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

आ.अ.सं/.I.T.A No.740/Del/2021
निर्धारणवर्ष/Assessment Year: 2016-17

Cable News Network Inc. **C/o Price water house coopers Pvt. Ltd., Sucheta Bhawan, Gate No. 2, 1st Floor, 11-A, Vishnu Digamber,** **New Delhi.**	**बनाम** **Vs.**	**DCIT (International Taxation),** **Circle 1(2)(1),** **New Delhi.**
PAN No. AADCC2007P		
अपीलार्थी Appellant		**प्रत्यर्थी/Respondent**

निर्धारितीकीओरसे **/Assessee by**	**Sh. Rishabh Malhotra, AR**
राजस्वकीओरसे **/Revenue by**	**Shri Gangadhar Panda, CIT DR**

सुनवाईकीतारीख/ Date of hearing:	25.10.2022
उद्घोषणाकीतारीख/Pronouncement on	26.12.2022

आदेश /O R D E R

PER SAKTIJIT DEY, J.M.

This is an appeal by the assessee challenging the final assessment order dated 17.03.2021 passed under section 143(3) of the Income Tax Act, 1961, pertaining to assessment year 2016-17, in pursuance to the directions of learned Dispute Resolution Panel (DRP).

2. Registry has pointed out delay of 32 days in filing the present appeal. However, the assessee in letter dated 25.06.2021 has explained that there is no delay in view of the order of the Hon'ble Supreme Court dated 27.04.2021 extending the period of limitation after taking *suo motu* cognizance of the difficulties faced by the litigants in filing appeals, applications, etc. due to Covid-19 pandemic. Having taken note of the submissions of the parties, we are of the view that the present appeal of the assessee has to be admitted for adjudication on merits. Accordingly, we do so.

3. In ground nos. 1 to 5, the assessee had challenged the taxability of distribution revenue earned in India as royalty under section 9(1)(vi) of the Act, as well as under the provisions of India-USA Double Taxation Avoidance Agreement (DTAA).

4. Briefly the facts are, the assessee is a non-resident corporate entity, incorporated in the State of Delaware, United States of America (USA) and a tax resident of that country. The assessee derives income in India from sale of various advertisements and also from distribution of its products namely news and information. For selling the advertisements as well as products, the assessee has appointed Turner International India Private Limited (TIIPL) as its exclusive advertising sales representative in India. TIIPL is also

responsible for distribution of the products of the assessee. For the assessment year, under dispute, assessee filed its return of income on 30.11.2016 declaring income of Rs.11,10,85,020/-. The distribution revenue earned by the assessee in India was offered as business income. In course of assessment proceedings, the Assessing Officer observed that as per the past assessment history of the assessee, the advertisement revenue is taxable as business income in India, as the assessee had a PE in the form of TIIPL. However, as far as the distribution revenue is concerned, the Assessing Officer observed that it was treated as royalty both under the provisions of the Act as well as under the India-USA tax treaty. Thus, following the decision taken by the Assessing Officer in earlier assessment years, the Assessing Officer held that the distribution revenue received by the assessee is in the nature of royalty income and has to be taxed accordingly in India. Assessee objected to the aforesaid decision of the Assessing Officer before learned DRP. However, following their directions in assessee's own case in assessment year 2013-14, learned DRP endorsed the view taken by the Assessing Officer that the distribution revenue has to be taxed as royalty income.

5. Before us, learned Counsel appearing for the assessee, submitted that the issue in dispute is squarely covered by the decision of the Tribunal in assessee's own case in assessment years 2004-05, 2008-09, 2009-10, 2010-11, 2011-12, 2013-14 and 2014-15. In support, he placed a copy of the order dated 17.02.2022 passed by the Tribunal in ITA No. 6565/Del/2016 and others.

6. The learned Departmental Representative, though, fairly agreed that issue is covered by the decision of the Tribunal, however, he relied upon the observations of the Assessing Officer and learned DRP.

