred to the definitions of copyright, communication to public, broadcast under the Copyright Act, however, he has completely ignored the broadcast reproduction right as provided under section 37 of the Act. Thus, in our view, the ratio laid down in the decisions referred hereinabove clearly clinches the issue in favour of the assessee, as, what the assessee has granted to ESPN India through the distribution agreement is broadcast reproduction right, as defined under section 37 of the Copyright Act and not any Copyright. In any case of the matter, the Assessing Officer himself in assessment year 2003-04 has observed that the copyright over all the contents of ESPN channels remains with ESPN Star Sports, Singapore and has not been transferred to the assessee. Therefore, when the assessee itself does not have ownership over the copyright, it could not have transferred such

right to any other party. Thus, respectfully following the ratio laid down in the judicial precedents cited before us, we hold that the subscription/distribution revenue received by the assessee is not in the nature of royalty either under section 9(1)(vi) of the Act nor under Article 12(3) of the Tax Treaty. In view of the aforesaid, this issue is decided in favour of the assessee.

18. Having held so, the issue arising for consideration is, what is the nature and character of the distribution revenue received by the assessee. Once the income goes out of the purview of the term royalty, definitely it falls within the category of business profits under Article 7 of India–Mauritius Tax Treaty. Hence, such income can be taxable in India, only if, the assessee had a PE in India. The departmental authorities have held that ESPN India constitutes both, dependent agent PE (DAPE) as well as fixed place PE. This is where the second issue of existence of PE arises. As discussed earlier, the departmental authorities have held that since, the assessee carries on its business in India through ESPN India, it constitutes a fixed placed PE of the assessee in India. Further, the departmental authorities have held that the transaction between the assessee and ESPN India are not on principal to principal basis but there is a relationship of principal

and agent. Further, they have held that ESPN India cannot be considered to be an agent of independent status as it is totally dependent upon the assessee and another sister concern in Mauritius for earning its revenue. They have also held that ESPN India signs contracts on behalf of the assessee, hence, constitutes a DAPE.

19. Rebutting the aforesaid reasoning of the departmental authorities, learned counsel appearing for the assessee submitted before us that ESPN India enters into contract with cable operators to distribute the channels on its own account and not on behalf of the assessee. He submitted, ESPN India earns income from cable operators on its own account and establishes legal relationship on its own account. It has no authority to conclude contract on behalf of the assessee. In the same way, the assessee does not have any privity of contract with the cable operators/intermediaries in India. Therefore, the relationship between ESPN India and assessee is on principal to principal basis. He submitted, besides carrying out the activities of distribution of channel services for the assessee, ESPN India was also engaged in acquisition and allotment of air time for advertisement and sale/leasing of decoders etc. to cable operators

for other entities. Therefore, ESPN India is an agent of independent status under Article 5(5) of the India – Mauritius Tax Treaty and is acting in ordinary course of business while dealing with the assessee. He submitted, ESPN India carries on its own business in its own premises and the assessee does not have any control over it and nor has the power of disposal over it. The assessee does not have any fixed place PE in India through which it carries out business. Therefore, it cannot be said that the assessee has a fixed place PE in India. In support of such contention, learned Counsel relied upon the following decisions:

1) *International Global Networks BV v. ADIT, International Taxation, Range 4(1), Mumbai [2017] 84 taxmann.com 188 (Mumbai-Trib.)*
2) *Deputy Director of Income-tax (IT) - 3(2) v. B4U International Holdings Ltd. [2012] 137 ITD 346 (Mumbai Tribunal)*
3) *SPE Networks India Inc. v. Deputy Commissioner of Income-tax (Int. Taxation), Range-2(1) Mumbai [2017] 87 taxmann.com 345 (Mumbai - Trib.)*
4) *TVM Limited **V. Commissioner** of Income-tax [1999] 237 ITR 230 (AAR)*
5) *Additional Director of Income Tax (International Taxation) v. Taj TV Ltd. [2016] 161 ITD 339 (Mumbai Tribunal)*
6) *Taj TV Ltd. v. Additional Director of Income-tax (International Taxation), Range **2,** Mumbai [2017] 162 ITD 674 (Mumbai Tribunal)*
7) *Reuters Ltd. v. Deputy Commissioner of Income-tax, (International Taxation), Range 2(1), Mumbai [2015] 155 ITD 844 (Mumbai Tribunal)*

8) Taj TV Limited [TS-202-ITAT-2022(Mum)] (page no. 633-650 of Legal Paper book)

