

**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.1907/Del/2011
Assessment Year: 2006-07

And

ITA No.610/Del/2011
Assessment Year: 2007-08

And

ITA No.5415/Del/2011
Assessment Year: 2008-09

BBC World Distribution Ltd., C/o-Building No. 10, 8 th Floor, DLF Cyber City, Phase-II, Gurgaon	Vs.	ADIT, Circle-1(1), Intl. Taxation, New Delhi
PAN :AACCB7999Q		
(Appellant)		(Respondent)

Appellant by	Sh. Ajit Jain, CA
Respondent by	Ms. Anupama Anand, CIT(DR)

Date of hearing	24.08.2022
Date of pronouncement	21.11.2022

ORDER

PER SAKTIJIT DEY, JM:

Captioned appeals by the assessee are for the assessment years 2006-07, 2007-08 and 2008-09. Appeals relating to assessment year 2006-07 arises out of order dated 27.12.2010

passed by learned Commissioner of Income Tax (Appeals)-XI, New Delhi, whereas, the appeals for assessment years 2007-08 and 2008-09 are through the route of Dispute Resolution Panel (DRP). Since, the issues raised in all these appeals are more or less common, hence, these appeals have been clubbed together and disposed of in a consolidated order, for the sake of convenience.

2. The issues arising for consideration in these appeals can be knocked down as under:

- i. The subscription/distribution revenue earned by the assessee is chargeable to tax as royalty, and
- ii. Whether the assessee has a Permanent Establishment (PE) in India so as to attribute any part of the profit to such PE.

3. Briefly the facts are, BBC World News Ltd (in short 'BBCWN') is a company incorporated in United Kingdom (UK) and tax resident of UK. BBCWN is the owner of BBC World New Channel. BBCWN has granted non-exclusive global right to BBC World Distribution Limited (In short 'BBCWD'), the present assessee, to distribute the channel. BBCWD, in turn, has entered into an agreement with BBC World India Pvt. Ltd. (in short 'BWIPL') to distribute the channel to cable operators, DTH operators, hotels,

institutions etc. in India. In assessment year 2006-07, the assessee received an amount equivalent to Indian Rs.94,58,039/- from distribution of BBC World News Channel in India. Before the Assessing Officer, the assessee pleaded that the amount received from distribution of channel in India is not taxable because of the following:

- *BWIPL to distribute the Channel to cable operators, DPI operators hotels, etc in specified territory including India;*
- *BWIPL to provide assistance in collection, follow-up and remittance of monies to BBCWD;*
- *The relationship between BWIPL and BBCWD is that of independent contractors, working on a principal-to-principal basis. No general or special agency, master-servant relationship or any other relationship other than of a principal and service provider exists between BWIPL and BBCWD;*
- *BWIPL to quote prices for distribution on the basis of rates agreed with BBCWD.*
- *BWIPL to consult BBCWD prior to making any formal approach to the potential customer*
- *BWIPL not to make any changes to the standard form of proposal and other literature approved by BBCWD without prior consent of BBCWD;*
- *BWIPL to forward all distribution orders to BBCWD for its acceptance and BBCWD may in its absolute discretion reject any such proposals;*
- *BWIPL. to have no authority to accept any proposal/orders or conclude any contracts with the customers for and on behalf of BBCWD*
- *BBCWD reserves the right to solicit orders, negotiate and conclude agreements with customers for distribution of the Channel;*
- *BWIPL shall not represent BBCWD in any manner whatsoever, inferring BWIPL an authority bind BBCWD, and*
- *For the above services, BBCWD shall remunerate BWIPL with a mark-up of 10% on direct and indirect costs, as agreed between the parties.*

4. The Assessing Officer, however, did not agree with assessee's submissions. He held that while granting right to distribute BBC World News Channel in India, the assessee had transferred the

right to use copyright to BWIPL, hence, the amount received from distribution of the channel in India is in the nature of royalty, both, under the domestic law as well as under India – UK Double Taxation Avoidance Agreement (DTAA). Therefore, he held that the amount received by the assessee will be taxable at 15% on gross basis. Though, the assessee contested the aforesaid addition before learned Commissioner (Appeals), however, learned Commissioner (Appeals) upheld the decision of the Assessing Officer.