7. We have considered rival submissions and perused materials on record.

8. The facts on record clearly reveal that the issue, whether the distribution revenue has to be assessed as business income or royalty, is a recurring issue between the parties from past assessment years. In assessment year 2003-04, the competent authorities of India and USA reached an agreement under Mutual Agreement Procedure (MAP) holding that 10% of the advertising and subscription revenue received from India shall be deemed to be the net profit chargeable to tax in India. Undoubtedly, following the

MAP resolution, the assessee has offered its income in India in the impugned assessment year as well. However, the Department continues to assess the distribution/subscription revenue as royalty year after year. However, while deciding assessee's appeals having identical issue in past assessment years, the Tribunal in the order referred to above has allowed assessee's claim holding as under: -

> *"13. A perusal of the record shows that on identical set of facts in group company case in Turner Broadcasting System Asia Pacific, Inc. [TBSAP] vs. DDIT ITAs Ho. 1343/DEL/2014, 631/Del/2015, 4087/DEL/2016, 261Q/DEL/2017, the Tribunal has decided the controversy in favour of the assessee and against the Revenue.*
>
> *14. We find that the clauses of Distribution and Advertising Sales Agreement of TBSAP and CNN with TIIPL, remain to be the same. The assessee has furnished a clause-by-clause comparison, which are placed at pages 147 -155 of the paper book.*
>
> *15. A careful perusal of the clause by clause comparison shows that the terms and clauses are pari materia same except the difference in channels that have been distributed.*
>
> *16. A similar comparison of the assessment order in the case of TBSAP and the assessee has been furnished by the assessee which are exhibited at pages 156 to 160 of the paper book. A perusal of the same shows that the wordings and findings are identical.*
>
> *17. The Tribunal at Bombay in the case of MSM Satellite (Singapore) Pte Limited ITA No. 2523/Mum/201Q had the occasion to consider a similar quarrel in respect of subscription charges collected by MSM which were taxed as royalty for use of copyright and the co-ordinate bench held that the amount received by the Singaporean company cannot be brought to tax in India as royalty and the same is in the nature of business income.*

18. This decision has been approved by the Hon'ble High Court of Bombay and the Hon'ble Bombay High Court has emphatically observed that there is difference in copyright and broadcast reproduction right. The Hon'ble High Court observed as under:

> *"Section 37 of the Copyright Act, 1957 separately defines the broadcast reproduction right and, therefore, it is different from the payment of any copyright in literary, artistic or scientific work."*

19. As per Circular No. 6/2001, it has been clarified that subscription charges receivable for Foreign Telecasting Companies (FTCs) shall continue to be taxed in accordance with guidelines prescribed for advertisement revenue, i.e. as business income. The relevant extract of the Circular is as under:

> *"2..... Where an FTC is a resident of a country with whom India has a double Taxation Avoidance Agreement (OTAA), its business income (including receipts from advertisement) can be taxed only if it has a Permanent Establishment in India.*
>
> *3... Other kinds of income like subscription charges receivable from cable operators in respect of pay channels and income from the sale or lease of decoders, etc., shall continue to be taxed in accordance with the paragraph 2 above."*

20. In light of the above Circular, the co-ordinate bench in the case of group entity TBSAP [supra] has held as under:

> *"41. We have heard the rival submissions, perused the relevant finding given in the impugned orders as well as material referred to before us. The appellant-assessee is a US based Company and is tax resident of US. During the relevant assessment years, it has derived advertisement and distribution revenue from grant of exclusive rights to an Indian Company TIIPL to sale advertisement on the products and to distribute the products as incorporated above. The Indian Company has an exclusive distributor of the said products to the cable operators on principle to principle basis. The distribution agreement allowed the TIIPL to distribute the products to various cable operators and ultimately to consumers in India. The distribution revenue*

collected by the TIIPL was to be shared between the appellant. The ownership of copyright was stipulated in clause 5 of the agreement which is reproduced hereunder:

> *"5 Ownership as between TBSAP and Company:*
>
> *(a) TBSAP has the sole right to determine the content of the Products and reserves the right to change such content from time to time;*
>
> *(b) Subject to the license granted in Paragraph 4 above, all copyrights and other proprietary rights in the Products and in any promotional material relating to them are vested in and shall remain vested in TBSAP."*

Thus, in view of the said agreement the appellant had the sole right to determine the content of the products and also the right to change such content from time to time and secondly, all the copyrights and other priority rights in the products and in any promotional material vested in the appellant company alone. It is a copyright of the content in the product which always remained with the appellant-assessee and was never transferred. The clause merely provides right to distribute the product.

