

आयकर अपीलीय अधिकरण, 'बी' खंडपीठ मुंबई
INCOME TAX APPELLATE TRIBUNAL, MUMBAI "B" BENCH
सर्वश्री राजेन्द्र, लेखा सदस्य एवं शक्तिजीत डे, न्यायिक सदस्य

Before S/Sh. Rajendra, Accountant Member & Saktijit Dey, Judicial Member
आयकर अपील सं./ITA No.4471 to 73/Mum/2013, निर्धारण वर्ष/Assessment Year-2004-05, 06-07 & 07-08

Dy.CIT-Central Circle-20 Room No.402, 4 th floor, Assesseeyakar Bhavan, MK Road Mumbai-400 020.	Vs	M/s. Multi Screen Media Pvt. Ltd. (Earlier known as SET India Pvt. Ltd.) 4 th Floor, Interface Building No.7 Off. Malad Link Road, Malad(W) Mumbai-400 064. PAN: AABCS 1728 D
---	----	--

(अपीलार्थी /Appellant)

(प्रत्यर्थी / Respondent)

C.O. No.180/Mum/2014

Arising out of आयकर अपील सं./ITA No.4471 /Mum/2013, निर्धारण वर्ष/Assessment Year-2004-05

M/s. Multi Screen Media Pvt. Ltd. Mumbai-400 064.	Vs	Dy.CIT-Central Circle-20 Mumbai-400 020.
--	----	---

(प्रत्याक्षेपक/Cross objector)

(प्रत्यर्थी/Respondent)

निर्धारिती ओर से/Assessee by : Shri Nishan Thakkar

राजस्व की ओर से/ Revenue by : Shri N.P. Singh-DR

सुनवाई की तारीख/ Date of Hearing : 07-10-2015

घोषणा की तारीख / Date of Pronouncement : 09-10-2015

आयकर अधिनियम, 1961 की धारा 254(1) के अन्तर्गत आदेश

Order u/s.254(1) of the Income-tax Act, 1961 (Act)

खंडपीठ के अनुसार PER BENCH:

Challenging the orders dt. 26.3.2013 of the CIT(A)-39 Mumbai, the AO has filed the appeal for the above mentioned three AY.s. The assessee has filed cross objection for the AY 2004-05. The effective grounds of appeal are almost similar for all the years. Therefore, for the sake of convenience we are passing a consolidated order.

A.Y.	ROI filed on	Returned Income	Assessment dt.	Assessed Income
2004-05	1.11.2005	16,35,92,360/-	5.5.2010	38,42,98,940/-
2006-07	29.11.2006	35,82,44,496/-	4.12.2009	76,92,15,068/-
2007-08	31.10.2007	7,15,06,909/-	27.12.2010	75,17,97,261/-

ITA No.4771/Mum/2013(A.Y.2004-05):

Brief facts:

2. Assessee-company, engaged in the production and sale of TV programmes Films distribution of satellite channels filed its return of income on 1.11.2004, declaring total income of Rs. 16.35lacs. The AO completed the assessment u/s.143(3) of the Act on 22/12/2006, determining the income of the assessee at Rs.19.39 crores. Subsequently, the matter was re-opened by the AO as per the provisions of section 147 of the Act. He completed the assessment u/s. 143 (3)r.w.s. 147 of the Act, on 5.5.2010 computing the total income of the assessee at Rs.38.42 crores. As per the AO during the course of assessment for AY 05-06 disallowance amounting to Rs.32.49 crores was made on account of selling and distribution charges. To verify as to whether similar issue existed in the year under appeal the AO issued a notice u/s. 148 of the Act. The assessee objected the re-opening of the assessment vide its letter dt.28.8.2009. The

issue of reopening travelled up to Hon'ble Supreme Court, who held that re-assessment proceedings were valid.

3. Effective Ground is about deleting the disallowance of 81.25% of the expenditure incurred on advertisement and sales promotion amounting to Rs.21.74 crores. While completing the assessment, the AO mentioned that the amount of income escaping assessment was mentioned at Rs.29.26 crores, that the entire reasoning was based on assessment completed for AY 2005-06, that in the assessment the AO had disallowed 81.25% of only advertisement and sales promotion rather than full selling expenses, that for the year under consideration the disallowance warranted would be 81.25% of the advertisement and sales promotion expenses i.e. Rs.21.74 crores. The assessee was required to justify as to why advertisement and sales promotion should be allowed as a deduction when the expenditure benefitted its principal. It made a detailed submission before the AO. Following the order of the AO, for 2005-06 a disallowance of Rs.21.74 crores was made.

