आयकर अपीलीय अधिकरण
मुंबई पीठ“आई ”,मुंबई
श्री विकास अवस्थी, न्यायिक सदस्य एवं
श्री गगन गोयल, लेखाकार सदस्य के समक्ष

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH “I”, MUMBAI
BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER &
SHRI GAGAN GOYAL, ACCOUNTANT MEMBER

आ.अ.सं.4479/मुं/2006 (नि . व.2002-03)
ITA NO.4479/MUM/2006 (A.Y. 2002-03)
आ.अ.सं.3149/मुं/2007 (नि . व.2003-04)
ITA NO.3149/MUM/2007 (A.Y. 2003-04)

M/s. ATL Media Limited
(As successor to Expand Fast Holdings Ltd.),
2nd Floor, Ebene House, Cyber City,
Ebene, Mauritius.
PAN: AAGCA-5649-G. ...... अपीलार्थी/Appellant

बनाम Vs.

Dy.Director of Income Tax (IT)/
DCIT(IT)-1(1)(2), Mumbai
Room No.517, 5th Floor,
Aaykar Bhavan, M.K.Road,
Mumbai – 400 020 ..... प्रतिवादी/Respondent

आ.अ.सं.4631/मुं/2006 (नि . व.2002-03)
ITA NO.4631/MUM/2006 (A.Y. 2002-03)
आ.अ.सं.3880/मुं/2007 (नि . व.2003-04)
ITA NO.3880/MUM/2007 (A.Y. 2003-04)

DCIT(IT)-1(1)(2), Mumbai
Room No.517, 5th Floor,
Aaykar Bhavan, M.K.Road,
Mumbai – 400 020 ...... अपीलार्थी/Appellant

बनाम Vs.

M/s. ATL Media Limited
(As successor to Expand Fast Holdings Ltd.),
2nd Floor, Ebene House, Cyber City,
Ebene, Mauritius.
PAN: AAGCA-5649-G. ..... प्रतिवादी/Respondent

Assessee by : Shri Niraj Sheth, Advocate with
Shri Jai Bhansali
Revenue by : Shri Anil Sant

सुनवाई की तिथि/ Date of hearing : 05/10/2023
घोषणा की तिथि/ Date of pronouncement : 02/01/2024

आदेश/ORDER

PER VIKAS AWASTHY, JM:

These cross appeals for Assessment Year 2002-3 and 2003-04 are taken up together as the issues raised in both the appeals and the facts germane to the issues are similar in both the impugned assessment years. For the sake of convenience, the cross appeals for Assessment Year 2002-03 are taken up as lead appeals.

ITA NO. 4479/MUM/2006 (A.Y. 2002-03)-ASSESSEE'S APPEAL:
ITA NO.4631/MUM/2006 (A.Y. 2002-03) –REVENUE'S APPEAL:

2. The facts as emanating from records are: The assessee is a resident of British Virgin Island (BVI) and is engaged in the business of telecasting satellite channels. The assessee is carrying out its operations from Singapore though its subsidiary. The assesse earns revenue from two streams i.e. (i) advertisement, and (ii) subscription. In India the assessee vide agreement dated 01/06/2000 appointed Zee Telefilms Ltd. (**ZTL**) as agent for advertising/marketing and El-Zee Televisions Ltd. **(El-Zee)** was appointed as exclusive distributor vide Distribution Agreement dated 01/07/2000 for distribution of rights of the satellite channels broadcasted by the assessee in India. As per the aforesaid agreement, ZTL was compensated for its services by way of commission @8.5% of the advertisement tariff paid by the advertiser to the assessee. As regards distribution activities El-Zee was allowed to retain 20% of subscription fee as

commission in accordance with the Distribution Agreement. The assessee filed its return of income declaring Nil income. In scrutiny assessment proceedings the Assessing Officer made addition by estimating income from advertisement @15% of the advertisement revenue. In respect of subscription income from pay channels, the Assessing Officer held subscription as 'royalty' and levied tax @20% on such royalty income. There is no Double Taxation Avoidance Agreement (DTAA) between India and BVI. The Assessing Officer assessed income of the assessee from its operations in India as under:

(A) Business Income		
- Advertisement revenues	-	Rs. 6,09,38,912/-
(B) Royalty subscription income	-	Rs.15,00,07,646/-
Total Taxable Income	-	Rs. 21,09,46,558/-
Rounded off to	-	Rs.21,09,46,560/-

Aggrieved by the assessment order dated 31/03/2005, the assessee carried the issue in appeal before the CIT(A).

