आयकर अपीलीय अधिकरण "एल" न्यायपीठ मुंबई में।

**IN THE INCOME TAX APPELLATE TRIBUNAL**
**MUMBAI BENCH "L", MUMBAI**

श्री जी.एस. पन्नू, लेखा सदस्य एवं
श्री अमित शुक्ला, न्यायिक सदस्य के समक्ष ।

**BEFORE SHRI G S PANNU, ACCOUNTANT MEMBER**
**AND SHRI AMIT SHUKLA, JUDICIAL MEMBER**

**ITA No. : 4678/Mum/2007**
(Assessment year: 2003-04)
**ITA No.: 412/Mum/2008**
(Assessment year: 2004-05)
**ITA No.: 4176/Mum/2009**
(Assessment year: 2005-06)

| ADDIT(IT)/DDIT(IT)-2(2)/2(1),<br>Room No.120 1st Floor,<br>Scindia House, Ballard Estate,<br>N M Road,<br>Mumbai -400 038 | **Vs** | ताज टी वी लिमिटेड<br>M/s Taj TV Ltd,<br>C/o. M/s Suresh Surana &<br>Associates, 4th Floor,<br>Dalamal Chambers, 29, New Marine Lines, Mumbai -400 020<br>स्थयी लेखा सं. PAN: **AABCT 6542 J** |
|---|---|---|
| अपीलार्थी (Appellant) | | प्रत्यर्थी (Respondent) |

**ITA No.: 5537/Mum/2008**
(Assessment year: 2003-04)
**ITA No.: 5536/Mum/2008**
(Assessment year: 2004-05)
**ITA No.: 4706/Mum/2009**
(Assessment year: 2005-06)

| ताज टी वी लिमिटेड<br>M/s Taj TV Ltd,<br>C/o. M/s Suresh Surana &<br>Associates, 4th Floor,<br>Dalamal Chambers, 29, New Mari<br>Lines, Mumbai -400 020<br>स्थयी लेखा सं. PAN: **AABCT 6542 J** | **Vs** | ADDIT(IT)/DDIT(IT)-2(2)/2(1),<br>Room No.120 1st Floor,<br>Scindia House, Ballard Estate,<br>N M Road,<br>Mumbai -400 038 |
|---|---|---|
| अपीलार्थी (Appellant) | | प्रत्यर्थी (Respondent) |
| Assessee by | : | श्री पेर्सी पर्डीवाला Percy Pardiwalla/<br>श्री मधुर अग्रवाल Shri Madur Agrawal/<br>श्री हितेन के चंदे Shri Hiten K Chande |
| Revenue by | : | श्री जसबीर चौहान Shri Jasbir Chouhan |

सुनवाई की तारीख /Date of Hearing : 07-04-2016

घोषणा की तारीख /Date of Pronouncement : 05-07-2016

**आदेश**

**ORDER**

**श्री अमित शुक्ला, न्या स:**

**PER AMIT SHUKLA, JM:**

The aforesaid cross appeals have been filed by the revenue as well as by the assessee, against separate impugned orders passed by CIT (Appeals)-31, Mumbai for the quantum of assessment passed under section 143(3) for the assessment years 2003-04, 2004-05 and 2005-06. Since common issues are involved in all the appeals, therefore, same were heard together and are being disposed off by way of this consolidated order.

2. We will first take-up revenue's appeal for the assessment year 2003-04, which will also cover the issues and grounds raised in the Department's appeals for the AYs 2004-05 & 2005-06. Grounds of appeal as raised by the revenue read as under:

> *"1. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in holding that Taj India does not constitute an agency PE of the assessee within the meaning of Article 5(4) of the DTAA with regard to the distribution income received by it.*
>
> *2.(i) On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting disallowances made by the Assessing Officer u/s.40(a)(i) of the I.T. Act in respect of claims of transponder charge expenses amounting to US$ 3,29,966 and up linking charges of US $ 3,05,347.*

*2. (ii) On the facts and in the circumstances of the case and in law, the Ld. CIT(A) failed to appreciate that the income received from the assessee by M/s. PanAmSat being in the nature of transponder charges and received by other non-residents being in the nature of up linking charges have arisen in India and accordingly tax should have been deducted at source on such expenses.*

*3. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in holding that the distribution income earned by the assessee during the period when it was not a resident of Mauritius is not taxable in India.*

*4. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in holding that payment of programming fees in respect of live programmes does not constitute "royalty" as provided under Article 12 of the DTAA between India and Mauritius.*

*The Appellant prays that the order of CIT(A) on the above grounds he set aside and that of the A.O. restored.*