4. Aggrieved by the order of the AO, it preferred an appeal before the First Appellate Authority (FAA). Before him, it was contended that the expenditure had been incurred wholly and exclusively for the purpose of business and it was eligible for deduction u/s. 37 of the Act, that the expenditure helped the assessee to increase the subscription revenue. It relied upon the case of Star India P.Ltd. (103 ITD 73), Viacom 18 Media Pvt. Ltd. (ITA 5057/ Mum/ 07) and Sabena Detergents P.Ltd. (303 ITR 320).

After considering the submission of the assessee and the assessment order, the FAA referred to the order of the Tribunal dated 20/3/2013 (ITA/4686/Mum/2010 of AY 2005-06). He held that the Tribunal had considered all the factual aspects and had decided the issue in favour of the assessee. Relying upon the order of the tribunal for AY.05-06 and the decision of Hon'ble Bombay High Court in case of Star India (supra), the FAA allowed the appeal filed by the assessee.

5. Before us, Departmental Representative (DR) stated that matter could be decided on merits. Authorised Representative (AR) relied upon the order of the Tribunal dated 20.3.2013 (supra).

We have heard the rival submissions and perused the material before us. We find that while deciding the appeal for AY 2005-06 the Tribunal has discussed the issue as under:

“3. Remaining issue is against confirming disallowance of advertisement and sales promotion expenses of Rs.32,49,91,062/-, being 81.25% of total expenses claimed under Section 37(1) of the Act.

4. The AO disallowed the aforesaid expenses on the ground that the expenditure is of the Channel principal. The assessee stated before the CIT(A) that the AO has legally erred in apportioning only 18.75% of total expenditure of advertisement and sales promotion as allowable to the assessee. It was further submitted that the AO erred in disallowing the expenditure on advertisement and sales promotion amounting, to Rs 32,49,91,062/- merely on the basis of presumption and surmises and without appreciating that the expenditure was incurred wholly and exclusively for the purpose of business, and, therefore, the expenses are allowable in full. It was argued that the expenditure on advertisement and sales promotion amounting to Rs.32,49,91,062/- was disallowed without appreciating the fact that the Transfer Pricing Officer had examined the international transactions between the Appellant and its associated enterprises and had held that the margin arrived at as per the Transactional Net Margin Method is at arms' length and accordingly the said expenditure should also be considered be at arms length and not excessive and unreasonable. Reliance was placed on various case laws also including the decision of Third Member of the Tribunal in the case of India Private Limited, reported in 103 ITO 73 and also in the case of Nestle India Private

Limited, decided by the Delhi Bench of the Tribunal. It was further explained that in the age of multiple channels, in order to keep its subscriber base intact and keep the viewers constantly interested, it was important to incur expenditure on advertising and sales promotion as it also, helped its distribution business and in developing content in line with viewership preference and to maintain its subscription fees. Reliance was placed on the decision of the Hon'ble Supreme Court in the case of *Sassoon J. David & Co. Ltd.* After considering the submission and perusing the material on record, learned CIT(A) noted that full copies of other agreements regarding advertisement commission and sale of programs discussed in the order have not been filed, though the assessee has filed copy of distribution agreement entered into by the assessee with the principal i.e. SET Singapore. Learned Cit(A) noted that the main argument of the assessee are that the expenditure incurred was for the purpose of its business and in commercial expediency which discretion and decision is with the assessee. It was further noted that against the order of the Tribunal in the case of *Star India Ltd.*, the revenue has filed an appeal before the Hon'ble High Court, however, Hon'ble Bombay High Court has dismissed the appeal of the revenue but not detail finding has been given. Thereafter the CIT(A) noted that there are certain distinguishing feature in the case of *Star India Pvt. Ltd.* (supra) and in case of the assessee, therefore, without following the decision in the case of *Star India Pvt. Ltd.*, learned CIT(A) confirmed the action of the AO. Distinguishing features have also been noted by the CIT(A) in his order at pages 6 to 8.

5. Being aggrieved with the observations made by the learned CIT(A), the assessee has filed the present appeal here before the Tribunal.

6. Learned counsel of the assessee, who appeared before the Tribunal, stated that the issue is squarely covered by the decision of the Hon'ble Bombay High Court in the case of *Star India Private Limited*, decided in ITA NO.165/2009, dated 24-3-2009. It was stated that it is not necessary all the time that the Hon'ble High Court should discuss the facts in detail then pass an order. The Hon'ble High Court has observed that the Tribunal has passed a detailed order by discussing all the facts and no question of law arises out of the order of the Tribunal. Accordingly, the order of the Tribunal has been confirmed by the Hon'ble High Court which is binding in nature.

6.1 In respect to distinguishing the facts by the CIT(A), learned counsel of the assessee has filed a chart mentioning the objection of the learned CIT(A) and mentioning the assessee's submissions. This chart contains two pages. It was further stated that even in the case of assessee itself, the Tribunal has allowed the issue in favour of assessee earlier. However, there was a divergent view among the members of the Tribunal in the case of *Star India Pvt. Limited*. The matter was referred to the Third Member and the Third Member after discussing the issue in detail, has allowed the issue in favour of the assessee. The order of the Tribunal has been reported in 103 ITO 73, which pertains to assessment year 1998-99 and 1999-2000. The facts are identically same in the case of the assessee and in the case of *Star India Pvt. Limited*.

7. Learned OR has placed reliance on the order of CIT(A). It was further submitted that the full documents were not filed before the CIT(A). In respect to decision of the Hon'ble Bombay High Court, it was stated that the Hon'ble High Court has not discussed the facts of the case as simply has stated that no question of law arises out of the order of the Tribunal. In this respect, reliance was placed on the decision reported in 255 ITR 147 (SC), wherein it was held that without discussing in detail, order passed was not justified.

8. In rejoinder, learned Counsel of the assessee stated that the issue has been examined in detail in earlier years, which have been allowed in favour of the assessee. There is no new facts in the year under consideration and, therefore, stated that facts are not discussed in detail, is not correct. It was further submitted that facts of the case of *Star India Pvt. Ltd.* and the facts in the case in hand, are identically same. The decision of *Star India Pvt. Ltd.* has been affirmed by the Hon'ble Jurisdictional High Court, therefore, the same is binding.

9. We have heard rival submissions and considered them carefully, After considering the submission and perusing the material on record, we find that the assessee deserves to succeed on the issue involved. We find that learned CIT(A) was not justified in observing that Hon'ble High Court has not passed a detailed order, therefore, the same was not followed, in our view,

whether the order of the Hon'ble High Court is, in detail or in short, that has to be followed. We further noted that learned CIT(A) has tried to distinguish the facts in the case of Star India Private Limited and in the case of assessee. Distinguishing feature has been explained by the assessee while filing a chart.

9.1 The first objection of the CIT(A) is that the Star India was entitled to commission of 15% on advertisement revenues secured by it whereas in appellant's case it is stated by Assessing Officer to be at 12.5%. Whether the commission is 15% or 12.5%, in our view, there should not be any objection. Even we noted that in subsequent years, Star India has also been earning 10% commission on advertising revenues which fact is recorded in IT AT orders in case of Star India for AY 2000-01, reported in {(2009) 117ITD 319 (Mum) and for AY 2002- 03, reported in {2008-TIOL-426-ITAT-MUM}. Multi Screen Media Pvt. Ltd. (MSMI) had been subjected to scrutiny under Transfer Pricing assessment and the TPO has confirmed that the margin earned by the Net Margin Method (TNMM) is at arm's length.

9.2 The second objection is that Star India was supplying programmes to Star Hong Kong at cost +5% whereas as per the Assessment order, appellant does this for a fixed fee. The assessee has filed explanation that the average mark-up earned by MSMI on content supplied during the period is 18.75% which fact is accepted by the Assessing Officer in his order at page 17. Therefore, again we find that there is no distinguishable feature as to whether supplying programmes to Star Hong Kong at cost +5% or some other rates, but the fact is that method of doing business is the same.

9.3 The next objection noted by the learned CIT(A) that the Star India was earning cable subscription charges for itself whereas the appellant is collecting gross distribution revenues for itself and the principal i.e. SET Singapore whose share is 75% of the gross. The stake of the principal in the appellant's case is large and critical and not merely incidental. In this regard, the explanation has been filed on behalf of the assessee that in subsequent year, though Star India had made payment to its principal in respect of its distribution income which fact is recorded in IT AT Order in case of Star India for A Y 2002-03, yet the advertisement expense was held to be allowable. In case of Viacom 18 Media Pvt. Ltd. (ITA No.5057/Mum/07, PB Pg.No.225/ the advertisement expenses were held to be allowable considering Viacom 18 was advertising sale agent of overseas channel company. In case of assessee, assessee had been subjected to scrutiny under Transfer Pricing assessment and the TPO has confirmed that the margin earned by the assessee as per the TNMM is at arm's length, this fact noted by the CIT(A) at page 4 and by the AO at page 2 & 7 of their order respectively. After comparing the objection of the learned CIT(A) and the explanation of the assessee, we found again there is no change of facts but there is change in earning of profit. Every assessee has its own fact and its own criteria to earn the money but the main thing is to be seen as to whether line of business is same or not. Learned CIT(A) has not stated anywhere in her order that line of business is separate and distinct to each other.