2.1 The First Appellate Authority vide impugned order applied global profitability rate of 9.36% to the income earned from advertisement and subscription revenue from India and restricted the addition to Rs.3,38,14,897/- as against Rs.21,09,46,560/- assessed by Assessing Officer. Further, the CIT(A) did not concur with the Assessing Officer in holding subscription revenue in the nature of royalty and held it to be Business Income. Against the aforesaid findings of the CIT(A) both, the assessee and the Revenue are in appeal before the Tribunal.

3. The assessee in its appeal has assailed the order of CIT(A) on following grounds:

> *" 1. (a) The Commissioner of Income Tax (Appeals) (hereinafter referred as "CIT (A)") erred in law and facts in holding that the assessee has business connection in India as per section 9(1)(i) r.w.s 5(2) of the Act and hence assessee's income of advertisement and subscription revenue taxable in India as per provisions of the Income-tax Act, 1961 (hereinafter referred to as "the Act"). The reasons given by him are wrong and contrary to the facts of the case.*
>
> *(b) The CIT(A) erred in law and facts in holding that the relationship Zee Telefilms Ltd. (hereinafter referred to as "ZTL") and El-Zee Television Limited (hereinafter referred to as "El-Zee") constitutes a business connection.*
>
> ***2. The CIT(A) failed to appreciate that the income is not liable to be taxed in India, even if it is considered that the assessee has a business connection as the income which is attributable to such business connection has already been taxed in India as ZTL / El-Zee have been remunerated at arm's length. Hence, as per Circular 23 no further income can be made attributable to the foreign company. The CIT(A) ought to have considered the application of the said circular which is binding on the department.***
>
> *3. Without prejudice to above, the CIT(A) erred in law and facts in upholding the assessment of income on the assessee (Foreign Company) inspite of the fact of the assessee suffered losses in its worldwide business as per audited accounts of earlier years and there are huge accumulated losses during the year also.*
>
> *4. The CIT(A) erred in law and facts in estimating income U/R 10(2)(ii) on the basis of percentage of profit in worldwide accounts of aft its activities instead of percentage of profit in broadcasting business, wherein the appellant suffered losses and he ought to have estimated no income based on losses in the relevant business"*

4. Shri Niraj Sheth appearing on behalf of the assessee at the outset submitted that the primary ground in assessee's appeal is ground No.2, hence, he would be making his submissions in respect of ground No.2 only. He submitted that if, the assessee is remunerating its Permanent Establishment (PE) in India at arm's length, no further income is attributable to the assessee. Advancing his arguments he submitted that the assessee earns revenue from two streams (a) advertisement revenue and (b) subscription revenue.

According to the assessee no part of the advertisement and subscription revenue is taxable in India.

5. The assessee vide agreement dated 01/06/2000 appointed ZTL as its exclusive agent in India for sale of advertising and sponsorship on the channels. In lieu thereof, the assessee would compensate ZTL by way of fee equal to 8.5% of the advertisement tariff paid by the advertiser to the assessee. ZTL was appointed as independent agent with no authority to enter into contract on behalf of assessee. The Assessing Officer held the advertisement revenue taxable on accrual basis and estimated income from advertisement stream @15% of the net advertisement revenue.

5.1. The assessee eneterd into Distribution Agreement dated 01/7/2000 with El-Zee. El-Zee was granted exclusive rights of distriburion/marketing of satellite channels broadcasted by the assessee within the territory of India. In consideration thereof, EL-Zee was allowed to retain 20% of the subscription fees charged by the assessee from the affiliates /subscribers of the channels in India. The Assessing Officer held subscription fee in the nature of 'royalty' u/s.9(1)(vi) of the Act, taxable @20%.

5.2 In proceedings before the First Appellate Authority the assessee contended that though the assessee has earned net profit of 9.36% on global basis but in India the assessee has incurred losses, therefore, no taxable income had accrued in India. The CIT(A) disregarding the contentions of the assessee attributed 9.36% of the advertisement revenue as chargeable to tax. However, the CIT(A) upheld the contentions of the assessee that the advertisement revenue should be tax on cash basis and not on accrual basis as

has been done by the Assessing Officer. The CIT(A) further deleted the addition made by the Assessing Officer treating subscription fee as royalty.

6. The first contention of ld.Counsel for the assessee is that the advertisement and subscription revenue are not taxable in India as 'Business Income' as all operations of the assessee are carried outside India. The assessee has no business connection in India. Merely because the channels are viewable in India amongst other countries cannot be the reason to hold that the assessee has business connection in India. In support of his arguments the ld.Counsel for the assessee referred to the decision in the case of Asia Satellite Telecommunications Co. Ltd. Vs. DIT, 197 Taxman 263(Del).