20. Without prejudice, learned counsel submitted, since, the transaction between the assessee and ESPN India have been found to be at arm's length, no further profit can be attributed to the PE. To substantiate his claim that ESPN India has been remunerated on arm's length basis, learned counsel drew our attention to the orders passed by the Transfer Pricing Officer (TPO). Further, in support of his submission, learned counsel relied upon the following decisions:

1) *ADIT vs. E-Funds IT Solutions Inc (399 ITR 34) (SC) (page no. 288-327 of Legal Paper book)*
2) *DIT **vs.** BBC Worldwide Ltd (203 Taxman 554) (am) (Delhi HC) (page no. 330-337 of Legal Paper book)*
3) *Set Satellite (Singapore) Pte Ltd. vs. DDIT **(2008) (307** ITR 205) (Bombay HC) (page no. 338-354 of Legal Paper book)*
4) *DIT vs. B4U International Holdings limited (2015) (374 ITR 453) (Bombay HC) (page no. 355-364 of Legal Paper book)*
5) *ESS Advertising (Mauritius) S.N.0 et Compagnie [2019] 101 taxmann.com 312 (Delhi - Trib.) (page no. 365-383 of Legal Paper book)*
6) *ESS Advertising (Mauritius) S.N.0 et Compagnie [2021] 186 ITD 546 (Delhi - Trib.) (page no. 384-400 of Legal Paper book)*
7) *ESPN Star Sports Mauritius SNC et Compagnie [Now known as ESS Advertising (Mauritius) SNC et Compagnie] vs. The Dy. C.I.T Circle 1(2)(2) [Intl. Taxation New Delhi [2021] ITA No. 1219/DEL/2017 (Delhi — Trib.) dt. **20** October **2021** (page no. 450471 of Legal Paper book)*

21. Learned Departmental Representative strongly relied upon the observations of the Assessing Officer and learned Commissioner (Appeals).

22. We have considered rival submissions and perused the materials on record. At the outset, we need to examine, whether, the assessee has a fixed place PE in India. The distribution agreement between the assessee and ESPN Indian clearly stated that the transaction is on principal to principal basis. The agreement further allowed ESPN India to enter into agreement with sub-distributors/cable operators so that the channels can be distributed to end consumers in India. As per the terms of the agreement, the revenue earned from distribution of channels has to be shared between the assessee and ESPN India in certain ratio. The materials on record demonstrate that ESPN India is carrying on its distribution activity as well as other activities, such as, acquisition and allotment of air time for advertisement and sale/leasing of decoders. No material has been brought on record by the Revenue to suggest that the assessee has any kind of control over the business of ESPN India or the premises of ESPN India have been given at the disposal of the assessee or the assessee carries on any kind of business through the premises of

ESPN India. In case of ADIT Vs. EFunds IT Solutions Inc. (supra), the Hon'ble Supreme Court while deciding the issue of existence to fixed place PE has held as under:

"5. As against this, Shri S. Ganesh, learned senior counsel for the respondents, has argued that the tests for whether there is a fixed place PE have now been settled by the judgment of this Court in Formula One (supra), and that it is clear that for a fixed place PE, it must be necessary that the said fixed place must be "at the disposal" of the assessees, which means that the assessees must have a right to use the premises for the purpose of their own business, which has not been made out in the facts of this case. He further argued that, on the facts of this case, both the US companies as well as the Indian company pay income tax, and the Transfer Pricing Officer by his order dated 22nd February, 2006, has specifically held that whatever is paid under various agreements between the US companies and the Indian company are on arm's length pricing and that, this being the case, even if a fixed place PE is found, once arm's length price is paid, the US companies go out of the dragnet of Indian taxation. He also adverted to Article 5(6) to state that the mere fact that a 100% subsidiary may be carrying on business in India does not by itself means that the holding company would have a PE in India. Further, according to learned counsel, so far as the service PE is concerned, even the assessing officer did not find that such a PE existed.

According to him, under Article 5(2)(l), it is necessary that the foreign enterprises must provide services to customers who are in India, which is not Revenue's case as all their customers exist only outside India. Further, according to the learned counsel, the entire personnel engaged in the Indian operations are employed only by the Indian company and the fact that the US companies may indirectly control such employees is only for purposes of protecting their own interest. Ultimately, there are four businesses that the assessees are engaged in, namely, ATM Management Services, Electronic Payment Management, Decision Support and Risk Management and Global Outsourcing and Professional Services. Since all these businesses are carried on outside India and the property through which these businesses are carried out, namely ATM networks, software solutions and other hardware networks and information technology infrastructure were all located outside India, the activities of e-Funds India are independent business activities on which, as has been noticed by the High Court, independent profits are made and income assessed to tax under the Income Tax Act. According to the *learned counsel, "agency PE" was never argued before the assessing officer and even before the ITAT. Therefore, no factual foundation for the same has been laid. Equally, according to the learned counsel, the settlement procedure availed for the assessment years in question cannot be said to be binding for subsequent years as they were without prejudice to the assessees' contention that they have no PE in India. He also relied upon the OECD Commentary, paragraph 3.6 in particular, to demonstrate that the so-called admissions made and relied upon by the three authorities below were correctly overturned by the High Court.*