42. In the case of the assessee in the earlier assessment year, the competent authority of India and USA had reached the agreement that 10% of the advertisement and subscription revenue received from the Indian sources was deemed to be net profit from the business chargeable to tax in India. In line of such an agreement the assessee in Assessment Years 2007-08 and 2008-09 had related its income on the same basis as agreed by the competent authority of both the countries. Accordingly fully disclosed its computation of income along with notice to the tax computation filed during the return of income/assessment proceedings, the same has been accepted by the Department in the assessment orders for Assessment Years 2007-08 and 2008-2009. Though assessee's case was throughout had been that it does not have any kind of plea and the transaction with TIIPL are on principle to principle basis and even if TIIPL is an agent of independent status, then remuneration paid to TIIPL was at arm's length, and

therefore, TIIPL cannot be considered to be PE of assessee in India. It has been brought on record that in all the years and in subsequent years also Assessing Officer has held the advertisement revenue to be the business income following the MAP order. However, during the impugned assessment years, the said position has been digressed by the Assessing Officer without there being any material change in the facts and circumstances or the terms of agreement or the business mutual. Therefore, we are in tandem with the contention of the ld. counsel that when this fundamental aspect is permeating through different assessment years which have been accepted by the parties, then as a rule of consistency, the same position should not be altered or should be allowed to be changed.

43. Be that as may be, now we will independently analyse, whether distribution revenue on the facts of the present case can be considered as 'royalty' in terms of Article 12 of the DTAA between India and USA. Ld. Assessing Officer had applied the provision of domestic law u/s 9(l)(vi) and held that payment received by the assessee for grant of right or license to distribute the channel in India tantamount to transfer of rights including the granting of license in respect of any copyright, etc. would amount to royalty. The relevant finding and observation of the Assessing Officer has already been dealt above. On perusal of the material placed on record and the facts of the case it is quite evident that the appellant- assessee has merely granted rights to TIIPL to 'receive, promote, market, license, distribute and sub-distribute the products to cable, satellite, broadcast, hotel, interactive and telecommunication entities and other users", "sell advertising" and performing ancillary activities. Clause 5 as reproduced above provides the sole ownership of the rights and the contents of the products to the assessee company and Indian Company had no right to copy, modify or alter the content therein. The definition of royalty as given in Article 12(3) which has been reproduced above, envisages that "payments of any kind received as a consideration for the use of, or the right to use, any copyright of a literary, artistic, or scientific work, including cinematograph films or work on film, tape or other means of reproduction for use in

connection with radio or television broadcasting, any patent, trademark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience……."The Term copyright has not been defined in the DTAA albeit has been defined in Section 14 of the Copyright Act, 1957 as an exclusive right to do or authorize being of any of the acts specified in the said provision in respect of work or any substantial part thereof likewise work being defined in Section 2(y) of the said Act which is namely, 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. Section 37 of the Copyright Act separately defines broadcast reproduction right. The Term 'Copyright' has defined in Section 14 and 'broadcast reproduction right' has been defined in Section 37 and both are two distinctive and separate rights. 'Broadcast reproduction right' is not reckoned as copyright. Here, in this case, appellant never granted any licenses to use any copyright, either to distributor or to the cable operator albeit it has only granted right for purpose of selling advertisement on the product that are channels, etc. and distribution of such products in India. The Indian company is carrying out the distribution and selling of the advertisement and it does not have any kind of right to edit, interpret, add the products distributed by it. The assessee company only granted commercial rights in the nature of 'broadcast reproduction right' to the TIIPL, which has been separately defined u/s. 37 of the Copyright Act and therefore, it cannot be held that revenue derived by the assessee for distribution of products is taxable as 'royalty' albeit it is a business income of the assessee.

44. The Assessing Officer has tried to justify the tax the distribution revenue in the nature of royalty by applying the retrospective amendment made in Explanation-6 of Section 47 9(l)(vi) of the Act. Such an approach cannot be upheld because there is no similar amendment in the definition of royalty under the DTAA and it has been well settled by the Hon'ble Delhi High Court in the case of New Skies Satellite BV (supra), that amendment in the domestic law cannot be imported or read into DTAA.

45. The Ld. Departmental Representative has relied upon various clauses of the agreement between the Appellant Company and TIIPL to state that the content in the product was licensed to TIIPL. Accordingly, the amount received by the Appellant Company from TIIPL (Indian Concern) needs to be brought to tax as Royalty and not business income. However, the Ld. DR has completely ignored Clause 5 of the agreement (reproduced above). Considering the specific clause, no inference to the effect that the copyright of the content in the product has been transferred can be drawn. The clause makes it clear that the copyright in the content of the product always remains with the Appellant and is never transferred. The Appellant merely provides right to distribute the product. The ability to initiate legal action against the infringer of the copyright by TIIPL is merely a commercial term incorporated in the agreement to safeguard the interest of the appellant company which is situated in the United States.