7. The ld.Counsel for the assessee next submitted that the CIT(A) has accepted the transaction with ZTL at arm's length but taxed advertisement revenue and subscription revenue @ 9.36% as business income . This is contrary to the provisions of section 9(1)(i) of the Income Tax Act, 1961 [in short 'the Act'] and Circular No.23 dated 23/09/1969. In support of his submissions he placed reliance on the decision of Hon'ble Bombay High Court in the case of SET Satellite (Singapore) PTE Ltd. vs. DDIT (IT), 307 ITR 205(Bom). He pointed that in the aforesaid decision the issue was decided with reference to Article -7 of the DTAA, however, the provisions of section 9(1)(i) of the Act are pari-materia to the provisions of Article 7.1 of the Tax Treaty. To buttress his arguments he referred to the decision of Tribunal in the case of Galileo International Inc. vs. DCIT, 114 TTJ 289 (Del.-Trib.).

8. The ld.Counsel for the assessee further submitted that assuming without admitting that the assessee has business connection in India, as per section

9(1)(i) of the Act, only as much of the Revenue is chargeable to tax in India as reasonably attributable to the operations carried out in India. In the instant case ZTL and El-Zee are remunerated at arm's length, revenues have been reasonably attributed to operations carried out in India, therefore, tax liability of the assessee on this count stands extinguished. The assessee remunerated ZTL for advertisement related services at 8.5% and for distribution of channels the assessee has remunerated El-Zee at 20% in line with the industry standards. Similar remuneration was held to be at arms length by the Tribunal in the case of assesee's group concern Asia Today Ltd., 124 taxmann.com 1 (Mum-Trib). The ld.Counsel for the assessee pointed that though in the said decision the transaction was to be at arms length based upon the provisions of the treaty , the principles laid down would equally apply under the provisions of the Act. As pointed earlier, the provisions of Article-7 are pari-materia to the provisions of section 9(1)(i) of the Act. The ld.Counsel for the assessee further submitted that CBDT in Circular No.23 of 1969 (supra) while dealing with scope of Section 9 explained that if, agent's commission fully represents the value of the profits attributable to its service, it should prima-facie extinguish the assessment. The principle laid down in the Circular is no different than that enunciated in DTAAs wherein Hon'ble Apex Court, Hon'ble Jurisdictional High Court and the Tribunal have held that arms length remuneration to PE extinguishes the tax liability of the assessee in India.

9. The ld.Counsel for the assessee pointed that though the said Circular was subsequently withdrawn by CBDT vide its Circular No.7 of 2009 dated 22/10/2009, however, the said withdrawal would have prospective effect only and the Circular No.23 (supra) would continue to apply for the Assessment

Year under question. In support of his submissions he placed reliance on the following decisions:

(i) CIT vs. Model Exims Kanpur, 358 ITR 72(All.);
(ii) DDIT vs. Siemens Aktiengesellschaft- ITA No.6133/Mum/2002;
(iii) CIT vs. Gujarat Reclaim & Rubber Products Ltd., 79 taxmann.com 352 (Bom);
(iv) ACIT vs. Capricon Food Product India Ltd., 38 taxmann.com 158(Chennai-Trib); and
(v) ACIT vs. Nuova Shoes, 91 taxmann.com 354(Agra –Trib)

10. The ld.Counsel for the assessee finally concluded that the addition made in hands of the assessee as business income @9.36% of advertisement revenue and subscription revenue be deleted.

11. Per contra, Shri Anil Sant representing the Department vehemently defended the assessment order and the order of Transfer Pricing Officer (TPO). The ld. Departmental Representative supported the order of CIT(A) to the extent that advertisement revenue and subscription revenue from operations in India is liable to be taxed in India.

12. We have heard the submissions made by rival sides and have examined the orders of authorities below. The assessee, tax resident of BVI is engaged in the business of telecasting satellite television channels. For marketing and advertising on channels in India, the assessee entered into an agreement dated 01/06/2000 with ZTL. As per the agreement, ZTL gets remunerated @ 8.5% of the advertisement tariff paid by the advertisers to the assessee. The assessee appointed El-Zee as an exclusive Distributor for distribution of marketing rights of Pay channels broadcasted by the assessee in the territory of India vide Distribution Agreement dated 01/07/2000. The assessee, remunerated El-Zee with 20% of the subscription fee collected in India.

13. The first contention of assessee is, the assessee has no business connection in India, therefore, the revenue from advertisements and subscription of channels is not taxable in India. The alternate plea of the assessee is, assuming, the assessee has business connection in India, only that part of the revenue is chargeable to tax in India, which is reasonably attributable to the operations carried out in India. The case of assessee is that since assessee has remunerated Indian agents i.e. ZTL and El-Zee at arm's length, no further income is attributable to the assessee from operations carried out in India.

14. The Assessing Officer during the assessment proceedings estimated 15% of the net advertisement revenue as 'Business Income' of the assessee u/s.9(1)(i) of the Act as attributable to India. Further, the Assessing Officer held subscription income as 'royalty' under section 9(1) (vi) of the Act and has taxed the same @20%. The CIT(A) in the First Appellate proceedings held that subscription revenue to be Business Income of the assessee and not royalty. The CIT(A) upheld the findings of the Assessing Officer that the assessee has business connection in India and that Circular No.23 is not applicable to the appellant. For the aforesaid findings, he placed reliance on the decision of CIT(A) in assessee's own case in Assessment Year 2001-02. In so far as method of accounting, the CIT(A) accepted that cash system followed by the assessee is justified and the assessee cannot be forced to follow accrual system of accounting. The CIT(A) holding assessee's income from advertisement and subscription taxable in India as Business Income applied assessee's global profitability rate of 9.36% on revenue from advertisement and subscription in India and confirmed the addition of **Rs.3,38,14,497/-**

15. We find that in Assessment Year 2001-02 the assessee had assailed the findings of the Assessing Officer in holding that the assessee has business connection in India. In first appellate proceedings, the CIT(A) inter-alia, upheld the findings of the Assessing Officer that the assessee has business connection in India. Ostensibly, no further appeal was filed by the assesee against the said findings of the First Appellate Authority. The assessee has only placed on record order of Tribunal dated 01/1/2010 in ITA No.4630/Mum/2006 filed by the Department against the aforesaid order of CIT(A). Thus, the assessee accepted the position that it has business connection in India. No meaningful arguments against the findings of CIT(A) on this issue were advanced by the ld. Counsel in the instant appeal. In this factual matrix, we have no hesitation in upholding that the assessee has 'Business Connection' in India.

16. Once it is established that the assessee is having 'business connection' in India, the next question arises regarding taxability of revenue from operations in India. As noted earlier, the business of the assessee is carried out by it's two Indian agents viz. ZTL and El-Zee. The contention of the assessee is that ZTL and El-Zee are remunerated at arm's length, revenue from both the streams i.e. advertisement an subscription have been reasonably attributed to operations carried out in India, therefore, tax liability of the assessee on these revenue channels stands extinguished.

The assessee has placed reliance on the decision in the case of one of its group concern Asia Today Ltd. ADIT(supra), wherein addition made for similar reasons were deleted by the Tribunal. Before we proceed further, it would be relevant to point out that in the case of Asia Today Ltd.(supra) the provisions of India-Mauritius DTAA were in operation, whereas in the instant case there is

no DTAA between India and BVI. The contention of the assessee is that provisions of Article-7(1), which deals with business profits of DTAA are pari-materia to provisions of *Explanation 1* (a) to Section 9(1)(i) of the Act. For the sake of ready reference, the relevant extract of Article 7(1) of the DTAA and relevant provisions of section 9(1)(i), as they were applicable to Assessment Year under appeal are reproduced herein below:

> **"ARTICLE -7 BUSINESS PROFITS**
>
> *1. The profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other State but only so much of them as is attributable to that permanent establishment."*
>
> ***"Section 9 - Income deemed to accrue or arise in India.***
>
> ***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 property in India, or through or from any asset or source of income in India, [***] or through the transfer of a capital asset situate in India.*
>
> *[Explanation 1].—For the purposes of this clause—*
>
> *(a) in the case of a business of which all the operations are not carried out in India, the income of the business deemed under this clause to accrue or arise in India shall be only such part of the income as is reasonably attributable to the operations carried out in India ;"*

17. On plain reading of provisions of Article 7(1) of the DTAA it emerges that:

(i) The profits of an enterprise are ordinarily taxable in the country of its location;

(ii) Where, the enterprise has a PE located in the other country (in the instant case India) and carries on its business in the other country (India)

through PE, then the portion of profits, to the extent it is attributable to the PE can be taxed in the other country (India).

Explanation 1(a) to section 9(1)(i) of the Act contemplates that a where a non resident has business connection in India and his business operations are carried out partly abroad and partly in India, in such a situation revenue only from operations in India shall be taken into account and a reasonable portion thereof shall be treated as income accruing or arising in India.

An comparative analysis of provisions of Article 7(1) of DTAA and provisions of Explanation 1(a) to Section 9(1)(i) reflects that they are homogeneous. Both the provisions tax income that from business operations in India and only to the extent the revenue is reasonably attributable to India operations. The co-ordinate Bench in the case of Galileo International Inc. vs. DCIT (Supra) held, "*Reading the above Article 7 of the treaty it is clear that the profit of an enterprise will be taxable only to the extent as is attributable to the permanent establishment. This is in pari material with clause (a) of Explanation 1 to section 9(1)(i) of the Act.*"

18. Thus, in this back drop, the ratio laid down in the case of Asia Today Ltd. (**ATL**) can be applied in the instant case. The facts in the case of Asia Today Ltd. are similar to the facts in the instant case, therein the assessee (ATL), a company incorporated in Mauritius, engaged in telecasting of satellite channels had entered into an agreement with ZTL and El-Zee to sell advertisement time and collect subscription revenue. The case of assessee was that the assessee was not having PE in India, hence, no part of its income is taxable in India. The Revenue held that ZTL and El-Zee are the PE of assessee.

The assessee claimed that even if they are held to be PEs, the assessee has remunerated the PEs at arm's length, hence, the assessee is not liable for further tax on remaining revenue. The Co-ordinate Bench after placing reliance on the decision in the case of SET Satellite (Singapore)PTE Ltd. vs. CIT(supra) held that where assessee had Dependent Agency PE (DAPE), if Indian agent was paid arm's length remuneration, nothing further could be taxed in the hands of assessee.

19. We may now advert to the decision of Hon'ble High Court in the case of Set Satellite (Singapore) PTE Ltd.(supra). The issue before the Hon'ble High Court for adjudication was:-

> *" On the facts and circumstances of the case the learned CIT(A) erred in holding that since the assessee has remunerated the agent on arm's length(ALP) no further profits of the assessee could be taxed in India other than the profits so earned by the dependent agent(DA)?"*

Answering the aforesaid question and the additional questions framed during hearing of appeal by the assessee/appellant, the Hon'ble High Court threadbare examined the provisions of Article-7(1) of the DTAA and Circular No.23 of 1969 and held:

> ***"11.*** *We may firstly point out that CIT has dealt with the issue as to why the advertisements received by the Appellant were not liable for being taxed in India based on the CBDT Circular No. 23, dated 23-7-1969 which clearly sets out that where a non-resident's sales to Indian customers are secured through the services of an agent in India, the assessment in India of the income arising out of the transaction will be limited to the amount of profit which is attributable to the agent's services, provided that (i) the non-resident principal's business activities in India are wholly channelled through his agent; (ii) the contracts to sell are made outside India; and (iii) the sales are made on a principal-to-principal basis. The CIT(A) had recorded a specific finding in favour of the Appellant in the affirmative on all three counts. It is in these circumstances that it was held that the advertisement revenue received by the Appellant may be from the customers in India is not liable for tax in India. That CBDT Circulars are binding needs no repetition. If authorities need be cited. We may now*

refer to the judgment of the Supreme Court in UCO Bank v. CIT [1999] 237 ITR 889. In that judgment the issue was whether Circular of 9-10-1984 was inconsistent or whether there was contradiction in the circular and Section 145 of the Income-tax Act. The Supreme Court observed that :—

> *"... In fact, the circular clarifies the way in which these amounts are to be treated under the accounting practice followed by the lender. The circular, therefore, cannot be treated as contrary to section 145 of the Income-tax Act or illegal in any form. It is meant for a uniform administration of law by all the income-tax authorities in a specific situation and, therefore, validly issued under section 119 of the Income-tax Act. As such, the circular would be binding on the department." (p. 901)*

See also CIT v. Hero Cycles (P.) Ltd. [1997] 228 ITR 463 (SC). It would thus be clear that the Circular No. 23 would be binding on the Assessing Officer and had to be considered while assessing the tax liability of an assessee.

The Tribunal in its judgment has not considered the effect of the finding recorded by the CIT (Appeals) based on the Circular and which circular was relevant for the purpose of deciding the controversy in issue. This circular read with Article 7(1) of the DTAA would result in holding that the income from advertisement if neither directly nor indirectly attributable to that of the permanent establishment, would not be taxable in India. The Tribunal in fact in para 10 has recorded a finding that Article 7(2) provides that the arm's length price is the criterion for computation of these hypothetical profits. In our opinion the entire rational or reasoning given by the Tribunal has to be set aside. In matters of tax what has to be considered and more so in international transactions if there be a treaty, the provisions of the treaty and if the provisions of the treaty are more advantageous to an assessee, then the construction will have to be given which is advantageous to the assessee. At this stage we may note that on behalf of the assessee learned Counsel has produced an order passed by the Additional CIT (Transfer Pricing-II), Mumbai in the matter of determination of arm's length price with reference to all the transactions reported in Form No. 3CEB filed by the assessee. The assessee is SET India, the depending agent. The order records that the assessee is engaged in the business of providing audio-visual television content and also acts as an advertising agent of Set Satellite Singapore Pvt. Ltd. The assessee distributes these channels to the Indian cable operators and that the assessee has applied the TNM method to determine the arm's length price for its international transaction. It, however, clarified that the order is in respect of reference received for assessment year 2002-03 and not for subsequent assessment years.

