

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH “D”: NEW DELHI**

**BEFORE SHRI NARENDRA KUMAR BILLAIYA, ACCOUNTANT MEMBER
AND
SHRI KUL BHARAT, JUDICIAL MEMBER**

**ITA No. 7903/DEL/2018
[Assessment Year: 2014-15]**

ESS (Formerly known as ESPN Star Sports), C/o Star India Pvt. Ltd., Star House, Urmi Estate, 95, Ganpatrao Kadam Marg, Lower Parel West, Mumbai-400013 PAN- AABCE0838N	<u>Vs</u>	ACIT, Circle-1(2)(2), International Taxation, New Delhi.
APPELLANT		RESPONDENT
Assessee represented by	Sh. Porus Kaka, Sr. Adv.	
Department represented by	Sh. Gangadhar Panda, CIT-DR	
Date of hearing	15.12.2022	
Date of pronouncement	21.02.2023	

ORDER

PER KUL BHARAT, JM:

This appeal, by the assessee, is directed against the assessment order dated 8.10.2018 passed u/s 143(3) read with section 144C(13) of the income-tax Act, 1961, hereinafter referred to as the “Act”, pertaining to the assessment year 2014-15. The assessee has raised following grounds of appeal:

“Based on the facts and circumstances of the case, ESS (hereinafter referred to as the ‘Appellant’) respectfully craves leave to prefer an appeal against the order passed by the Assistant Commissioner of Income-tax (International Taxation) - 1(2)(2), New Delhi (‘AO’) in pursuance of the directions issued by Dispute Resolution Panel - I (‘DRP’), New Delhi, under Section 253 of the Income-tax

Act, 1961 ('Act') on the following grounds which are independent and without prejudice to each other:

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

Ground number 1

erred in determining the total income of the Assessee at Rs 842,51,96,560 instead of Rs 90,35,46,340, as declared by the Assessee in its return of income.

Ground number 2

erred in characterizing the income earned by the Assessee from sub-licensing of 'Designated Rights' pertaining to 'live' transmissions of sporting events amounting to Rs 752,16,50,223 as 'Royalty' under the Act.

Ground number 3

erred in holding that the income earned by the Assessee from sub-licensing of 'Designated Rights' pertaining to 'live' transmissions of sporting events is for use of 'Process' as per Explanation 2 to Section 9(l)(vi) of the Act

Ground number 4

erred in holding that the income received by the Assessee from sub-licensing of 'Designated Rights' pertaining to 'live' transmissions of sporting events involves transfer of rights in respect of a 'Process' as per Explanation 6 to Section 9(l)(vi) of the Act

Ground number 5

failed to appreciate the fact that sub-licensing of sports broadcasting rights comprising of 'live' and 'non-live' rights to SIPL are to be exploited using the radio, television, theatrical, mobile, etc. platform

Ground number 6

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

Ground number 7

erred in granting short credit of taxes deducted at source amounting to 2,03,36,66,125 without appreciating the fact that the same is reflected in Form 26AS.

Ground number 8

erred in levying interest under Section 234B of the Act of Rs 1,11,83,15,110

Ground number 9

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

2. Facts giving rise to the present appeal are that the assessee, a foreign company, filed its return of income on 28.11.2014 declaring total income of Rs. 90,35,46,336/-. The case was picked for compulsory scrutiny through CASS. The Assessing Officer referred the matter to Transfer pricing Officer (“TPO”) after obtaining the prior approval of the Competent Authority. However, he did not propose any adjustment. Thereafter, a draft assessment order was passed whereby the Assessing officer proposed addition of royalty income amounting to Rs. 752,16,50,223/-. Aggrieved against this the assessee filed its objection before the learned Dispute Resolution Panel (DRP), who after considering the submissions and the objections of the assessee upheld the adjustment made by the AO. Thereafter, the Assessing Officer passed final order dated 8.10.2018. Thereby he assessed income of the assessee at Rs. 842,51,96,560/- after making the addition of Rs. 752,16,50,223/-. Aggrieved against this the assessee is in appeal before this Tribunal.