46. The Ld. DR has also relied upon the down linking guidelines to state that in order to ensure that the channels are down linked in India an application must be made to the concerned authority in India by a company located in India. The assessee company must be an exclusive distributor of the channel and should have the ability to conclude contracts in India on behalf of the channel for the programme content. TIIPL has been granted exclusive distribution rights by the Appellant Company with respect to the products (channels) in India. Surely, TIIPL can enter into an agreement with respect to the content of the programmes but this right does not allow them to take ownership of the content. The copyright within the product has always been vested with the Appellant Company. The clause must be seen from a business prospective and in a wholesome manner. What is streamed is uplinked and down linked without any change in the content. The Indian distributor cannot separate content from the channel stream. The product in the case at hand is a channel and what is streamed is the content, all of which gets distributed without any separation or dissection. Accordingly, the amount received from TIIPL cannot be brought to tax as 'royalty' in the hands of the Appellant Company.

47. Ld. DR has tried to distinguish the facts of the captioned matter from the case of MSAA Satellite (Supra) and stressed heavily upon the ability of the consumer to 'store' and 'interact' with the content. However, the aforementioned factors cannot form basis for distinguishing the judgement rendered by the Hon'ble Bombay High Court. The crux and the core issue involved in the decision rendered by Hon'ble Bombay High Court and the impugned issue remains to be the same, i.e., whether the amounts received by a non-resident company for granting distribution rights to an Indian Company could be brought to tax as royalty or not. The Hon'ble Bombay High Court has categorically held that subscription charges received by MSM Satellite was for only viewing of the channels operated by it and it cannot be said that such revenue was for parting of any copyright. Accordingly, if the aforesaid principle of the Hon'ble Bombay High Court is to be followed, then the amount received by the appellant company from the Indian concern is to be brought to tax as Business Income.

48. Lastly, the Ld. DR has relied heavily upon the decision rendered by the Hon'ble Supreme Court in the case of Star India Private Limited v. Department of Industrial Policy and Promotions & Others. [C.A. Nos. 7326-7327 of 2018] to contend that the distribution fees[tariff] as received by the assessee relate to "content" which is protected and covered by the Copyright Act in form of "Copyright", "Broadcast Right" and/or "Rebroadcast Right". Accordingly, the amounts received by the Appellant Company needs to be brought to tax as Royalty.

49. If we go through judgment, it is seen that the issue before the Hon'ble Supreme Court was, whether the TRAI only had the power to regulate the means of transmission and did not have the authority to regulate the content of the program. The Petitioners in the concerned case wanted to be covered under the Copyright Act instead of the TRAI Act. However, the Hon'ble Supreme Court had held otherwise. Further, the question and the Act that were considered in the aforesaid decision has nothing to do with levy of Income-tax and characterization of income in the Income-tax Act, 1961. Accordingly, the ratio of Star India does not

have any direct application in the case at hand. The issue before the Hon'ble Apex Court was on the regulatory powers of TRAI and whether the same is inconsistent with the Copyright Act. Therefore, the legal question as well as the judgement of the Apex Court relate to a subject which is alien to the issue involved in the case at the hand. It is a settled position of law that without appreciating the ratio decidendi of the judgement i.e. the rule of law on which judgement is based, a judgment cannot be applied blindly on different set of facts. Thus, the reliance of the Ld. Departmental Representatives on the judgement of the Hon'ble Apex Court has no application in the case at hand.

50. However, if we read para 60 of the aforesaid decision, wherein the Hon'ble Apex Court while delivering the verdict has recognized that the broadcasting is a separate right from the Copyright. Relevant Paragraph for the sake of ready reference is reproduced hereunder:

> *"60. A reading of the aforesaid provisions, according to the learned Senior advocate for the appellants, makes it clear that broadcasters may, in fact, be the owners of the original copyright of a work- for example, if they themselves have produced a serial. They may also be the copyright owners of the broadcast of this serial which is a separate right under the Copyright Act which they are able to exploit, and if there is a re-broadcast of what has already been copyrighted, this again is protected by Chapter VIII of the Copyright Act."*
> *The argument before the Hon'ble Apex Court on the interpretation of the Copyright Act, 1957 was that, in case of a broadcaster there may be three different rights. First right when the broadcaster has produced the serial and second when they broadcast the serial and third again re broadcast. The Hon'ble Apex Court has concluded the same in para 64 as hereunder:*
>
> > *"The picture that, therefore, emerges is that copyright is meant to protect the proprietary interest of the owner, which in the present*

> *case is a broadcaster, in the "work", i.e. the original work, its broadcast and/or its re-broadcast by him."*

51. Consequently, even the observations of the Hon'ble Apex Court in fact supports the case of assessee and its reliance on Bombay High Court that the broadcasting right a separate right which cannot come within the purview of copyright gets fortified. Even at the cost of repetition, it is again reiterated that even as per the agreement the copyrights in the product/channel has not been transferred to the Appellant and therefore it would not fall in the first category i.e. wherein the broadcaster himself has produced the serial.

52. The Ld. DR was not correct to compare with the first example wherein the broadcaster himself has produced the serial which is not the case of the Appellant Company In fact the case of the Appellant is covered by the judgement of the Hon'ble Bombay High Court in the case of MSM Satellite (Singapore) Pte Ltd, (Supra) wherein the Hon'ble Bombay High Court emphatically observed that there is a difference in copyright and "broadcast reproduction rights". The Hon'ble High Court has observed that Section 37 of the Copyright Act, 1957 separately defines the broadcast reproduction right and therefore it is different from the payment of any copyright in literary, artistic or scientific work.

53. Just by way of reference, the famous treaty of Salmond on Jurisprudence, it is explained how a legal right is created. While explaining the jurisprudence behind the concept of right, it is mentioned as hereunder:

> *"It is to be noticed that in order that an interest should become the subject of a legal right, it must obtain not merely legal protection, but also legal recognition."*

Meaning thereby, a right can become a legal right only if it is recognized by law and also protected by law. It is further supported by the Latin maxim, Ubi Jus Ibi Remedium i.e. for every wrong there is a remedy. If one applies the same principle in the present case, the

copyright and broadcasting reproduction right has been separately recognized in different chapters of the Copyright Act, 1957. The Copyright is defined in Chapter III of the Copyright Act while the broadcasting reproduction rights are a part of Chapter VIII of the same Act. This means the law has recognized separately these two rights. Again separate legal protection is provided for these two different rights. Accordingly, even following the jurisprudential principle it may be observed that the law has itself recognized two different right and exploitation of one cannot be confused with the use of other.

54. Thus, we hold that the distribution revenue earned by the appellant-assessee cannot be taxed as royalty albeit as a business income. Since, assessee has already offered income as business income in terms of the MAP, therefore, the income as declared by the assessee in accordance with the MAP and accepted by the Department in the earlier years has to be accepted. Accordingly, the additions made by the Assessing Officer are deleted.

55. In the result, all the appeals of the assessee are allowed."

21. On findings the facts of the captioned appeals identical to the facts of the group entity TBSAP, we have no hesitation in following the decision of the co-ordinate bench and hold accordingly."

9. There being no factual difference brought to our notice by the revenue in the impugned assessment year, respectfully following the aforesaid decision of the Coordinate Bench rendered in assessee's own case, we hold that the distribution revenue received by the assessee cannot be treated as royalty. Accordingly, we delete the addition. These grounds are allowed.

10. In ground no. 6, the assessee has raised the issue of double taxation of distribution revenue, once as business income and again as royalty.

11. Having considered rival submissions, we find assessee's grievance to be correct. However, since, we have deleted the addition of distribution revenue by treating it as royalty, the grievance of the assessee is addressed, hence, no further decision is to be taken on the issue.

12. Ground nos. 7 and 8, challenging levy of interest under section 234A and 234B of the Act, being consequential in nature, do not require adjudication.

13. Ground no. 9, being pre-mature at this stage is dismissed.

14. In the result, the appeal is partly allowed.

Order pronounced in the open court on 26/12/2022

Sd/-	Sd/-
(G.S. PANNU)	**(SAKTIJIT DEY)**
PRESIDENT	**JUDICIAL MEMBER**

Dated: 26.12.2022

**Kavita Arora, Sr. P.S.*

Copy of order sent to- Assessee/AO/Pr. CIT/ CIT (A)/ ITAT (DR)/Guard file of ITAT.

By order

Assistant Registrar, ITAT: Delhi Benches-Delhi