***12.** We may now consider the judgment in Morgan Stanley & Co. Inc's case (supra). The Appeals dealt with the Double Tax Avoidance Agreement (DTAA) between India and United States. That treaty advocated application of the arm's length principle or provided a mechanism for avoiding double taxation on income. The issue involved, Morgan Stanley and Company (for short, "MSCo.") and one of the group companies*

of Morgan Stanley, Morgan Stanley Advantages Services Pvt. Ltd. (for short "MSAS"). An agreement was entered into for providing certain support services to MSCo. MSCo. outsourced some of its activities to MSAS. MSAS was set up to support the main office functions in equity and fixed income research, account reconciliation and providing IT enabled services such as back office operations, data processing and support centre to MSCo. On 5-5-2005 MSCo. filed its advance ruling application . The basic question related to the transaction between the MSCo. and MSAS. The advance ruling was sought on two counts (i) whether the applicant was having PE in India under Article 5(1) of the DTAA on account of the services rendered by MSAS under the services agreement dated 14-4-2005 and if so (ii) the amount of income attributable to such PE. It was ruled that MSAS should be regarded as constituting a service PE under Article 5(2)(1). On the second question the AAR ruled that the transactional net margin method (TNMM) was the most appropriate method for the determination of the Arm's Length Price (ALP) in respect of the service agreement dated 14-4-2005 and it meets the test of arm's length as prescribed under section 92C of the 1961 Act and no further income was attributable in the hands of MSAS in India. The said ruling of AAR on the question of income attributable to the PE was the subject-matter of challenge by the Department. Insofar as the issue of PE is concerned the Supreme Court was pleased to hold that it agreed with the Ruling of the AAR that stewardship activities would fall under Article 5(2)(1). Dealing with the question of deputation, the Court held that on the facts that there is a service PE under Article 5(2)(1) and as such held that the Department was right in its contention that there exists a PE in India. Considering Article 7 of that treaty the Court observed that what is to be taxed under Article 7 is income of the MNE attributable to the PE in India and what is taxable under Article 7 is profits earned by the MNE. Under the Income-tax Act the taxable unit is the foreign company, though the quantum of income taxable is income attributable to the PE of the said foreign company in India. The Court observed that the important question which arises for determination is whether the AAR is right in its ruling when it says that once the transfer pricing analysis is undertaken there is no further need to attribute profits to a PE. The Court further noted that the computation of income arising from international transactions has to be done keeping in mind the principle of arm's length price. The Court further reiterated that the main point for determination is whether the AAR was right in ruling that as long as MSAS was remunerated for its services at arm's length, there should be no additional profits attributable to the applicant or to MSAS in India. After considering the various methods by which arm's length price can be determined the Court observed as under :—

> *"As regards determination of profits attributable to a PE in India (MSAS) is concerned on the basis of arm's length principle we have quoted Article 7(2) of the DTAA. According to the AAR where there is an international transaction under which a non-resident compensates a PE at arm's length price, no further profits would be attributable in India. In this connection, the AAR has relied upon Circular No. 23 of 1969 issued by the Central Board of Direct*

> > *Taxes. This is the key question which arises for determination in these civil appeals."*
>
> *After discussing the various issues the Court in its conclusion held as under :—*
>
> > *"As regards attribution of further profits to the PE of MSCo. where the transaction between the two are held to be at arm's length, we hold that the ruling is correct in principle provided that an associated enterprise (that also constitutes a PE) is remunerated on arm's length basis taking into account all the risk-taking functions of the multinational enterprise. In such a case nothing further would be left to attribute to the PE. The situation would be different if the transfer of pricing analysis does not adequately reflect the functions performed and the risks assumed by the enterprise. In such a case, there would be need to attribute profits to the PE for those functions/risks that have not been considered. The entire exercise ultimately is to ascertain whether the service charges payable or paid to the service provider (MSAS in this case) fully represent the value of the profit attributable to his service. In this connection, the Department has also to examine whether the PE has obtained services from the multinational enterprise at lower than the arm's length cost."*
>
> *In our opinion considering the judgment, if the correct arm's length price is applied and paid then nothing further would be left to be taxed in the hands of the Foreign Enterprise."*

From the aforesaid decision it is unambiguous that where the overseas entity has remunerated PE in India at arm's length nothing further is liable to be taxed in the hands of non-resident entity.

20. It is not the case of Revenue that the assessee has not compensated it's India agents viz. ZTL and El–Zee at arm's length. The ld. Counsel for the assessee made a categoric statement that remuneration paid to ZTL and El-Zee is commensurate to industry rates. This fact has not been rebutted by the Department. Therefore, the rate at which the assessee has remunerated ZTL and El-Zee are considered at arm's length.

Thus, in facts of the case and decisions discussed above, we find merit in ground No.2 of appeal by the assessee. The Assessing Officer is directed to

delete addition of Rs.**3,38,14,897/-** confirmed by the CIT(A) on account of assessee's income from operations in India.

21. No submissions were advanced by the assessee on ground No.1, 3 & 4 of appeal, hence, they are dismissed.

22. In the result, appeal of the assessee is partly allowed.

Department's Appeal:

23. The Revenue has assailed the order of CIT(A) on the following grounds:

"1. On the facts and in the circumstances of the case and in law, the Id. CIT(A) erred in holding that the assessee was justified in following the cash system of accounting.

2. On the facts and in the circumstances of the case, and in law, the Id. CIT(A) erred in holding that the subscription revenue collected is only business income of the telecasting company and not royalty within the meaning of section 9(1)(vi)of the I.T. Act, 1961.

3. On the facts and in the circumstances of the case and in law the Id. CIT(A) erred in holding that global profitability ratio of 9.36% be applied to estimate the Indian income of the assessee.

4. On the facts and in the circumstances of the case and in law, the Id. CIT(A) erred in holding that no interest u/s. 234B is payable by a non-resident whose total income is subject to deduction of tax at source and directing the Assessing Officer to delete interest charged u/s. 234B of the IT. Act, 1961."

24. The Ld. Departmental Representative submitted that the CIT(A) has erred in holding that the assessee is justified in following cash system of accounting. The Assessing Officer in preceding Assessment Years i.e. Assessment Year 1999-2000 and 2000-2001 has held that for the purpose of

computing income of assessee, the gross receipts should be taken on accrual basis.

The ld. Departmental Representative supporting the assessment order further submitted that the CIT(A) has erred in coming to the conclusion that subscription revenue collected is only business income of telecasting company and not royalty within the meaning of section 9(1)(vi) of the Act. The CIT(A) has further erred in applying global profitability rate of 9.36% as against 15% adopted by the Assessing Officer in respect of advertisement revenue. The Assessing Officer has given detailed reasons for holding subscription income as royalty taxable at 20%. He prayed for upholding the assessment order and reversing findings of the CIT(A).

25. Per contra, ld. Counsel for the assessee vehemently supporting the order of CIT(A) on this issue submitted that subscription revenue cannot be treated as royalty since the receipts do not involve any transfer of copy right, literary, artistic or scientific work. He further pointed that explanation to section 9(1)(vi) of the Act inserted vide Finance Act, 2012 would not apply to the facts of the present case. The assessee in support of his submissions placed reliance on the decision in the case of CIT vs. MSM Satellite (Singapore) Pte Ltd., 106 taxamann.com 353 (Bombay).

26. We have heard the submissions made by rival sides and have examined the orders of authorities below. In ground No.1 of appeal, the Revenue has assailed the findings of CIT(A) in accepting assessee's cash system of accounting. We find that this issue is squarely covered by the decision of Co-ordinate Bench in assessee's own case in ITA No.4630/Mum/2006, appeal by

the Revenue. The Coordinate Bench upheld the order of CIT(A) in accepting cash basis of accounting by the assessee. The facts in the impugned assessment year are identical. The assessee has been consistently following the practice of accounting on cash basis. In the past the same has been accepted. The CIT(A) in impugned order accepted assessee's cash system of accounting following its own decision in Assessment Year 2001-02. We see no reason to interfere with the findings of CIT(A) on this issue, hence, ground No.1 of appeal is dismissed.

27. In ground No.2 of appeal, the Revenue has assailed the order of CIT(A) in holding subscription revenue as 'business income' as against 'royalty' held by the Assessing Officer. We find that the CIT(A) after examining the Distribution Agreement between the assessee and El-zee came to the conclusion that the agreement neither allows the distributor to use its copyright nor has given any right to use the copyright. Thus, no transfer of any copyright including any right to use has been provided in the agreement. The subscription is collected from the customers for the use of facility of viewing television channels. Hence, the subscription income is purely business income. We see no infirmity in the findings of the CIT(A) on this issue.