5. Insofar as assessment years 2007-08 and 2008-09 are concerned, the assessee specifically submitted in course of assessment proceedings that in these assessment years the assessee had not received any payment from distribution of channels in India from grant of distribution right. It was submitted that since the entire distribution revenue has been received by BWIPL and offered to tax in India, nothing can be taxed at the hands of the assessee. However, the Assessing Officer did not accept the contention of the assessee. He held that as per the definition of Copyright Act, 1957, the distribution right granted by the assessee amounts to transfer of right to use Copyright, hence, in the nature of royalty. Further, referring to

certain guidelines issued by the Ministry of Information and Broadcasting to the effect that the Indian company should have the authority to conclude contract on behalf of the channels for advertisements, subscription and program contents, the Assessing Officer concluded that not only the subscription/distribution revenue would be chargeable to tax as royalty but the Indian company, which has been granted the distribution rights can be considered to be a Permanent Establishment (PE) of the assessee in India. Accordingly, he brought to tax the distribution revenue received from DWIPL at the hands of the assessee by applying the rate of 15%. Though, the assessee raised objections before learned DRP against the additions made by the Assessing Officer, however, the objections were rejected.

6. Before us, learned counsel appearing for the assessee submitted that in assessment year 2006-07, the assessee had appointed BWIPL as a service provider to distribute the BBC World News Channels to cable operators, DTH operators, hotels etc. in India. He submitted, for distribution of channel to hotels the assessee had directly entered into the contract with third party distribution agency. He submitted, during the assessment

year 2006-07, the assessee had received Rs.94,58,039/- from third party distribution agency and hotels. He submitted, for other customers the assessee did not receive any distribution fee as the channel was free to air in India. He submitted, copyright over BBC World News Channel was completely vested with BBC World New Ltd. He submitted, when assessee itself did not have copyright in the content which is displayed on the channel, the assessee could not have transferred any copyright to BWIPL. He submitted, as per the terms of the agreement, the broadcasters licensed to receive the channel has not right to change, modify, alter or edit the contents, which are displaced on the channel. He submitted, the assessee had only been given non-exclusive license to reception and simultaneous re-transmission of the channel and the broadcast of the program in the territory. Thus, what the assessee has is a broadcasting reproduction right, which is completely different from copyright. He submitted, this broadcasting reproduction right has been passed on to BWIPL. Thus, he submitted, broadcasting reproduction right, being distinct from copyright, cannot be treated as royalty. In this regard, he relied upon a decision of the Hon'ble Bombay High Court in case of MSM Satellite (Singapore) Pte. Ltd. [2019] 106

taxmann.com 353 (Bombay). Further, he relied upon the decision of the Hon'ble Delhi High Court in case of ESPN Star Sports Vs. Global Broadcast News Ltd. and Ors. [2008] 38 PTC 477 (Del.). Additionally, he also relied upon the following decisions:

1. *ADIT Vs. Taj TV Ltd. [2016] 161 ITD 339 (Mumbai – Trib.)*
2. *DDIT(IT) Vs. SET India Pvt. Ltd. (ITA No.4372/Mum/2004)*

7. Insofar as assessment years 2007-08 and 2008-09 are concerned, learned counsel submitted, pursuant to Ministry of Information and broadcasting guidelines dated 11.11.2005, which mandatorily required Indian company to have exclusive distribution rights in a channel uplinked from abroad, inclusive of rights to subscription/revenue, the assessee entered into new agreement with BWIPL, under which, exclusive rights to BWIPL was granted to distribute the channel in India. Hence, BWIPL directly entered into contract with subscribers in its own rights and entire subscription revenue in these two years was received by BWIPL and was accounted in their books of account and offered to tax in India. He submitted, in these two assessment years no distribution revenue was received by the assessee. Thus, he submitted, taxing of notional income at the hands of the

assessee is unjustified. In support of his contention, learned counsel relied upon the following decisions:

- E.D. Sassoon & Co. Vs. CIT [1954] 26 ITR 27 (SC)
- CIT Vs. Shoorji Vallabhdas & Co. [1962] 46 ITR 144 (SC)
- Godhra Electricity Company Vs. CIT [1997] 225 ITR 746 (SC)
- CIT Vs. Excel Industries Ltd. [2013] 358 ITR 295 (SC)
- Shivnandan Buildcon Pvt. Ltd. Vs. CIT [2015] 60 taxmann.com 347

8. Insofar as the allegation of the departmental authorities that the assessee has a PE in India in the form of BWIPL in assessment years 2007-08 and 2008-09, learned counsel submitted that the issue is academic in nature as no attribution of profit can be made at the hands of the assessee as entire distribution revenue generated in India has been offered to tax in India by BWIPL. Without prejudice, he submitted, BWIPL cannot constitute a PE as the relationship between the assessee and BWIPL is on principal to principal basis. Thus, he submitted, the additions made should be deleted.

