IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "H",MUMBAI

BEFORE SHRI AMIT SHUKLA (JUDICIAL MEMBER)
AND
MS. PADMAVATHY S. (ACCOUNTANT MEMBER)

I.T.A. No.1814/Mum/2014
(Assessment year : 2009-10)

Star Television Entertainment Ltd (Since amalgamated with Star India Pvt Limited) STAR House, Urmi Estate 95, Ganpatrao Kadam Marg Lower Parel (west) Mumbai - 400013 **PAN – AAICS2535B**		Deputy Commissioner of Income Tax (International Taxation) – 2(1) Scindia House Mumbai – 400038
APPELLANT		**RESPONDENT**

I.T.A. No.1813/Mum/2014
(Assessment year : 2009-10)

Star Asian Region FZ LLP (Since amalgamated with Star India Pvt Limited) STAR House, Urmi Estate 95, Ganpatrao Kadam Marg Lower Parel (west) Mumbai - 400013 **PAN – AAJCS3494A**		Deputy Commissioner of Income Tax (International Taxation) – 2(1) Scindia House Mumbai - 400038
APPELLANT		**RESPONDENT**

Present for the Assessee	Shri Porus Kaka, a/w.Shri Divesh Chawla
Present for the Department	Shri Himanshu Sharma, Sr DR

Date of hearing	09/10/2023
Date of pronouncement	08/12/2023

O R D E R

Per Bench:

These two appeals are against the final order of assessment passed under section 143(3) r.w.s.144C(13) of the Income Tax Act (the Act) by the Deputy Director of Income-tax-2(1), Mumbai dated 28/01/2014 in the case of Star Television Entertainment Ltd (STEL) and dated 27/11/2014 in the case of Star Asian Region FZ LLP (SARF). Since the issues contended are common for both these assessees the appeals were heard together and disposed of by this common order.

2. The common issues contended in both the appeals through various grounds are tabulated below:-

Sr No.	Particulars / Issues	SARF	STEL
1	General Ground	Gr.No.1-3	Gr.No.1-3
2	Rejection of the comparability analysis carried out by the Appellant	Gr.No.4-6	Gr.No.4-6
3	Non application of PSM approved by the TPO for AE transaction to third party transaction	Gr.No.7 & 11	Gr.No.7 & 11
4	Application of certain TP principles	Gr.No.8-10	Gr.No.8-10
5	Double taxation of India sourced revenue at the Arm's length rate determined by the TPO, i.e. 13.54% without considering the 50:50 split of revenues between STAR Ltd and Channel Companies as approved by the TPO	Gr.No.12-14	Gr.No.12-14
6	Transfer of Channels (i.e. Vijay TV and STAR World) held liable to tax in India as Short Term Capital Gain by holding that the channel / assets of the channel are located in India	Gr.No.15-16	Gr.No.15-16
7	Taxation of royalty income (income from transfer of content) at the rate of 42.23% instead of the applicable rate of 10.5575% on gross basis	Gr.No.17	-
8	Short grant of credit of TDS amounting to Rs.1,82,84,887	-	-
9	Non grant of credit of advance tax amounting to	-	-

	Rs.40,66,863 and short grant of credit of SA Tax amounting to Rs.5,99,465		
10	Initiation of penalty proceedings under section 271(1)(c), 271A and 272B of the Act	Gr.No.18-20	Gr.No.17-19

ITA 1814/Mum/2014 - Star Television Entertainment Ltd (STEL)

3. The assessee is a non resident company and is a tax resident of Hong Kong belonging to the Star Television group of companies. During the year under consideration, the assessee filed the return of income on 30/09/2009 declaring total income at Rs.26,31,85,239/-. Subsequently, assessee filed a revised return of income on 30/03/2011 declaring total income at Rs.50,30,92,046/-. The case was selected for scrutiny and statutory notices were duly served on the assessee. A reference was made to the Transfer Pricing Officer (TPO) in order to determine the arm's length price of the transactions the assessee has entered into with its Associated Enterprises (AEs). The TPO made an adjustment of R.25,64,77,167/-. The assessing officer was of the view that the income arising to the assessee in India out of the non-AE transactions, was out of the purview of TPO and had to be determined by assessing officer. Accordingly he proceeded to compute the income from non-AE transactions at a reasonable percentage of the turnover which is determined at 28%. The Assessing officer applied the said percentage on the gross turnover in non-AE transactions to make an addition of Rs.215,71,87,007 towards income from non-AE transactions. The assessing officer also revised the income from AE transactions to Rs.32,92,61,172 as against the ALP adjustment proposed by the TPO. In addition the Assessing Officer also made an addition of Rs.42,55,32,513/- towards capital gains on transfer of channel "Star World" to "Star International Movies Ltd", a Hong Kong based company. Aggrieved, the

assessee filed its objections before the Dispute Resolution Panel (DRP), who confirmed the TPO adjustment as well as the addition made by the Assessing Officer. The assessee is in appeal before the Tribunal against the final order of assessment passed by the Assessing Officer pursuant to the directions of the DRP.

TRANSFER PRICING ADJUSTMENT

4. For the year under consideration, the assessee has entered into the following transactions with other entities in the star group as reported in form 3CEB.