3. The brief background and facts of the case are that, assessee company, that is, 'Taj T V Limited' was registered under the laws of Mauritius and is a tax resident of Mauritius since 12th July, 2002. Prior to that, it was registered as a company in British Virgin Islands in the year 2000. It is engaged in the business of broadcasting of sports channel namely, 'Ten Sports' all across the globe including India. Since it did not had any branch or business premises in India, therefore, it had formed a subsidiary, 'Taj Television India Private Limited' (Taj India) as its advertising sales agent to sell commercial advertisement slot to prospective advertisers and other parties in India, in connection with the business of programming and telecasting sports events and

programs on Ten Sports Channel. An agreement dated 08.05.2002 was entered into by the Assessee Company and Taj India for collection of advertising revenue in India for which a commission of 10% of the total advertisement revenue secured for Taj TV was paid to Taj India. A "distribution agreement" was also entered into on 1st March, 2002 by the Assessee with Taj India for the distribution of the pay channel to the various cable operators and ultimately to the consumers in India. The distribution revenue collected by Taj India is to be shared between 'Taj TV' and 'Taj India' in the ratio of 60:40, that is, 60% of revenue goes to Taj TV and balance 40% is retained by Taj India. Both the agreements were approved by Reserve Bank of India (RBI). For the assessment year 2003-04, the assessee had filed its return of income at "Nil" on the basis that advertising and distribution revenue earned by it is not taxable in India because it does not have any Permanent Establishment (PE) in India. A detailed note was filed in the computation of income along with the return of income, which has been incorporated in the assessment order at pages 10 to 13, which for the sake of the ready reference is reproduced herein below, because the entire edifice of the impugned appeal hinges upon the said note:

*"1 Taj TV Ltd. (Taj TV or 'The Company') is a foreign company registered under the Mauritian law. Taj-TV is engaged in the business of bringing to the Indian subcontinent and the Middle East the best in sports programming and production. Taj TV's primary focus is its sports channel programming and production. Taj-*

*TV's primary focus is its sports channel – Ten Sports. Taj is considered as resident for tax purposes in Mauritius as it is registered in Mauritius. We enclosed a copy of 'Tax Residency Certificate'.(TR of the company, marked a s Annexure-I*

2. *Taj-TV has appointed Ta] Television (India) Pvt. Ltd. ('Taj-India) as the advertising sales agent vide agreement dated 8 May 2002 to sell commercial advertising time to prospective advertisers and other parties in India, in connection with the business of programming and telecasting on "Ten Sports" Channel and to collect advertisement charges from India exporters and advertisers on behalf of Tai-TV. The said agreement has been approved by the Reserve Bank of India ('RB') vide their approval letter No. EC. CO, EPD/310/210. 16.08/02-03 dated 19 August 2002. As per the agreement, Taj India is entitled to 10% commission of the advertisement revenues secured for Taj-TV, which is considered fair and reasonable. Taj India does not have any authority to enter into any contract on behalf of Ta]-TV.*

3. *Taj-TV has also appointed Ta]-India as the distributor vide agreement dated 1 March 2002, to distribute an encrypted advertiser and/or subscription supported television programming service known as 'Ten Sports' to cable systems solely for exhibition to subscribers in India. The said agreement has been approved by the RBI vide their approval letter No. CO.OPD/742/21.16.06/2001-02 dated 3 October 2003. As per the agreement, the distribution revenue collected*

*by Ta]-India will be split in the ratio of 60:40 between Taj-TV and Taj-India. The amount payable by Taj-India to Ta]-TV shall be net of Indian Income Tax. Taj-TV is registered in Mauritius and also it does not have any branch or office in India. Further, the telecasting is being done from outside India.*

4. *In view of the complexity of the issues involved in determining taxability of the Foreign Telecasting Companies ('FTC.$) and the extent of income that could be said to accrue or arise to them from their operations in India, the Central Board of Direct Taxes (CBDT) has issued a Circular No. 742 dated 2nd May, 1996 read with Circular No. 6 of 2001 dated 5 March 2001 with effect from 1 April 2001. The Circular No. 742 has prescribed or presumptive taxation by treating 10% of the advertisement revenue from India meant for remittance abroad (excluding the commission of Indian agent and advertising agent) as the income of the FTCs. In view of withdrawal of Circular No. 742, the presumptive taxation system is not applicable now.*

5. *India and Mauritius have entered into the Double Taxation Avoidance Agreement (DTAA) on 24 August 1982 which is notified in India vide GSR 920(E) dated 26 December 1983. It is well settled that the provisions of the DTAA would override the general tax provisions (Refer Circular No.333 dated 2 April 1982 issued by the CBDT). In view of the same, the DTAA provisions would override the general tax provisions to the extent the general tax provisions are inconsistent with the DTAA provisions.*