9. Learned Departmental Representative submitted, the transfer of distribution right is in the nature of copyright as per

Explanation 2(v) to section 9(1)(vi) of the Act as well as Article 12(3) of India – Mauritius Tax Treaty. He submitted, as per the definition of copyright under section 14 of the Copyright act, the distribution right transferred by the assessee comes within such definition. He submitted, even otherwise also the distribution revenue received by the assessee can be treated as royalty as defined under clause (iva) of Explanation 2 to section 9(1)(vi) of the Act as the consideration received is in respect of transfer of all or any right in respect of process and equipment. Thus, he submitted, the distribution revenue would be covered under equipment and process royalty.

10. As regards the existence of PE in India, learned Departmental Representative submitted, as per the guidelines issued by the Ministry of Information and Broadcasting, BWIPL, the Indian entity, has been authorized to conclude contract on behalf of the assessee. Therefore, there is a fixed place PE as well as dependent agent of the assessee in India in the form of BWIPL.

11. We have considered rival submissions and perused the materials on record. We have also applied our mind to the decisions relied upon. As far as the factual aspect relating to the issue in disputed is concerned, undoubtedly, neither the assessee

(BBCWD) nor the Indian entity BWIPL are owners of the BBC World News Channel. The materials placed on record clearly reveal that BBC World News Ltd. is the owner of BBC World News Channel. It is further evident, BBC World News Ltd. had entered into a distribution agreement with assessee granting non-exclusive global rights to distribute world news channel. The assessee in turn has appointed distributors for distributing BBC World News Channel in different areas. For distribution of channel in India, the assessee had entered into a distribution agreement with BWIPL. Facts on record reveal that in assessment year 2006-07, BBC World News Channel was available free for viewers, except in case of hotels and institutions. In assessment year 2006-07, the assessee received distribution/subscription revenue from the distribution of channels in India specifically to hotels and institutions. The Assessing Officer as well as learned Commissioner (Appeals) have treated the distribution revenue to be in the nature of royalty by primarily treating it as copyright under explanation 2(v) of section 9(1)(vi) of the Act. Since, the definition of copyright is not available either under India – UK Tax Treaty and the domestic law, the Assessing Officer and learned Commissioner (Appeals) have heavily relied upon the definition of

copyright as provided under the Copyright Act, 1957 and specifically the meaning of copyright as provided under section 14 of the Copyright Act. However, it is the contention of the assessee that what the assessee has conferred upon the BWIPL through the distribution agreement, at best, can be considered to be broadcasting reproduction right as defined under section 37 of the Copyright Act.

12. On going through the terms of the distribution agreement, firstly, between the BBC World News Ltd. and assessee and between the assessee and BWIPL, it is very much clear that while granting non-exclusive global right for distribution of BBC World News Channel to the assessee, BBC World News Ltd., which holds the copyright over the content of the BBC World News channel, has not parted with any of such right. In fact, the agreement makes it clear that while exercising the distribution right, the assessee cannot modify, alter, or make any change in the contents of BBC World News Channel. In view of such explicit condition imposed under the distribution agreement, it cannot be said that the assessee had any right over the copyright of the contents of the channel. When the assessee itself had no right over the copyright of the content of BBC World News Channel, it

is beyond comprehension, how the assessee can transfer such non-existent right in favour of BWIPL. Even, in the agreement between the assessee and BWIPL specific condition has been imposed that the distributor had no right to change, modify or alter or edit the content displayed on the channel. Thus, in sum and substance, what the assessee has conferred upon BWIPL through the distribution agreement is right to broadcast the channel circumscribed by certain conditions. In other words, BWIPL had only acquired broadcasting reproduction right as defined under section 37 of the Copyright Act. There are plethora of decisions, wherein, it has been very clearly and categorically held that broadcasting reproduction right as provided under section 37 of the Copyright Act is distinct and separate from copyright as defined under section 14 of the Copyright Act.

13. In case of MSM Satellite (Singapore) Pte. Ltd. (supra). Hon'ble Bombay High Court while interpreting the meaning of copyright under Article 12(3) of India – Singapore Tax Treaty, section 9(1)(vi) of the Income Tax Act and definition of copyright under the Copyright Act 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 calendar 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 stress 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 work 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 being 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 can not be categorized as royalty."