- License to use Star Mark in combination with Channel Mark from Star Ltd
- Agency services availed by Channel Companies from Star Ltd in connection with sale of advertisement airtime, distribution of channels and syndication of content including services relating to pre-production, post production, playout, uplinking and transmission through transponder
- Procurement of content by Channel Companies from Star India Private Limited ('SIPL') and Vijay Television Private Limited (' VTPL')
- Availing of management services by Channel Companies from Star Ltd
- Grant of license for distribution of channels by the Channel Companies to Star Den Media Services Private Limited ('Star Den')
- Grant of license for the purpose of syndicating content in India by STEL to SIPL . Grant of license for mobile content b STEL to SIPL
- Availing of support services for organizing an event by STEL from SIPL
- Sale of advertisement spots to SIPL and Star Entertainment Media Private Limited.

5. The assessee has shown the transfer pricing analysis considering the transactions between the assessee and the following companies, viz. –

1. Star Televison Asian Region Ltd (STAR Ltd)
2. Star International Movies Ltd (SIML)
3. Star Asian Movies Ltd (SAML)
4. Star Asian Region FZ LLP (SAR)
5. Channel V Networks Ltd – Partnership (Channel V)

All the above companies are foreign companies and are engaged in the satellite television business and derived revenues, from various markets across Asia and other parts of the world including Indian markets from sale of advertisement time on television channel, distribution of television channel and indication of contents of channel. It was stated in the transfer pricing report that the Star group as a whole would constitute an entrepreneur vis-à-vis the third party comparables engaged in television business. It was further stated that each of the companies has unique intangibles and undertakes entrepreneurial activities necessary to start a successful channel operation business on an overall basis. In the TP study, the assessee has adopted the profit split method (PSM) as the most appropriate method. In order to apply the PSM, the consolidated global profitability of channel companies was applied to the Indian revenues generated by the channel companies for the 12 months period, 01/04/2008 to 31/03/2009. Step by step process of computing the profits taxable in India has been outlined as below:-

(i) The global profitability percentage based on the audited financial statements of the Channel Companies for the year ended June 30,2009 was applied to the India revenues earned by the Channel Companies for the 12 month period April 1, 2008 to March 31,2009 to ascertain the profitability in respect of the India revenues earned by the Channel Companies.

It may be noted here that at the time of filing the original return of income, the audited financial statements of the Channel Companies for the year ended June 30,2009 were not available, given which the profitability as per the unaudited financial statements for the 9 month period ended March 31, 2009 was considered. However, pursuant to availability of the audited financial statements for the year ended June 30, 2009, the returns were revised to factor in the revised profitability.

(ii) While computing the global profitability of the Channel Companies based on the financial statements for the year ended June 30,2009, any profit / loss earned / incurred to / by the Channel Companies on account of the business not

related to channel broadcasting was eliminated, since such transactions would qualify as extraordinary transactions.

(iii) As per the arrangements entered into by the Channel Companies with Star Ltd, Star Ltd is entitled to a fee which is calculated so as to recover all the costs that are incurred by Star Ltd in respect of marketing advertisement airtime on Channels, distributing the Channels and syndicating the content telecasted on the Channels in addition to 50 percent of the overall profit on the Channel operations (which is calculated after considering the costs incurred by Channel Companies and the above costs of Star Ltd, as adjusted against the overall revenues from the Channels).

(iv) Based on the above arrangements, the profits earned by Star Ltd and attributable to India revenues ought to be equal to the profits earned by the Channel Companies (subject to other non operating income earned by either of the Specified AEs).

Accordingly, the total profits earned by the Channel Companies from India (as computed above) were also considered as profits earned by Star Ltd from India during the period April 1,2008 to March 31, 2009.

(v) The above profits earned by the Channel Companies and Star Ltd were consolidated to determine the total profits earned in respect of the India revenues for the 12 month period April 1. 2008 to March 31, 2009

vi) Since the profits earned by the Channel Companies and Star Ltd were consolidated, the consolidated profit effectively denoted the profits based on third party revenues and third party costs.

6. The consolidated profits computed above as a percentage of the total revenues earned by the Channel Companies from India during the 12 month period April 1,2008 to March 31,2009 translated into an overall profit rate of 8.48 percent the detailed computation which is provided below:

Channel Companies	India revenues	Global profitability percentage – as per global financial statements for the year ended Jun 30, 2009	Arm's length profit attributable to India
STEL	10,136,005,721	4.96%	502,304,311
SIML	1,292,907,615	12.27%	158,672,687

SAML	1,702,206,539	8.56%	15,789,233
Channel V	613,496,612	-3.29%	(20,177,865)
SAR	2,854,166,988	-2.91%	(83,143,494)
Total	16,598,783,475		703,444,873
Star Ltd			703,444,873
Total profits including Star Ltd			**1,406,889,746**
Total India revenue of Channel Companies			**116,598,783,475**
Profit as a percentage of total revenue			**8.48%**

7. The assessee submitted that though there was no need for benchmarking under PSM, with a view to avoid litigation, the assessee has chosen 9 comparables, the average margin of which was given to be 4.85% based on weighted average of earlier years. Accordingly, the assessee held that the transactions with AEs are at arm's length. The TPO observed that out of the comparables chosen by the assessee, the following companies are loss making or low profit making and called on the assessee to show cause why the company could not be excluded:-

Sr.No.	**Company name**	**2009 (net profit on revenue)**
1.	Aastha Broadcasting Network Ltd	-291.23%
2.	Jain Studios Ltd (consolidated)	-15.87%
3.	Television Eighteen India Ltd (consolidated)	-34.96%
4.	Raj Television Network Ltd	1.04%

8. The assessee filed a detailed submission stating that all comparable companies proposed to be excluded by the TPO are full-fledged entertainment broadcasters and functionally comparable to Star group and, therefore, should not be excluded. The TPO did not accept the submissions of the assessee and proceeded to arrive at the final set of comparables as listed below:-