Learned counsel also stated that the ground of adverse inference was never argued or put before any of the authorities below, and the only place that it could be found is in the assessment order for the year 2003-04, which order became non-est as it was substituted by the agreement entered into between the parties ending in withdrawal of appeals before the CIT (Appeals). Thus, according to the learned counsel, the view of the High Court is absolutely correct and should not be interfered with. Learned counsel also argued that the cross- appeals of the Revenue were correctly dismissed in that, even though the ITAT decided the case in law against the assessees, yet it found on facts, differing from the calculation formula by the authorities below, that nil tax was payable. This is the only part of the ITAT judgment upheld by the High Court, and should not, therefore, be disturbed in any case.

6. Before we deal with the submissions made on both sides, it is necessary to first set out the statutory background. This is contained in Section 90 of the Income Tax Act, before it was amended in 2009. Section 90(1) and 90(2) of the Income Tax Act, as it then stood, read as under:

> *"Section 90. Agreement with foreign countries.—*
>
> *1) The Central Government may enter into an agreement with the Government of any country outside India—*
>
> *(a) for the granting of relief in respect of—*
>
> *(i) income on which have been paid both income-tax under this Act and income-tax in that country; or*
>
> *(ii) income-tax chargeable under this Act and under the corresponding law in force in that country to promote mutual economic relations, trade and investment, or*

(b) for the avoidance of double taxation of income under this Act and under the corresponding law in force in that country, or

(c) for exchange of information for the prevention of evasion or avoidance of income-tax chargeable under this Act or under the corresponding law in force in that country, or investigation of cases of such evasion or avoidance, or

(d) for recovery of income-tax under this Act and under the corresponding law in force in that country, and may, by notification in the Official Gazette, make such provisions as may be necessary for implementing the agreement.

(2) Where the Central Government has entered into an agreement with the Government of any country outside India under sub-section (1) for granting relief of tax, or as the case may be, avoidance of double taxation, then, in relation to the assessee to whom such agreement applies, the provisions of this Act shall apply to the extent they are more beneficial to that assessee."

7 xxxx
8 xxxx
9 xxxx
10 xxxx
11 xxxx

12. Thus, it is clear that there must exist a fixed place of business in India, which is at the disposal of the US companies, through which they carry on their own business. There is, in fact, no specific finding in the assessment order or the appellate orders that applying the aforesaid tests, any fixed place of business has been put at the disposal of these companies. The assessing officer, CIT (Appeals) and the ITAT have essentially adopted a fundamentally erroneous approach in saying that they were contracting with a 100% subsidiary and were outsourcing business to such subsidiary, which resulted in the creation of a PE. The High Court has dealt with this aspect in some detail in which it held:

"49. The Assessing Officer, Commissioner (Appeals) and the tribunal have primarily relied upon the close association between e-Fund India and the two assessees and applied functions performed, assets used and risk assumed, criteria to determine whether or not the assessee has fixed place of business. This is not a proper and appropriate test to determine location PE. The fixed place of business PE test is different. Therefore, the fact that e-Fund India provides

various services to the assessee and was dependent for its earning upon the two assessees is not the relevant test to determine and decide location PE. The allegation that e-Fund India did not bear sufficient risk is irrelevant when deciding whether location PE exists. The fact that e-Fund India was reimbursed the cost of the call centre operations plus 16% basis or the basis of margin fixation was not known, is not relevant for determining location or fixed place PE.

Similarly what were the direct or indirect costs and corporate allocations in software development centre or BPO does not help or determine location PE. Assignment or sub-contract to e-Fund India is not a factor or rule which is to be applied to determine applicability of Article 5(1). Further whether or not any provisions for intangible software was made or had been supplied free of cost is not the relevant criteria/test. e-Fund India was/is a separate entity and was/is entitled to provide services to the assessees who were/are independent separate taxpayers. Indian entity i.e. subsidiary company will not become location PE under Article 5(1) merely because there is interaction or cross transactions between the Indian subsidiary and the foreign Principal under Article 5(1). Even if the foreign entities have saved and reduced their expenditure by transferring business or back office operations to the Indian subsidiary, it would not by itself create a fixed place or location PE. The manner and mode of the payment of royalty or associated transactions is not a test which can be applied to determine, whether fixed place PE exists."