3. Ground nos. 1 to 6 in this appeal are against the addition of Rs. 752,16,50,223/-, treating thereby the sub-license of designated right as royalty under the Act.

4. Apropos to these grounds, learned counsel for the assessee vehemently argued that the authorities below were not justified to make the impugned addition and the issue is

squarely covered in a catena of decisions in favour of the assessee. In support of his contention, the learned counsel placed reliance on the various case laws, as below:

- Fox Network Group Singapore Pte Ltd. [121 taxmann.com 330 (Delhi-Trib.)]
- Delhi Race Club (1940) Ltd. [51 taxmann.com 550 (Delhi High Court)]
- Neo Sports broadcast (P.) Ltd. [15 taxmann.com 175 (Mumbai-Trib.)]
- Nimbus Communications Ltd. [32 taxmann.com 53 (Mumbai-Trib.)]
- Taj TV Ltd. [ITA no. 1079/M/2008 and ITA No. 3702/M/2005 (Mumbai-Trib.)]
- MSM Satellite (Singapore) Pte. Ltd. [106 taxmann.com 353 (Bombay)]
- Set India private Limited [ITA No. 1347 of 2013 (Bombay)]
- Set India private Limited [ITA No. 4372 of 2004 (Mumbai-Trib.)]
- Star India Private Limited (ITA no. 1536/Mum/2005)]
- Taj TV Limited [161 ITD 339 (Mumbai-Trib.)]
- Turner Broadcasting System Asia Pacific Inc. [120 taxmann.com 155(Delhi-Trib.)]
- ESS Distribution (Mauritius) [145 taxmann.com 267 (Delhi-Trib.)]

5. Learned counsel for the assessee submitted that the issue is no more res-integra, has already been decided in favour of the assessee. Learned counsel took us through the decision of the Tribunal rendered in the case of Fox Network Group Singapore Pte Ltd. Vs. ACIT (International Taxation) New Delhi. He drew our attention to paras 19 to 21 of the decision. Learned counsel thereafter took us through the judgment of the Hon'ble Delhi high Court rendered in the case of Delhi Race Club (1940) Ltd. 51 taxmann.com 550 (Delhi) to buttress the contention that live coverage does not fall u/s 9(1)(i) or Section 9(1)(vi) of the Act. Thereafter, the learned counsel took us through the decision of the Coordinate Bench rendered in the case of DCIT (International Taxation) Vs. Nimbus Communications Ltd. (ITA Nos. 1598 & 2270/Mum/2011)

6. On the other hand, learned DR opposed the submissions of the learned counsel for the assessee. He strongly relied on the orders of authorities below to buttress the contention.

7. Heard the learned representatives of the parties and perused the material available on record. We find that under identical facts the co-ordinate Bench of this Tribunal in the case of Fox Network Group Singapore Pte. Ltd. [121 taxmann.com 330 (Delhi-Trib.)], has decided the issue under consideration by observing as under:-

“20. This precise issue had come up for consideration before the Hon'ble Jurisdictional High Court in the case of Delhi Race Club (supra) that, whether any payment for broadcast or live coverage will constitute copyright, and therefore, is taxable under the ambit of royalty in terms of. Explanation 2 to Section 1(vz). The fact of that case was that assessee had made payment to other clubs/centers on account of live telecast of horse racing. The Assessing Officer has made the disallowance u/s. 40(a)(ia) on account of royalty paid to other centers for live telecast. According to him, the same was covered under section 194J. The contention of the Revenue before the Hon'ble High Court was:

- (i) clause (v) to Explanation 2 to clause (vi) of sub-section (1) of section 9 is not restricted to Copyright and the use of the words 'literary' and artistic' under clause (v) of Explanation 2 could not have been used for excluding 'copyrights' in areas of drama, music, etc,*
- (ii) Further, the live telecast of an event is outcome of 'scientific work' which makes telecast of event possible at a distant place over television and the transaction in the instant case covered.*
- (iii) The 'rights of broadcasting' was akin to 'copyright'.*

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

21. After considering the definition of 'Royalty' as given in section 9(1)(vz) and relying upon various sections of Copyright Act, Their Lordships held that:—.