Sr.No	Company name	2009 (net profit on revenue)
1.	Broadcast Worldwide Ltd	7.13%
2.	TV Today Network Ltd	11.97%
3.	Zee Entertainment Enterprises Ltd (consolidated segmental)	21.18%
4.	Zee News Ltd	15.66%
5.	Maa Television Network Ltd	11.76%
	Total	**13.54%**

9. The average mean of comparable as computed by the TPO was **13.54%** as against the consolidated profitability of **8.48%** earned by the Assessee. To analyze whether the Assessee falls within + 5% safe limits the TPO prepared the below working with reference to the PLI of Operating Profit / Revenue. The working is as follows:-

Particulars	Star Group	Plus 5 percent	Minus 5 percent	ALP
Revenue	100	100	100	100
Cost	91.52	86.94	96.098	86.46
Profit	8.48	13.06	3.90	13.54
Profit as percentage of revenue	**8.48%**	**13.06%**	**3.90%**	**13.54%**

10. Accordingly, the TPO arrived at the TP adjustments as below:-

Particulars	INR
Revenues	16,598,783,475
Profit at the rate of 13.54 percent	2,246,906,824
Profit at the rate of 8.48 percent	1,406,889,746
Adjustment amount	**840,017,078**

11. The TPO held that it would be appropriate to apportion 50% of the adjustment to Star Limited and 50% to channel companies and split the 50% amongst the channel companies as below to make an adjustment of Rs.25,64,77,167/-:-

Particulars	Total – 50% of Rs. 840,017,078	STEL (INR)	SIML (INR)	SAML (INR)	V Partnership (INR)	SAR (INR)
	100%	61.06%	7.79%	10.25%	3.70%	17.20%
Apportioned to channel companies	420,008,539	**256,477,167**	32,715,183	43,029,908	15,523,657	72,220,624

12. The assessee submitted before the DRP that all the 9 comparables chosen by the assessee should be retained and exclusion of companies on the ground that they are loss making, is not correct. The DRP rejected the submissions of the assessee and upheld the TP addition.

13. **Ground No.4 to 6** is with regard to the inclusion of Jain Studios Ltd., Television 18 India Ltd., and Raj Television Network Ltd. The Ld.AR in this regard submitted that the co-ordinate bench in group company's case, Star International Movies Ltd (ITA No.185/Mum/2014 for AY 2009-10 dated 18.10.2019) has considered the issue of exclusion of these comparables where it has been held that these three comparables are to be included. The relevant observations of the Tribunal are as extracted below:-

> *"9. We have considered rival submissions and perused material on record. We have also applied our mind to the decision relied upon. As could be seen from the factual matrix of the issue, both the Transfer Pricing Officer and the DRP have not disputed applicability of PSM as the most appropriate method to benchmark the transaction with the AEs. The dispute is only confined to the comparability of three comparables as noted above. The Transfer Pricing Officer has rejected Jain Studios Ltd. and Television 18 India Ltd., primarily on account of abnormal fall in rate of profit. Likewise, he has rejected Raj Television Network Ltd. due to sharp fall in margin by attributing to high amount of bad debt written–off during the year. From the facts on record, it is clear that none of these companies can be classified as persistent loss making companies. In various decisions it has been held that unless the company declares loss consistently for three consecutive assessment years, it cannot be considered as a persistent loss making company. In this context, we may refer to the decision of the Tribunal in*

> *Goldman Sachs India Securities Pvt. Ltd. (supra). The other decisions cited by the learned Sr. Counsel for the assessee also support this view. It is further relevant to observe, in assessee's own case for the assessment year 2008–09, the Tribunal has accepted Jain Studios Ltd. as a comparable. Further, the Transfer Pricing Officer himself has accepted Television 18 India Ltd., as a comparable in assessment years 2007–08 and 2008–09. That being the case, both, Jain Studios Ltd. and Television 18 India Ltd., should not be rejected as a comparable. Insofar as Raj Television Network Ltd. is concerned, undisputedly, the profit margin shown by the company in the assessment year 2007–08 and 2008–09 is substantially high. Though, in the impugned assessment year, the profit margin has fallen drastically, the company has still shown profit of 1.04%. Even if the fall in profit rate is due to write–off of bad debt, still this company cannot be excluded as a comparable since bad debts are operating in nature. In view of the aforesaid, we direct the Assessing Officer / Transfer Pricing Officer to include the aforesaid three companies as comparable and determine the arm's length price accordingly. These grounds are allowed."*

14. The Ld.DR relied on the order of the lower authorities.

15. We heard the parties and perused the materials on record. In the case of the assessee, the Assessing Officer has excluded the above 3 comparables for the same reasons that those companies are loss making and the profit margin is low. Therefore, the ratio laid down by the co-ordinate bench in the above case is applicable to assessee also and, therefore, respectfully following the above decision of the co-ordinate bench, we hold that these comparables cannot be excluded. The TPO is directed to include these comparables and re-compute the ALP accordingly.