13. It further went on to hold that the ITAT's finding that the assessees were a joint venture or sort of partnership with the Indian subsidiary was wholly incorrect. Also, none of these arguments have been invoked by the Revenue and such a finding would, therefore, be perverse. After citing Klaus Vogel on Double Taxation Conventions, Arvid A. Skaar in Permanent Establishment: Erosion of a Tax Treaty Principle and Bollinger vs. Commissioner, 108 S.Ct. 1173, the High Court found against the Revenue, holding that there is no fixed place PE on the facts of the present case. We agree with the findings of the High Court in this regard. 14. Reliance placed by the Revenue on the United States Securities and Exchange Commission Form 10K Report, as has been correctly pointed out by the High Court, is also misplaced. It is clear that the report speaks of the e-Funds group of companies worldwide as a whole, which is evident not only from going through the said report, but also from the consolidated financial statements appended to the report, which show the assets of the group worldwide.

15. xxxxx

> *16. This report would show that no part of the main business and revenue earning activity of the two American companies is carried on through a fixed business place in India which has been put at their disposal. It is clear from the above that the Indian company only renders support services which enable the assessees in turn to render services to their clients abroad.*
>
> *This outsourcing of work to India would not give rise to a fixed place PE and the High Court judgment is, therefore, correct on this score."*

23. As per the ratio laid down in the aforesaid decision of the Hon'ble Supreme Court, burden is on the revenue to establish the existence of fixed place PE. Insofar as the issue, the ESPN Indian is a dependent agent of the assessee, the agreement between the parties does not make out a case of DAPE. There is no privity of contract between the assessee with the cable operators or end customers in India. It is ESPN India who has entered into contracts with cable operators for distribution of the channels in India and responsible for breach of contract with cable operators. The transaction between the assessee and ESPN India is limited to conferring of right to distribute the channels of ESPN Star Sports in India through cable operators. How, ESPN India does such distribution activity is not the concern of the assessee. The assessee is only concerned with share in distribution revenue depending on the total amount received by ESPN India from sub-distributors. We have also noted that in certain instances of

alleged breach of contract between ESPN India and cable operators, it is ESPN India, which is liable and not the assessee. Further, other factors, such as, acquisition of air time and sale of decoders clearly indicate that ESPN India has its independent business and cannot be called as dependent agent of the assessee. Though, the Revenue has alleged that ESPN Indian is a DAPE, however, it has failed to demonstrate that in terms with Article 5(4) of India – Mauritius Tax Treaty, ESPN India habitually exercises authority to conclude contracts on behalf of the assessee.

24. That being the factual position emerging on record, in our view, ESPN India cannot even be considered to be a DAPE of the assessee. The decisions cited before us, particularly the decision of the Coordinate Bench in case of TAJ TV Ltd. (supra) and Turner Broadcasting Systems Asia Pacific Inc (supra) squarely apply to the facts of the present appeal. Therefore, following them, we hold that the assessee does not either had a fixed place PE or dependant agent PE in India under Article 5 of the India-Mauritius Tax Treaty. In any case of the matter, it is an undisputed factual position that ESPN India has been remunerated at arm's length and there are no adjustments

suggested by the TPO in any of the assessment years under dispute. That being the case, no further attribution of profit can be made to the PE. In this regard, we rely upon the decisions cited by learned counsel for the assessee. Thus, we hold that the distribution revenue received by the assessee is not taxable in India.

25. In view of our decision above, the fourth issue regarding the mode and manner of attribution of profit to the alleged PE has become redundant, hence, not required to be adjudicated.

25. In assessment year 2004-05, there is one more issue relating to non-disposal of assessee's ground pertaining to withdrawal of interest entitlement under section 244A, by learned Commissioner (Appeals).

26. We have heard the parties and perused the materials on record. Before us, it is the contention of learned counsel for the assessee that since no refund has been granted to the assessee, question of withdrawal of interest under section 244A of the Act does not arise. Considering the aforesaid submission of the assessee, we restore the issue to the Assessing Officer for factually verifying assessee's claim and deciding it afresh in

accordance with law after providing opportunity of being heard to the assessee.