14. On a comparative analysis of Article 12(3) of India – Singapore DTAA and Article 13(3A) of India –UK DTAA it can be safely concluded that both the provisions are *pari materia*. Therefore, applying the ratio laid down by the Hon'ble Bombay High Court, as aforesaid, it can be concluded that the distribution revenue received by the assessee cannot be termed as royalty, either under section 9(1)(vi) of the Act or under the India – UK DTAA. While deciding more or less identical issue in case of ADIT Vs. Taj TV Ltd. (supra), the Coordinate Bench has held that while granting the distribution right no license to use any copyright is transferred to the distributor or the cable operator. The assessee only makes available the content to the cable operators via distributor which are transmitted by them to the ultimate customers/viewers. The right over the contents at all time lies with the ultimate owner of the content and are never made available to the distributor or the cable operator. Facts are identical in assessee's own case, inasmuch as, the assessee even does not own the copyright over the content which is broadcasted on the channel. It only has the right to distribute the channel to third party distribution agency and hotels in India. In case of DDIT Vs. SET India Pvt. Ltd. (supra), the Coordinate Bench has

held that the distribution right of a channel is purely commercial right and is distinct from the right to use the copyright, hence, cannot be characterized as royalty. The following observation of the Bench is of much relevance:

“6. 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 M/s. SET India Pvt Ltd 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

15. The aforesaid view expressed by the Coordinate Bench has been approved by the Hon’ble Bombay High Court while accepting that the right to distribute a channel is purely a commercial transaction and is distinct from copyright. In this regard, we may

refer to the decision of the Hon'ble Bombay High Court in case of Set Satellite (Singapore) Pvt. Ltd. Vs. Dy. DIT [2008] 307 ITR 205. Thus, in view of the aforesaid, we hold that the distribution revenue received by the assessee is not in the nature of royalty, hence, not taxable in India in absence of a PE. It is a fact on record that in assessment year 2006-07, the departmental authorities have not made any allegation of existence of PE. Accordingly, the addition is deleted.

16. Assessments years 2007-08 and 2008-09 stand on a slightly different footing. Undisputedly, in these two assessment years, the assessee had not received any distribution revenue for distribution of channel in India. Pursuant to new guidelines framed by the Ministry of Information and Broadcasting imposing a mandatory requirement that the Indian company appointed as a distributor must have exclusive right to enter into contract on behalf of the foreign company, the assessee had entered into a fresh agreement with BWIPL, in terms of which, BWIPL was authorized to calculate and receive entire distribution revenue from the cable operators and credit it to its books of account. Thus, in nutshell, the entire distribution revenue generated in India was accounted for in the books of account of BWIPL and no

part of it was shared with the assessee. It is also a fact that the entire distribution revenue has not only been accounted as income by BWIPL but profit derived there from has been offered to tax in India. The aforesaid factual position has not been controverted by the departmental authorities. However, the Assessing Officer as well as DRP has held that since as per the agreement the distribution revenue was required to be shared with the assessee, hence, a part of distribution revenue accrues at the hands of the assessee and has to be taxed in India as royalty. Further, the departmental authorities have held that since, BWIPL constitutes a fixed place PE and dependent agent PE, the distribution revenue is taxable in India.

17. Having considered the submissions of the parties, we are of the view that the approach of the departmental authorities in taxing the royalty income in these two assessment years is quite baffling. When, it is a fact on record that the entire distribution revenue generated in India from distribution of BBC World News Channel has been accounted for in the books of Indian entity and offered to tax in India, how a part of such income can be notionally attributed to the assessee and taxed in India. Firstly, as held by us earlier, the distribution revenue is not in the nature

of royalty and secondly when the assessee has not received any part of such revenue, which has been offered to tax at the hands of BWIPL, no part of such income can again be attributed to the assessee notionally and taxed in India. Therefore, the addition made has to be deleted.

18. In view of our decision above, the issue, whether the assessee had a PE in India in these two assessment years is purely academic in the nature, as, the entire income has been offered to tax by Indian entity. Before we part, for the sake of completeness, we must deal with the submission of learned Departmental Representative that the distribution revenue earned by the assessee would otherwise qualify as equipment royalty and process royalty under Explanation 2(iva) of section 9(1)(vi) of the Act. In our view, such argument of learned Departmental Representative is preposterous as no such finding has been recorded either by the Assessing Officer or by learned Commissioner (Appeals) and DRP.

19. At this stage, learned Departmental Representative cannot give a new dimension to the issue which was never the case of departmental authorities. In this regard, we rely upon the decision of the Coordinate Bench in case of Mahindra & Mahindra

Vs. DCIT, ITA No.2606, 2607, 2613 and 2614/Mum/2000. Thus, we reject the aforesaid contention of learned Departmental Representative.

20. In view of the aforesaid, we delete the additions made by the Assessing Officer.

21. In the result, all the appeals are allowed, as indicated above.

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