16. **Ground 7 & 11 and 12 to 14** is with regard to the decision of the Assessing Officer in not applying the PSM as approved by the TPO to non AE transactions and determining the profit on estimate basis. The Assessing Officer, while passing the draft assessment order held that though the Transfer Pricing Officer has determined a taxable income in India under PSM, such transaction is restricted to

intra-group /AE transactions only and that the profitability from non-AE transactions are to be determined by the assessing officer. In this regard the Assessing Officer, called on the assessee to furnish India -specific P& L Account so as to identify and determine the income from operations in India and to properly allocate the profit attributable to Indian operations. The assessee submitted that it is not statutorily required to maintain the India specific account and therefore, it did not prepare such accounts. The assessee further submitted that the global profitability of channel companies is applied to the channel revenue from Indian operations to arrive at the income taxable in India. The assessing officer did not accept the submissions of the assessee and the manner in which the income is computed. The Assessing Officer held that the income of the assessee is liable to be computed as per Rule 10(i) read with Rule 10(iii) of the Income-tax Rules, 962 which provides that income of the assessee may be determined at a reasonable percentage of turnover and in this regard relied on the findings given by DRP in assessee's own case for AY 2007-08. Accordingly, the Assessing Officer estimated the profitability of non AE transactions at 28% and for AE transactions, applied the rate of 13.54% as determined by the TPO. The taxable income as worked out by the Assessing Officer in the hands of the assessee is as given below that resulted in the overall addition of Rs. 238,64,48,179 which is split between the AE and non-AE transactions:-

Entity	Indian Revnues	Profitabiltiy	Non-A.E. Adv. Revenues	Non-A.E. Adv. Revenues	Non-A.E. Syndication Revenues	Total Non-Associated Enterprises	Total A.E.	Total Non A.E. @28%	Total A.E. @13.54%	Total Indian Income
1	2	3	4	5	6	7=4+5+6	8=2-7	9=7x28%	10=8x13.54%	11=9+10
STEL	**10136005721**	**4.96**	**7685743846**	**NIL**	**18495464**	**7704239310**	**2431766411**	**2157187007**	**329261172**	**2386448179**
SIML	1292907615	12.27	775293699	NIL	NIL	775293699	517613916	217082236	70084924	287167160
SAML	1702206539	8.56	1095227617	NIL	128316111	1223543728	478662811	342592244	64810945	407403188
SARF	2854166988	-2.91	1804147631	NIL	1619109	1805766740	1198371171*	505614687	162263394	667878081

17. The Ld.AR in this regard submitted that the addition has been made purely on estimate basis and, therefore, cannot be sustained. The Ld.AR further submitted that the issue is covered by the decision of the co-ordinate bench in the case Star International Movies Ltd (supra) has considered the similar issue and has deleted the addition made by the Assessing Officer. The ld AR also submitted that the assessing officer in assessee's case has made the addition in similar as in the case of Star International Movies Ltd (supra) and therefore the decision of the coordinate bench is applicable to assessee's case also.

18. The Ld.DR relied on the order of the lower authorities.

19. We heard the parties and perused the materials on record. We notice that the coordinate bench in the case of Star International Movies Ltd (supra) has considered a similar issue where it is held that –

> *14. We have considered rival submissions and perused material on record. Admittedly, the Assessing Officer simply relying upon the direction of learned DRP in assessment year 2007–08 has estimated the profit on non–AE transactions. However, as could be seen, the Tribunal while deciding the issue relating to identical addition made in assessment year 2007–08 in ITA no.8683/Mum./2011, dated 2nd February 2016, has observed that once the combined net profit has been arrived at by taking into account the transactions of both AEs/non–AEs, which is factored into all the costs and revenue, then, to segregate a non–AE transaction over and above such profit determined is not proper. Thus, ultimately, the Bench held that the income from non–AE transaction cannot be taxed separately by applying net profit rate of 28%. It is relevant to observe, the aforesaid decision of the Tribunal was not contested by the Revenue in the appeal preferred before the Hon'ble Jurisdictional High Court. Notably, the same view was again expressed by the Tribunal while deciding assessee's appeal for the assessment year 2008–09 in ITA no. 7680/Mum./2012 & Ors., dated 16th September 2016. In view of the aforesaid, we delete the addition made by the Assessing Officer. Grounds are allowed.*

20. We notice that in assessee's case also the assessing officer has relied on the directions of the DRP for AY 2007-08 (refer page 27 para 15 of draft assessment order) in order to estimate the profit on the non-AE transactions. The facts in assessee's case for the year under consideration being identical, respectfully following the above decision of the Tribunal, we delete the addition made by the Assessing Officer.

21. In view of our decision with regard to the TP adjustment as above, the **Ground Nos. 8 to 10** raised by the assessee with regard to the application of certain TP principles have become academic and does not warrant separate adjudication.

22. **Ground No. 15 & 16** pertain to taxability of income from transfer of channel as short term capital gains. During the year under consideration, the assessee has transferred channel i.e. Star World 24 hour English channel to another sister concern 'Star International Movies Ltd (SIML) vide business agreement dated 28/02/2009 for a consideration of Rs.42,55,32,513/-. The assessee transferred the business as a going concern to SIML. The assessee did not offer the gain arising out of such transaction to taxation in India for the reason that the channel is not an asset situated in India. The assessee submitted before the Assessing Officer that the said transactions is between the assessee and SIML being non residents and that the Star World business is situated outside India and, therefore, the sale of Star World is not taxable in India. The assessee further submitted that tax has been deducted at source on the payment of sale consideration and therefore the same cannot be treated as capital gains in the hands of the assessee. The Assessing Officer did not accept the submissions of the assessee and proceeded to treat the entire transaction value as short term capital

gain taxable in India. The relevant observations of the assessing Officer is as extracted below:-