27. There is one more issue arising in assessee's appeal, being ITA No. 6704/Del/2017. This appeal has its genesis in the order passed by the Assessing Officer while giving effect to the order of learned Commissioner (Appeals). The issue raised by the assessee in this appeal is relating to short grant of credit of TDS. It is the claim of the assessee that TDS of Rs. 1,31,35,635/- claimed in the revised return is reflected in form 26AS and appeal effect order passed by the Assessing Officer. Therefore, complete credit of TDS should be given. Having considered the submissions of the parties, we direct the Assessing Officer to factually verify assesee's claim with reference to From 26AS and TDS certificate and thereafter allow credit for TDS in accordance with law. This disposes all the appeals filed by the assessee.

ITA No.3387/Del/2010 (AY: 2003-04)
ITA No.3388/Del/2010 (AY: 2004-05)
ITA No.1201/Del/2017 (AY: 2012-13)
ITA No.6706/Del/2017 (AY: 2009-10)
ITA No.6578/Del/2016 (AY: 2009-10)
ITA No.5303/Del/2018 (AY: 2014-15)
ITA No.6579/Del/2016 (AY: 2011-12)

28. As could be seen from the grounds raised in all these appeals, the Revenue is aggrieved with the decision of learned Commissioner (Appeals) in holding that royalty has to be taxed on net basis and attribution of profit to PE at the rate of 5% of the receipts in some assessment years. While deciding assessee's appeals in the earlier part of the order, we have held that the subscription/distribution revenue earned by the assessee is not in the nature of royalty under Article 12(3) of India–Mauritius Tax Treaty. Further, we have held that though the income received by the assessee is in the nature of business income, however, in absence of PE in India, no part of such income is taxable in India.

29. Without prejudice, we have held that even assuming there is a PE in India, since, the transaction between the assessee and the AE in India, which allegedly constitutes the PE of the assessee, are at arm's length, no further attribution of profit can be made to the PE. In view of our decision hereinabove, the grounds raised by the Revenue on the issue of taxability of royalty income on net basis and attribution of profit to the PE at a certain percentage have become infructuous. Hence, grounds raised on such issues are dismissed.

30. The only other issue raised by the Revenue in some of its appeals relates to chargeability of interest under section 234B of the Act. Having considered rival submissions, we are of the view that the issue is squarely covered by the decision of the Hon'ble Supreme Court in case DIT Vs. Mitshubishi Corporation [2021] 130 taxmann.com 276 (SC). Therefore, we do not find any reason to interfere with the decision of learned Commissioner (Appeals) on the issue.

31. Besides the above appeals, there is one more appeal by the Revenue, being ITA No. 6706/Del/2017. This appeal of the Revenue culminates out of the order of the Assessing Officer while giving effect to the order of learned Commissioner (Appeals). The ground raised by the Revenue in this appeal relates to the direction issued by learned First Appellate Authority to determine the income of the assessee on net basis. The issue raised in this appeal has become academic in view of our decision in the earlier part of the order, while deciding assessee's appeals. Hence, the appeal has become infructuous.

32. In nutshell, appeals are decided as under:

1.	ITA No.3412/Del/2010	Assessee's Appeal	AY: 2003-04	Partly Allowed
2.	ITA No.3413/Del/2010	Assessee's Appeal	AY: 2004-05	Partly Allowed
3.	ITA No.4426/Del/2016	Assessee's Appeal	AY: 2009-10	Partly Allowed

4.	ITA No.4543/Del/2016	Assessee's Appeal	AY: 2011-12	Partly Allowed
5.	ITA No.1220/Del/2017	Assessee's Appeal	AY: 2012-13	Partly Allowed
6.	ITA No.6705/Del/2017	Assessee's Appeal	AY: 2012-13	Partly Allowed
7.	ITA No.5084/Del/2018	Assessee's Appeal	AY: 2014-15	Partly Allowed
8.	ITA No.3387/Del/2010	Revenue's Appeal	AY: 2003-04	Dismissed
9.	ITA No.3388/Del/2010	Revenue's Appeal	AY: 2004-05	Dismissed
10.	ITA No.1201/Del/2017	Revenue's Appeal	AY: 2012-13	Dismissed
11.	ITA No.6706/Del/2017	Revenue's Appeal	AY: 2009-10	Dismissed
12.	ITA No.6578/Del/2016	Revenue's Appeal	AY: 2009-10	Dismissed
13.	ITA No.5303/Del/2018	Revenue's Appeal	AY: 2014-15	Dismissed
14.	ITA No.6579/Del/2016	Revenue's Appeal	AY: 2011-12	Dismissed

Order pronounced in the open court on 21ST November, 2022

Sd/-
(G.S. PANNU)
PRESIDENT

Sd/-
(SAKTIJIT DEY)
JUDICIAL MEMBER

Dated: 21st November, 2022.
RK/-
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi