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 Nos.814 & 815/Del/2021
निर्धारणवर्ष/Assessment Years: 2016-17 & 2017-18

Turner Broadcastng System Asia Pacific, Inc. C/o Price water house & Co. LLP, II-A, Sucheta Bhawan Vishnu Digamber Marg, New Delhi.	**बनाम Vs.**	**DCIT Circle 3(1)(1), New Delhi.**
PAN No. AABCT6254F		
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.

Captioned appeals have been filed by the assessee, challenging the final assessment orders passed under section 143(3) read with section 144C(13) of the Income Tax Act, 1961 for the assessment years 2016-17 and 2017-18, in pursuance to the directions of learned Dispute Resolution Panel (DRP).

ITA No. 814/Del/2021-Assessment Year 2016-17:

2. In ground nos. 1, 2 and 3, assessee has raised a common issue relating to taxability of distribution revenue received as royalty both under section 9(1)(vi) of the Income Tax Act, 1961, as well as under the India-United States of America (USA) Double Taxation Avoidance Agreement (DTAA).

3. Briefly the facts are, the assessee is a non-resident corporate entity, incorporated under the laws of USA and a tax resident of that country. As stated by the departmental authorities, in the year under consideration, the assessee derived income from grant of exclusive rights to Turner International India Private Limited (TIIPL) and India entity to sell advertising on the products and to distribute the products, namely, (a) satellite delivered television services, such as, "Cartoon Network, TCM Turner Classic Movies, POGO, Boomerang and WB"; (b) from interactive entertainment services known as "CartoonNetworkIndia.com and POGO tv"; and (c) from entertainment mobile telecommunication services "Cartoon network Mobile and Boomerang Mobile". In the year under dispute, the assessee earned revenue of Rs.1,780,000,000/- from selling advertising right and Rs.1,290,000,000/- from distribution of products. The assessee offered the income derived as income from

business. In course of assessment proceedings, the Assessing Officer noticed that in assessee's own case in preceding assessment years the Assessing Officer has held that the distribution revenue is taxable in India as royalty income, both under the provisions of Act as well as under the tax treaty. Thus, based on the decision taken in the earlier assessment years, the Assessing Officer issued a show -cause notice to the assessee to explain why the distribution revenue should not be taxed as royalty. In response, the assessee filed its reply objecting to the proposed action of the Assessing Officer. However, the Assessing Officer did not find merit in the submissions of the assessee. Ultimately, while framing the draft assessment order, the Assessing Officer concluded that the distribution revenue received by the assessee is in the nature of royalty, hence, brought it to tax @10% by applying the provisions of Section 115A of the Act. Assessee contested the aforesaid addition by raising objections before learned DRP. However, by relying upon the directions issued in assessee's case in assessment year 2010-11 to 2015-16, learned DRP held that the distribution revenue earned by the assessee in India is in the nature of royalty under section 9(1)(vi) of the Act as well as under Article 12 of the India-USA DTAA.

4. Before us, learned Counsel appearing before the assessee submitted that identical issue arising in assessee's own case in assessment years 2009-10, 2010-11, 2012-13 & 2013-14 have been decided by the Tribunal in favour of the assessee by holding that the distribution revenue has to be assessed as income from business and not royalty. He submitted, the decision of the Tribunal was based on the fact that the assessee has offered the income from distribution revenue as business income in terms of Mutual Agreement Procedural (MAP) approved by the authorities of both the countries and which was accepted by the Department in the earlier years. He submitted, same view was reiterated by the Tribunal while deciding assessee's appeals for assessment year 2014-15 in ITA No. 4325/Del/2018 dated 08.12.2021 and for assessment year 2011-12 and 2015-16 in ITA NO. 2172 & 2173/Del/2019 dated 31.05.2022. Thus, he submitted, the issue stands settled in favour of the assessee.

5. Though, learned Departmental Representative fairly agreed that the issue in dispute is covered in favour of the assessee by the decisions of the Tribunal in earlier assessment years, however, he relied upon the observations of the Assessing Officer and learned DRP.

6. We have considered rival submissions and perused the materials on record.

7. Perusal of the respective orders of the Assessing Officer and learned DRP make it clear that this is a recurring issue between the assessee and the Revenue from past assessment years. While the assessee has all along claimed that the distribution revenue earned by the assessee in India is taxable as business income, the Department has consistently held that it is to be assessed as royalty income under section 9(1)(vi) Act, as well as Article 12 of India – USA DTAA. However, while deciding the issue for the first time in assessment years 2009-10, 2010-11, 2012-13 and 2013-14, the Tribunal in ITA NO. 1343/Del/2014 and others dated 30.09.2020 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 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 9(1)(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 MSM 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.

8. Identical view has been reiterated by the Tribunal, while deciding assessee's appeal for assessment years 2014-15, 2011-12 and 2015-16 in the orders referred to above. Thus, in absence of any factual difference in the impugned assessment year, respectfully following the consistent view of the Coordinate Benches while deciding identical issue in assessee's own case, we

hold that the distribution revenue earned by the assessee in India has to be taxed as business income and not as royalty. Accordingly, we delete the addition made by the Assessing Officer. These grounds are allowed.

9. In ground no. 4, assessee has raised the issue of short grant of TDS to the extent of Rs.43,920/-.

10. Having considered rival submissions, we direct the Assessing Officer to factually verify assessee's claim with reference to Form 26AS and TDS certificate and, thereafter, allow credit for tax deducted at source in accordance with law. This ground is allowed for statistical purposes.

11. In ground no. 5, the assessee has challenged the adjustment of Rs.26,00,831/- made by the Assessing Officer without assigning any reason.

12. Having considered rival submissions, we direct the Assessing Officer to verify assessee's claim factually and decide the issue in accordance with law. This ground is allowed for statistical purpose.

13. Ground no. 6 being pre-mature at this stage is dismissed.

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

ITA No. 815/Del/2021 Assessment Year 2017-18:

15. Ground no. 1 to 3 are identical to ground no. 1, 2 and 3 of ITA No. 814/Del/2021 decided by us in the earlier part of the order. Facts being identical, our decision therein will apply *mutatis mutandis* to these grounds as well. Accordingly, the addition made is deleted. These grounds are allowed.

16. In ground no. 4, assessee has raised the issue of short grant of TDS credit to the extent of Rs.8,57,481/-.

17. Having considered rival submissions, we direct the Assessing Officer to factually verify assessee's claim with reference to Form No. 26AS and TDS certificate and, thereafter, allow credit for TDS in accordance with law. This ground is allowed for statistical purposes.

18. Ground no. 5 is not pressed, hence, dismissed.

19. Ground no. 6 and 7 on the issue of levy of interest under section 234B and 234C of the Act, being consequential in nature, do not require adjudication.

20. Ground no. 8 being pre-mature at this stage is dismissed.

21. In the result, appeal is partly allowed. To sum up both the appeals are 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