> ***18.3.5. <u>Location of the Asset in India:</u>***
> *The channel under transfer is an intangible asset of nature of bundle of brand name, goodwill, rights, permits, licenses, approvals and contracts. Commercially the most significant and one of the principal place of business of the assessee is India, where the asset ('Channel[1]) of the assessee exists in terms of brand name, goodwill, -viewership, broadcast rights exist and are inextricably linked to.*
>
> *Further, the assessee company holding the Channel carries out significant operations in respect of the ^Channel' in India:*
>
> *(i) Activities involved in operating the 'channel' center around the chain of activities consisting of numerous interrelated modules;*
> *(ii) The first of such module is preparation of programmes meant for telecast. Programmes have been prepared <u>by channel itself or acquired</u> or outsourced through its experience staff and human resources*
> *(iii) Creation of network for viewers is the next step, which has been carried out through the chain of cable operators in every footprint of the channel telecast;*
> *(iv) Telecasting and marketing of the programmes have followed the earlier modules. It involved uplinking the programmes to a satellite which has been hired or taken on lease through the channel company. Thereafter, downloading has been allowed to be done through decoders provided to the cable operators for which prescribed fee are levied in respect of the 'channel' under question;*
> *(v) As the main source of revenue, the channel has featured advertisements from customers, as procured through the parent company;*
> *(vi) All the above activities in respect of the 'channel' are present in India out of which the channel-holding company (the asssssee) has earned Revenue.*
> *(vii) The telecasting business, is a continuous and flowing process, the entire activities have been carried out by the assessee under the arrangement in Ire a termed as 'Channel'.*
>
> *Hence, there is clear cut nexus of the transferred asset to India and strong business connection of the asset to India due to very nature of the asset and its ability to continually and regularly generate income from India. The basic elements of the assets being brand name, logo, goodwill, contents, permits,*

licenses, approvals, pre-existing agreements. customer base (Advertisements), viewers base etc. Hence, such asset being a "Channel" can be held to be located in India.

Further, on account of the peculiar nature of the channel business, there would be insignificant/nil physical assets located outside India in respect of the asset block under the category "Channel". In view of the above, the very basic premises of the assessee that "Star World channel business is situated outside India" is flawed.

Therefore, the proceeds from sale of Star World Channel are linked to transfer of assets situated in India and accordingly, taxable in India.

*18.3.6. ******
18.3.7. Hence, from the above discussion it is dear that the Channel sale consists of transfer of assets like the Brand-name, goodwill, and certain items like contents and pre-ordered contracts and the rights over band and frequencies linked to the Indian skies and Indian approvals, sanctions, licenses and viewership.

Further, on account of failure of the assesses to furnish the detailed working of asset value attributable to outside India and computation of the amounts of capital gains taxable in India, the entire consideration is treated a emanating from transfer of assets in India and being held as liable to tax accordingly.

18.3.8. On the basis of the definition of capital asset in Section 2(14) of the Income Tax Act, 1961 and intangible asset in Section 2(11)(b) of the Income Tax Act, 1961, the trademark, brands, goodwill, business and commercial rights (Right over bandwidth, approvals, sanctions, licenses etc.) will constitute asset of the business and of the assessee in India.
Further, Sec. 2(47) laying down the definition of transfer, which includes sale, exchange or relinquishment of assets or rights therein etc. has been extended retrospectively from 1st April, 1962 by insertion of Explanation 2. The explanation provides that transfer D "transfer" includes and shall be deemed to have always included disposing of or parting with an asset or any interest therein, or creating any interest in any asset in any manner whatsoever, directly or indirectly, absolutely or conditionally, voluntarily or involuntarily, by way of an agreement (whether entered into in India or outside India) or otherwise....]".

In connection with the computation of capital gains arising from the instant transer, Section 55 of the I. T. Act, 1961 lays down meaning of "adjusted", "cost of improvement" and "cost of acquisition":

"...55. (1) For the purposes of [sections 48 and49],—
….
....(2) —/For the purposes of sections 48 and 49, "cost of acquisition".—

[(a) in relation to a capital asset, being goodwill of a business [or a trade mark or brand name associated with a business]—[or a right to manufacture, produce or process any article or thing] for right to cany on any business], tenancy rights, stage carriage permits or loom hours,—

(i) in the case of acquisition .of such asset by the .assesses by purchase-from a previous owner, means the amount of the purchase price;- and
(ii) in any other case [not being a case falling under sub-clauses (i) to (iv) of sub-section (1) of section 491 shall be taken to be nil:

18.3.9. In fact, taking cue from provisions of Section 55(2)(a), the assessee itself has.considered the cost of acquisition of such self-generated asset as 'Nil' for the purpose of undertaking TDS. Accordingly, as claimed by the assessee in submissions dated. 12.03.2013, vide Point No. 7 and dated. 18.03.2013, vide Point No. 9, the assessee itself has withheld taxes on the entire receipt of Rs. 42,55,32,513/-as its 'capital gains'.

18.3.10. In view of the above discussion, the goodwill, brand name, ' trademark, sanctions, approvals, licenses, viewership, clientele, etc. of the transferred 'channel' pertaining to India constitute an intangible asset situated in India akin to those envisaged u/section 55(2)(a) of the Income Tax Act, 1961. Since such are self-generated assets, the cost of acquisition is taken to be 'Nil'. Therefore the entire Sale Consideration Rs. 42,55,32,5137- is treated as Short-term capital gain in the hands of the assessee."

23. The Ld.DRP upheld the addition for the reason that the assets such as brand name, logo, goodwill, contents, terms, licenses, approval, customer base, viewers base are all located in India and, therefore, the asset cannot be held to be located outside India.

24. The Ld.AR submitted that the transfer of Star World Channel happened between assessee and Star International Movies Ltd both being non-resident and that in the case of non residents, the liability to pay tax arises on the income derived by him which received or deemed to be received in India or which accrues or arises in India or which accrues or arises or is deemed to accrue or arise in India. The Ld.AR drew our attention to section 9 of the Act which lays down various circumstances under which income would be deemed to accrue or arise in India and submitted that as per the said provisions, in the case of non residents, the income received from transfer of a capital asset is deemed to accrue or arise in India if the capital asset is situated in India. In the given case however the intangible asset being Star World Channel, is not an asset situated in India and therefore, the Ld.AR submitted that there cannot be any capital gain on transfer of an asset situated outside India in the hands of non residents, i.e. the assessee. With regard to the contention of the revenue that location of the advertisers and viewers are in India and, therefore, the gain on transfer of Star World channel is taxable in India, the Ld.AR submitted that it is a common business practice among all channel broadcasting companies to enter into contract with local advertisers for display of advertisement and that merely because the advertisers are located in India, the Assessing Officer cannot hold that the situs of the channel asset is situated in India. The Ld.AR further submitted that the location of the viewers does not constitute a source of income in India and in this regard, relied on the decision of the Hon'ble Delhi High Court in the case of Asia Satellite Telecommunications Co Ltd vs DIT 332 ITR 340 (Del). The Ld.AR also submitted that in the case of intangible asset, the situs of the intangible asset is to be determined based on the location of the owner of such intangible asset. The

Ld.AR in this regard further submitted that the Hon'ble Delhi High Court in the case of Cub Pty Ltd (2016) 71 taxmann.com 315 has considered a similar issue regarding the situs of the intangible asset and taxability of consideration received on transfer of such asset in India in the hands of non-resident and held that situs of intangible asset shall be at the location of the owner. The ld AR further submitted that in the said case the intangibles relating to a brand was exploited in India and even under such circumstances, the Hon'ble Court has held the intangible assets to be situated outside India since the ownership lies outside India. The Ld.AR accordingly submitted that assessee's case is in a better position that the Channel viewing is not restricted to India but is across the globe. Therefore, the ratio laid down by the Hon'ble Delhi High Court is squarely applicable in assessee's case. To substantiate the claim that the ownership of the channel asset being 'Star World' is outside India, the Ld.AR drew our attention to the guidelines issued by the Ministry of information and Broadcasting of India, which requires a foreign taxing company, i.e. the channel which is uplinked from outside India to obtain down linking license in India and accordingly, down linking license were obtained by the assessee to operate Star World channel in India. This would, according to the Ld.AR, evidence that the channel is owned and uplinked from outside India and, therefore, the ownership of the intangible asset is outside India.

25. The ld DR on the other hand vehemently argued that Explanation 5 to section 9(1)(i) would be applicable in assessee's case the assessee derives its value in the form of viewership substantially from India. The ld DR further submitted that even otherwise the income earned would fall within section 9(1)(i) itself and

that in the case of intangible assets the situs need not always be where the owner is present.

26. We heard the parties and perused the material on record. The assessee has sold the channel i.e. "Star World 24 hour" an English channel to another sister concern ‘Star International Movies Ltd (SIML) vide business agreement dated 28/02/2009 for a consideration of Rs.42,55,32,513/-. The Assessing Officer contended that there is clear cut nexus and strong business connection of the transferred asset to India due to very nature of the asset and its ability to continually and regularly generate income from India. The Assessing Officer further contended that the basic elements of the assets being brand name, logo, goodwill, contents, permits, licenses, approvals, pre-existing agreements, customer base (Advertisements), viewers base etc., are all located in India and therefore the asset being a "Channel" is held to be located in India. Accordingly the Assessing Officer held that the income on transfer of the channel is an income arising to the assessee within the provisions of section 9(1)(i) and therefore taxable in India. The assessee's argument is that the channel being an intangible asset, the situs is where the owner of the asset as is situated which in the given case is outside India and therefore the asset which is transferred is not an asset in India to fall within the provisions of section 9(1)(i). The ld AR during the course of hearing further argued that the impugned transaction will not be covered even by explanation (5) to section 9(1)(i) since the transaction does not involve transfer of any share or interest in the company but an intangible asset being the Star World Channel. Therefore before proceeding further we will look at the provisions of section 9(1)(i) which is relevant to assessee's case that read as under -

9.(1)The following incomes shall be deemed to accrue or arise in India;

(i) All income accruing or arising whether directly or indirectly through or from any business connection in India or through or from any asset or source of income in India or through the transfer of a capital asset situated in India;

Explanation 5 — For the removal of doubts, it is hereby clarified that an asset or a capital asset being any share or interest in a company or entity registered or incorporated outside India shall be deemed to be and shall always be deemed to have been situated in India, if the share or interest derives, directly or indirectly, its value substantially from the assets located in India:

27. Explanation 5 was added to section 9(1)(i) in the Act by the Finance Act, 2012, with retrospective effect from 01.04.1962 which provides that such shares/interest shall be deemed to be situated in India, if the share or interest derives, directly or indirectly, its value substantially from the assets located in India. With the insertion of the said explanation the legislature has brought in clarity with respect to the situs of the capital asset being share or interest in a company by stating that if the share or interest derives, directly or indirectly, its value substantially from the assets located in India is shall be treated as an asset situated in India. However there is no such specific provision with regard to the situs of intangible assets, such as trademarks, brands, logos, etc. We in this regard notice that the Hon'ble Delhi High Court in the case of Cub Pty Ltd (supra) has considered the issue of situs of the capital asset being intangible asset i.e. when it shall be deemed to be situated in India and held that –

19. *The issue of situs of an intangible asset, such as the intellectual property rights in trademarks, brands, logos etc. is indeed a tricky one. Insofar as the tangible assets are concerned, there is absolutely no difficulty. They exist in physical form and their existence is at specific locations. Thus, fixing their situs does not pose any problem. An intangible capital asset, by its very nature, does not have any physical form. Therefore, it does not exist in a physical form at any particular location. The*

legislature could have, through a deeming fiction, provided for the location of an intangible capital asset, such as intellectual property rights, but, it has not done so insofar as India is concerned. With regard to a share or interest in a company registered/incorporated outside India, Explanation 5 has been added to Section 9(1)(i) of the Income Tax Act, 1961 by virtue of the Finance Act, 2012 with retrospective effect from 01.04.1962. The said Explanation 5 reads as under: —
"Explanation 5. - For the removal of doubts, it is hereby clarified that an asset or a capital asset being any share or interest in a company or entity registered or incorporated outside India shall be deemed to be and shall always be deemed to have been situated in India, if the share or interest derives, directly or indirectly, its value substantially from the assets located in India."

20. *Thus, the legislature, where it wanted to specifically provide for a particular situation, as in the case of shares, where the share derives, directly or indirectly, its value substantially from assets located in India, it did so. There is no such provision with regard to intangible assets, such as trademarks, brands, logos, i.e., intellectual property rights. Therefore, the well accepted principle of 'mobilia sequuntur personam' would have to be followed. The situs of the owner of an intangible asset would be the closest approximation of the situs of an intangible asset. This is an internationally accepted rule, unless it is altered by local legislation. Since there is no such alteration in the Indian context, we would agree with the submissions made on behalf of the petitioner that the situs of the trademarks and intellectual property rights, which were assigned pursuant to the ISPA, would not be in India. This is so because the owner thereof was not located in India at the time of the transaction.*

21. *As a consequence of the foregoing discussion, the view taken by the AAR on question (1), which was placed before the AAR, cannot be accepted and the answer to the said question would be that the income accruing to the petitioner from the transfer of its right, title or interest in and to the trademarks in Foster's brand intellectual property is not taxable in India under the Income Tax Act, 1961. That being the case, question (2), which was posed before the AAR, would not arise.*

28. The Hon'ble High Court by following the principle of 'mobilia sequuntur personam' which means “movables follow the law of the person” and accordingly held that the situs of the owner of an intangible asset would be the closest approximation of the situs of an intangible asset. In the issue under consideration it is an undisputed fact that the asset transferred i.e. Star World Channel is an

intangible asset. From the perusal of the down linking license obtained by the assessee from Ministry of information and Broadcasting of India to operate Star World channel in India, it is also established that the ownership of the Star World channel is outside India. Given this, when the ratio laid down by the Hon'ble Delhi High Court in the above case is applied, we see merit in the argument of the ld AR that the impugned asset is not an asset situated in India since it is owned by a person outside India and therefore the situs of the asset is also outside India. Accordingly in our considered view, the income arising out of the transfer of Star World channel, being an asset outside India by the assessee to SIML will not fall within the provisions of section 9(1)(i) and accordingly not taxable in India

29. One more contention of the revenue is that the asset is situated in India since there is clear cut nexus and strong business connection of the transferred asset to India due to very nature of the asset and its ability to continually and regularly generate income from India and therefore taxable in India. We have already held that in the case of intangible asset the situs of the asset depends on the owner's location and therefore generating income from India cannot be the factor to decide to the situs of the asset. In this regard it is relevant to notice that the legislature through Explanation 6 to section provides even in the case of share or interest, referred to in Explanation 5 shall be deemed to derive its value substantially from the assets (whether tangible or intangible) located in India, if the value of such assets exceeds the amount of ten crore rupees; and represents at least fifty per cent of the value of all the assets owned by the company or entity, as the case may be. Though we have already stated that Explanation 5 does not cover intangible assets, in our considered view even otherwise, for the asset to be treated as situated in

India the conditions mentioned in explanation 6 needs to established. In the given case the assessing officer, did not called for any valuation report to analyse whether the value of viewership in India being intangible asset is included in the valuation and price paid for the transaction is substantially derived due to the viewership in India. Though there may be merit in the argument that viewership in India affects the valuation / purchase price of the transaction, we are not in a position to concur with the said contention of the revenue in the absence of any concrete material brought on record to prove the claim that the substantial value of the channel is derived from assets located in India. We further notice that the Hon'ble Delhi High Court in the case of Asia Satellite Telecommunications Co Ltd (supra) has held that merely because the footprint area includes India and the programmers by ultimate consumers/viewers are watching the programs in India, even when they are uplinked and relayed outside India, would not mean that the assessee is carrying out its business operations in India. Applying the said ratio to the issue under consideration, we are of the view that the Star World Channel having viewership India generation income cannot be a reason for holding that the channel is an asset situated in India. Therefore on this count also the addition made is not tenable.

30. **Ground No.17 to 19** The assessee is contending the initiation of penalty proceedings through these grounds. The issue is premature not warranting any adjudication.

ITA 1813/Mum/2014 - Star Asian Region FZ LLP (SARF)

31. The grounds of appeal raised by **SARF** (assessee in this case) in assessment year 2009-10 are tabulated in the earlier part of this order, from which it is clear that all the issues arising in the case of the **SARF** are similar to the ground raised in the case of **STEL** except taxation of 'royalty income (Ground No.17). Considering the fact that the facts being identical our decision with respect to all the issued contended, through Ground Nos.1 to 19 in the case of **STEL** are mutatis mutandis applicable to **SARF** also.

32. **Ground No.4 to 6** pertains to TP adjustment. We notice that the TPO has in the order dated 22.01.2013 has calculated the TP adjustment for STEL and SARF as can be seen from the table extracted in para 11 of this order. Accordingly our decision with regard to the TP adjustment in the case of STEL is applicable mutatis mutandis to SARF also. The TPO is directed to re-compute the ALP as per the directions given in para 15 of this order.

33. **Ground 7 & 11 and 12 to 14** is with regard to the decision of the Assessing Officer in not applying the PSM as approved by the TPO to non AE transactions and determining the profit on estimate basis. We notice that the assessing officer has arrived at the addition same manner similar to STEL which is evident from the table given in para 16 of this order. Therefore our decision to delete the addition made by the Assessing Officer following the decision in the case of Star International Movies Ltd (supra) is applicable to SARF also. Accordingly the

addition in the case of SARF is deleted and the grounds are allowed in favour of the assessee.

34. In view of our decision with regard to the TP adjustment as above, the **Ground Nos. 8 to 10** raised by the assessee with regard to the application of certain TP principles have become academic and does not warrant separate adjudication.

35. **Ground No. 15 & 16** pertain to taxability of income from transfer of channel as short term capital gains. During the year under consideration, the assessee (SARF) a resident of Hong Kong has transferred channel i.e. STAR Vijay channel to another sister concern "Vijay Television Private Limited (VTPL) vide business agreement dated 06/01/2009 for a consideration of Rs.59,10,50,000/-. By the said agreement, SARF transferred (i) Programs, (ii) Vijay name (iii) Goodwill and (iv) Future revenue for international distribution and advertisement. SARF offered to tax an income towards sale of contents (programs) as Royalty and paid tax thereon. However SARF did not offer to tax the income earned in to the same of Brand, Goodwill and revenue contracts in respect of STAR Vijay channel for the reason that these intangibles are not an asset situated in India. The assessee submitted before the Assessing Officer that the business of the channels namely broadcasting of television channels was carried on from outside of India and the assets transferred are global intangible assets not specific to Indian business. The Assessing Officer did not accept the submissions of the assessee and proceeded to treat the entire transaction value as short term capital gain taxable in India. The DRP upheld the addition made by the Assessing Officer.

36. We have while adjudicating the issue of transfer of STAR World channel by STEL to SIML held that for an intangible asset the situs is where the owner of the asset is situated and since the STAR World is owned by STEL who is a non resident the intangible asset being the channel is not a capital asset situated in India and accordingly the gain on transfer of such asset is not taxable in India. (refer para 26 to 28 of this order). Reliance in this regard is placed on the decision of the Hon'ble Delhi High Court in the case of Cub Pty Ltd (supra). Applying the ratio of the decision of the Hon'ble High Court to the case of the present assessee (SARF), in our considered view that the situs of STAR Vijay channel, an intangible asset which is owned by SARF a non resident is out side India and therefore not a capital asset in India. Accordingly in our considered view, the income arising out of the transfer of STAR Vijay channel, being an asset outside India by the SARF to VTPL will not fall within the provisions of section 9(1)(i) and accordingly not taxable in India. The findings given in para 29 regarding the contention of the revenue based on viewership in India, is also mutatis mutandis applicable to the transfer by SARF. Therefore on that count also the addition made by the Assessing Officer is not tenable.

37. **Ground No.17** is with regard to taxation of ‘royalty income @42.23% by the assessing officer. The Ld.AR in this regard submitted that since the assessee being a foreign company, the applicable tax rate of royalty income is as provided under section 115A of the Act which is at 10.5575% whereas the Assessing Officer has applied the tax rate at 42.23%. The Ld.AR further submitted that identical issue in assessee’s own case for A.Y. 2007-08 TO 2009-10 has been considered by the co-ordinate bench and that the issue is decided in favour of the assessee.

38. The Ld.DR, on the other hand, relied on the orders of lower authorities.

39. We heard the parties and perused the material on record. We notice that the co-ordinate bench in the case of Star International Movies Ltd (supra) for A.Y. 2009-10 has considered the similar issue and held that –

> *"18. We have heard the parties and perused materials on record. Undisputedly, identical issue arising in assessee's own case in preceding assessment years has been decided by the Tribunal in favour of the assessee. Consistent with the view taken by the Tribunal in assessee's own case in earlier assessment years, we direct the Assessing Officer to tax the royalty income at the appropriate rate as provided under section 115A of the Act."*

40. Respectfully following the above decision of the co-ordinate bench, we direct the Assessing Officer to tax the royalty income at the appropriate rate as provided in section 115A of the Act.

41. **Ground No.18 to 20** The assessee is contending the initiation of penalty proceedings through these grounds. The issue is premature not warranting any adjudication.

42. In result the appeal of the **STEL** in I.T.A. No.1814/Mum/2014 and **SARF** in I.T.A. No.1813/Mum/2014 are allowed.

Order pronounced in the open court on 08/12/2023

Sd/-	Sd/-
(AMIT SHUKLA)	**PADMAVATHY S.**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai, Dt : 08th December, 2023

प्रतिलिपि अग्रेषितCopy of the Order forwarded to :

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी /The Respondent.
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4. विभागीय प्रतिनिधि ,आय.अपी.अधि., मुबंई/DR, ITAT, Mumbai
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BY ORDER,

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ITAT, Mumbai