- It is not in dispute that the payment has been made by the respondent*

assessee to other clubs/centres on account of live telecast of races. The payment of 'royalty' is covered under section 194J which was inserted with effect from 13-7-2006. The said section, contemplates that in the eventuality a payment is made towards 'royalty', an amount equal to 10 per cent of such sum needs to be deducted as income-tax on income comprised therein. Explanation (ba) to the section stipulates 'royalty' shall have the same meaning as in Explanation 2 to clause (vi) of sub-section (1) of section 9. [Para 7]

- A perusal of clause (v) would reveal that consideration for transfer of all or any rights in respect of any 'copyright' and the word 'copyright' is followed by the words 'literary', 'artistic' or 'scientific work'¹. It also exists in other works like dramatic, musical etc. It is not in dispute that 'copyright' exists in literary and artistic work, It also exists in other works like dramatic musical etc. If the intention of the legislature was to include other work like dramatic, musical etc. the legislature would have said so or would, not have qualified the word 'copyright' with the words 'literary' and 'artistic' as the word 'copyright' encompasses in itself all the categories of work. Having done it is a case of Expressio Unis'. (The mention of one thing is the exclusion of the other). It was also noted that the word 'copyright' does not synchronize with the word 'literary', 'artistic' as they are the works in which 'copyright' exists. The provision if read as suggested by the revenue to that extent would be meaningless. Thus, the provision would be more meaningful if the word in is read by implication in-between the words-'copyright' and 'literary'. [Para 8]

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

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

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

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

- A live TV coverage of any event is a communication of visual images to the public and would fall within the definition of the word 'broadcast' in section 2(dd). That apart it was noted that section 13 does not contemplate broadcast as a work in which 'copyright' subsists as the said section contemplates 'copyright' to subsist in literary, dramatic, musical and artistic work, cinematograph films and sound recording. Similar is the provision of section 14 of the Copyright Act which stipulates the exclusive right to do certain acts. A reading of section 14 would reveal that 'copyright' means exclusive right to reproduce, issue copies, translate, adapt etc. of a work which is already existing. [Para 16]

- Adverting to the facts of the instant case, it was noted that the assessee was engaged in the business of inducting horse races and derived income from betting, commission, entry fee etc. and had made payment to other centres whose races were displayed in Delhi It is not known whether such races had my commentary or analysis of the event simultaneously. It is not the case of the revenue that the live broadcast recorded for rebroadcast purposes. Having held that the broadcast/live telecast is not a work within the definition of 2(y) of the Copyright Act and also that broadcast/live telecast doesn't fall within the ambit of section 13 of the copyright Act, it would suffice to state that a live telecast/broadcast would have no 'copyright'. This issue is well settled in view of the position of law as laid down by this Court in case of ESPN Star Sport v. Global Broadcast News Ltd. 2008 (38) PTC -"7, wherein this Court after analysing the provisions of the Copyright Act was of the view that legislature itself by terming broadcast rights as those akin to 'copyright' clearly brought out the distinction between two rights in Copyright Act, 1957. According to the Court, it was a clear manifestation of legislative intent to treat copyright and broadcasting reproduction rights as distinct and separate rights. It also held that the amendment of the Act in 1994 not only extended such rights to all broadcasting organizations but also clearly crystallized the nature of such rights. The Court did not accept the contention of the respondent that the two rights are not mutually exclusive by holding that the two rights though akin are nevertheless separate and distinct. [Para 17]