9.4 The next objection noted by the learned CIT(A) that the Star India had "exclusive rights" for the territory assigned in respect of the three revenue streams whereas the assessee has only "non-exclusive rights" in the territory assigned. In reply it has been stated that this is factually incorrect. Star India also had only non-exclusive rights which fact is itself recorded by the IT AT order of Star India, reported in 103 ITD 73, which has been placed at pages 52, 54, 55, 63 & 91 of the paper book.

9.5 The next objection noted by the learned CIT(A) in the case of Star India that 100% of the expenditure was disallowed whereas in assessee's case the AO had allowed partial expenditure. Whether the expenditure disallowed by the AO is 100% or part, does not matter line of business is the same. Further it makes the assessee's case stronger for the reason that the AO is satisfied that same expenditure has been incurred by the assessee. However, it is seen that in case of Star India, the CIT(A) allowed 20% of the expenditure and on second appeal, the Tribunal has allowed the full expenditure. Therefore, for the same reason also it cannot be said that there is any distinguishable feature in the case of Star India as compared to the case of the assessee.

10. On observation of all the above five objections raised by the CIT(A) in his order, in our view, do not spell that the line of business of the assessee in case of Star, are separate and distinct. The activities are similar, therefore, in our considered view, the decision in the case of Star India Pvt.Ltd (supra), is squarely applicable on the facts of the present case. We further noted that in past even in the case of the assessee itself, the issue has been decided in favour of the assessee. In this year, perhaps for the reason that there is a divergent view between the member of the Tribunal in case of Star India Pvt. Ltd., therefore, for this reason, the issue was not decided and it was pending. However, for the earlier year, the Tribunal has decided the issue in favour of the assessee. Copies of the order of assessment years 2000-01 & 2001-02 are placed on record. Even we further noticed that in case of other assessee i.e. in the case of NGC Network (India) P. Ltd., decided in ITA NO.635/Mum/2010 and in the case of Viacom 18 Media Pvt. Ltd., decided in ITA No.5057/Mum/2007, similar facts were involved and the issue has been decided by the Tribunal in favour of these assesseees.

11. In view of these above facts and circumstances of the case and without going into detail further, we hold that the issue is squarely covered by the decision of the Hon'ble Bombay High Court in the case of Star India Pvt. Ltd. (supra). Accordingly, we decide the issue in favour of the assessee and direct the AO to allow the expenditure to the assessee in view of the above observations.”

Respectfully, following the above we decide the effective ground of appeal against the AO.

C.O.No. 180/Mum/2014(A.Y.04-05):

6.As we have decided the issue in favour of the assessee,therefore the CO filed by it becomes infructuous.

ITANos.4772 to 4773/Mum/2013 AY2006-07 and 07-08:

7.Effective ground of appeal for both the years is identical to the effective ground raised by the AO for the AY.04-05,as stated earlier.Therefore,following the order of AY.2004-05,we decide the issue against the AO.

As a result, appeal filed by the AO for all the three years and CO filed by the assessee stands dismissed.

फलतःनिर्धारिती अधिकारी द्वारा तीनों वर्षों के लिए दाखलि की गई अपीलें नामंजूर की जाती है,निर्धारिती का प्रत्याक्षेप अस्वीकार किया जाता है.

Order pronounced in the open court on 9th October,2015.

आदेश की घोषणा खुले न्यायालय में दिनांक 9, अक्टूबर,2015 को की गई।

Sd/-

शक्तिजीत डे /SAKTIJIT DEY)

न्यायिक सदस्य/ JUDICIAL MEMBER

मुंबई/Mumbai,दिनांक/Date: 09.10. 2015

व.नि.स./Jv.Sr.PS.

Sd/-

(राजेन्द्र/RAJENDRA)

लेखासदस्य/ACCOUNTANT MEMBER

आदेश की प्रतिलिपि □ प्रेषित/Copy of the Order forwarded to :

1.Appellant /अपीलार्थी

2. Respondent /प्रत्यर्थी

3.The concerned CIT(A)/संबद्ध अपीलीय आयकर आयुक्त, 4.The concerned CIT /संबद्ध आयकर आयुक्त

5.DR A Bench, ITAT, Mumbai /विभागीय प्रतिनिधि, ए खंडपीठ,आ.अ.न्यायमंडल मुंबई

6.Guard File/गार्ड फाईल

सत्यपित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकर Dy./Asst. Registrar
आयकर अपीलीय अधिकरण, मुंबई /ITAT, Mumbai.