28. We find that the Hon'ble Bombay High Court in the case of CIT vs. MSM Satellite (Singapore) Pte Ltd.,(supra) has considered similar issue. One of the question for consideration before the Court was:-

> *"c. Whether on the facts and circumstances of the case and in law, the ITAT erred is not appreciating that the assessing officer has correctly assessed distribution receipt as 'Royalty Income'?"*

Answering the aforesaid question in negative the Hon'ble Court held:

> *"**12.** Section 9 of the Act pertains to income deemed to accrue or arise in India. Clause (vi) of Section 9(1) pertains to income by way of royalty. Relevant portion reads as under:—*
>
> *'(vi) income by way of royalty payable by —*
>
> *(a) the Government; or*
>
> *(b) a person who is a resident, except where the royalty is payable in respect of any right, property or information used or services utilised for the purposes of a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India; or*
>
> *(c) a person who is non-residnet, where the royalty is payable in respect of any right, property or information used or services utilised for the purposes of a business or profession carried on by such person in India or for the purposes of making or earning any income from any source in India:*
>
> *Explanation 2 below sub-section (1) of Section 9 describes the term "royalty" for the purpose of said clause, relevant portion of which reads as under:—*
>
> *Explanation 2.- For the purposes of this clause, "royalty" means consideration (including any lump sum consideration but excluding any consideration which would be the income of the recipient chargeable under the head "Capital gains")for'*
>
> ***13.** In our opinion, these provisions would in no manner change the position. Only if the payment in the present case by way of a royalty as explained in explanation (2) below sub-section (1) of Section 9 of the Act, the question of applicability of clause (vi) of sub-section (1) of Section 9 would arise. **Learned counsel for the revenue placed considerable tress on clause (v) of explanation (2) by virtue of which the transfer of the rights in respect of copyright of a literary, artistic or scientific wok including cinematograph film or films or tape used for radio or television broadcasting etc. would come within the fold of royalty for the purpose of Section 9(1) of the Act. We do not see how the payment in the present case could be covered within the said expressions. As noted, this is not a case where payment of any copyright in literary, artistic or scientific work was being made.**"*
>
> *[Emphasised by us]*

Thus, in facts of the case and the decision referred above, ground No.2 of appeal is dismissed sans-merit.

29. In ground No.3, the Revenue has assailed the finding of CIT(A) in applying global profitability ratio of 9.36% in estimating Indian income of the assessee. This ground of appeal of the Revenue is corresponding to ground No.2 of appeal by the assessee. Since, we have allowed ground No.2 in appeal by the assessee, as a sequitur, ground No.3 of department's appeal must fail. Hence, ground no.3 is dismissed.

30. In ground No.4 of appeal, the assessee has assailed the findings of CIT(A) in deleting interest u/s. 234B of the Act. The Revenue has not been able to controvert the well reasoned findings of CIT(A) on this issue. We see no reason to interfere with the order of CIT(A) on this count. Ground No.4 of appeal is thus, dismissed.

31. In the result, appeal of Revenue is dismissed.

ITA NO.3149/MUM/2007 (A.Y. 2003-04)- Assessee's Appeal:
ITA NO.3880/MUM/2007 (A.Y. 2003-04)- Revenues's Appeal:

32. Both sides are unanimous in stating that the facts and grounds in appeal of the assessee and the Revenue in the impugned assessment year are similar to Assessment Year 2002-03, therefore, the submissions made on grounds in Assessment Year 2002-03 would equally apply to Assessment Year 2003-04.

33. We have heard the submissions made by rival sides. We find that the grounds raised in appeal for Assessment Year 2003-04 in cross appeals by the assessee and Revenue are similar to the one raised in Assessment Year 2002-03. The findings given by us while adjudicating cross appeals for Assessment Year 2002-03 would *mutatis mutandis* apply to the instant set of appeals. For

parity of reasons appeals of the assessee are partly allowed and that of the Revenue is dismissed.

34. To sum up, appeals of the assessee for Assessment Year 2002-03 and 2003-04 are partly allowed and appeals of Revenue for Assessment Year 2002-03 and 2003-04 are dismissed.

Order pronounced in the open court on **Tuesday** the 2nd day of January, 2024.

Sd./-	Sd./-
(GAGAN GOYAL)	(VIKAS AWASTHY)
लेखाकार सदस्य/ACCOUNTANT MEMBER	न्यायिक सदस्य/JUDICIAL MEMBER

मुंबई/ Mumbai, दिनांक/Dated 02/01/2024
Vm, Sr. PS(O/S)

प्रतिलिपि अग्रेषितCopy of the Order forwarded to :

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. The PCIT
4. विभागीय प्रतिनिधि, आय.अपी.अधि., मुबंई/DR, ITAT, Mumbai
5. गार्ड फाइल/Guard file.

BY ORDER,

//True Copy//

(Dy./Asstt.Registrar),ITAT, Mumbai