- In view of the aforesaid position of law which brought out a distinction between a copyright and broadcast right, suffice would it be to state that the broadcast or the live coverage does not have a 'copyright' Thus, in view of the conclusion of this Court in ESPN Star Sports case (supra), the submission of the revenue that the word 'Copyright' would encompass all categories of work including musical, dramatic, etc, and also his submission that the Copyright Act acknowledges the broadcast right as a right similar to copyright needs to be rejected. [Para 18]

- Insofar as the submission of revenue that the live telecast of an event is the outcome of 'scientific work' and payment thereof would be covered

under the definition of 'royalty' is concerned, the said submission is also liable to be rejected first it runs contrary to his earlier submission and also for the simple reason the clause (v) to Explanation 2 to clause (vz) or sub-section (1) of section 9 would relate to work which includes films or videotapes for use in connection with television or tapes for use in connection with radio broadcasting. It is to be seen whether consideration for transfer of all or any rights of 'scientific work' including films or videotapes would include a live telecast. The clause is an inclusive provision for films or videotapes for use in connection with television or tapes for use in connection with radio broadcasting. It was noted that such a case was not set up by the revenue before the authorities below. It was held by the Assessing Officer that when any person pays any amount for getting rights/licence to telecast any event (which is a copyright of particular person i.e. no one can copy it for direct telecast or deferred telecast) then amount so paid is to be treated as 'royalty' and very much covered under section 9(l)(vz). In other words, the ground of the revenue was limited to the aspect of copyright. That apart we find, no such ground has been taken by the revenue even in this appeal. The 'scientific work' has not been defined in the Act nor in the Copyright Act It is not necessary that because the live telecast of an event is being done at a distant place, the same would be a 'scientific work'. Even otherwise, even by stretching this meaning, it is difficult to include a live broadcast within scientific work'. Clause (v) expressly uses the words 'including films or videotapes for use in connection with television or tapes for use in connection with radio broadcasting'. These words become relevant to understand the scope of this part of the provision Suffice to state, when reference is made to films or video tapes, then the intent of the provision is related to work of sound recording or any medium or video tape and can be seen on television surely such a work does not include a live telecast. This submission is also need to be rejected. Insofar as the submission of revenue that analysis, commentary and use of technology to live feed make the broadcast a subject matter of distant copyright is concerned, again neither such a case was set up before the authorities, nor in this appeal. In fact it is not known nor pleaded that the live telecast, in this case, was accompanied by commentary, analysis etc. It is an issue of fact, which cannot be gone into or raised at this stage. [Para 19]

22. *The aforesaid principle and sequitur of the judgment of the Hon'ble Jurisdictional High Court clearly clinches the issue in favour of the assessee, wherein it has been categorically held that there is a clear distinction between a copyright and a broadcasting right, broadcast or live coverage which does not have a copyright, and therefore, payment for live telecast is neither payment for*

transfer of any copyright nor any scientific work so as to fall under the ambit of royalty under Explanation 2 to Section 9(1)(vi).

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

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

8. In the present case the facts and issues are identical. We do not see any reason to deviate from the reasoning of Hon'ble Co-ordinate bench in the case of Fox Network Group Singapore Pte. Ltd. (supra). We, therefore, direct the Assessing Officer to delete the impugned addition.

9. As regards the issue raised in ground no. 7, relating to grant of short credit of taxes deducted at source amounting to 2,03,36,66,125, though reflected in Form 26AS, we direct the Assessing officer to verify the same and grant correct credit of taxes deducted at source. Ground is allowed for statistical purposes.

10. Ground no. 8, relating to charging of interest of interest u/s 234B is consequential. The Assessing officer will recalculate the charging of interest, if any, while giving effect to the appellate order.

11. Ground no. 9 relating to initiation of penalty proceedings u/s 271(1)(c) of the Act is premature and needs no adjudication.

12. Appeal of the assessee is partly allowed.

Order pronounced in open court on 21st February, 2023.

Sd/-
(NARENDRA KUMAR BILLAIYA)
ACCOUNTANT MEMBER

Sd/-
(KUL BHARAT)
JUDICIAL MEMBER

MP

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