*6. Article 7 of the India/Mauritius DTAA provides that a resident of Mauritius shall be liable to tax in India on profits of an enterprise only if it carries business in India through a Permanent Establishment (PE) situated in India. If an enterprise carries on business in the other contracting state through a PE, the profit of the enterprise may be taxed in the other state but only so much of them as is directly attributable to the PE. Article 5 of the DTAA defines PE.*

*7. It is submitted that Taj-TV does not have a RE in India as the transactions entered into by Taj-TV are on a principal to principal basis and at arm's length prices. Taj-India does not have any authority to enter into any contract on behalf of Taj-TV and all the advertisement sales contracts are entered into between the advertisers and Taj-TV. The commission of 10% in respect of advertisement revenue is fair and consistent with industry practice, which has been approved by the RBI. In view of the same, it/s submitted that there is no RE in India resulting in any further tax implication.*

*8. The company humbly submits that it does not have any branch or place3 of business in India. Accordingly, in view of provisions of the Article 7 read with section 90(2) of the Act, the income of the Company is not subject to tax in India. The Company also considers that:*

*a. It does not have a PE in India which could result in it being liable to tax in India;*
*b. the profits attributable to PE, if any, are already taxed in India by virtue of Taj-India being already taxed in India; and*
*c. In view of the overall loss situation, no profit can be attributed to Indian operations.*

9. *Section 139 of the Act requires every company including a foreign company to file return of income in India. In view of the same, without prejudice to the above, Taj-TV has prepared its financial statements for the year ended 31 March 2003 as applicable in the case of its Indian operations. The financial statements pertain to revenue derived from the Indian operations and costs attributable to the same (including apportionment of common costs).*

10. *The TDS Certificate for certain parties are not attached herewith as the same are not received till the date of filing return of income. The Company is in the process of collecting the said TDS certificates. The same shall be submitted on receiving from the parties.*

4. The assessee also as an alternative to the above claim that its income is not taxable in India had also prepared specific account for the income earned in India, that is, pertaining to its Indian operations and got them audited under section 44AB which was filed along with the return of income. It was reported that, the profit and loss account revealed revenue earned US $ 6,168,155 on which cost of sale was US $ 7,978,788 resulting into gross loss of US $ 1,810,633. The assessee had computed the total income in the return as per its India account at loss of US$ 6,726,450. Thus, it was stated that, there was a huge loss in Indian operations and which fact has not been disputed or rebutted by the AO also.

5. However, the AO after detailed discussion in his assessment order rejected the assessee's claim. In sum and substance he held that:-

*Firstly*, in relation to the advertising income, Taj India is a 'dependent agent' of the assessee and, therefore, assessee has PE in India in the form of Taj India within the scope and meaning of Article 5(4) of India-Mauritius DTAA;

*Secondly*, in relation to distribution income, he held that distribution agreement involves full/partial transfer of distribution rights and granting of license in respect of trademark, copyright, secret formula, or process etc., including films and video tapes. The said agreement involves the 'use of' or 'right to use' the copyright, trademark, etc. owned by the company. The assessee company is providing service through Taj India and Taj India could not have rendered any service to the subscribers and cable operators without the trademark, copyright, etc. transferred to it by the assessee Company;

*Thirdly*, the assessee company allows the cable operators to use or access the encrypted signal for commercial exploitation by allowing them to distribute it to the viewers. The encrypted signal is the property of the assessee company and by allowing it to be commercially exploited, it is partially transferring the rights to the cable operators. Therefore, distribution income is taxable as 'Royalty' under section 9(1)(vi) of the Act. Since the assessee company was incorporated in British Virgin Islands and was re-registered

as a company in Mauritius w.e.f. 12th July, 2002, therefore it is not entitled to treaty benefits of India-Mauritius DTAA in respect of distribution income earned up to 12 July 2002 (i.e. from 1.04.2002 to 12.07.2002) and such distribution income shall be taxable as 'Royalty'. However, he held that distribution income earned after 13th July, 2002 is connected with the PE in India and hence, it is taxable under Article- 7 of India-Mauritius-DTAA;

*Fourthly*, he disallowed the Programming cost paid to various cricket boards and other sports association for acquiring live telecast rights in respect of events taking place outside India under section 40(a)(i) of the Act as no tax was deducted at source. According to him, such payment are in the nature of 'Royalty' under section 9(l)(vi) of the Act as the assessee company has acquired the 'copyright' in respect of such events;

*Fifthly*, he also disallowed the Transponder fees of US $ 3,29,966 paid to PanAmSat International Systems Inc. USA (hereinafter referred to as the "PanAmSat") for rendering services through satellite, located outside India, in telecasting the sports channel 'Ten Sports' to various countries under section 40(a)(i) of the Act as no tax was deducted at source from such payment. According to him, it is in the nature of 'Royalty' and falls under clause (iv a) of Explanation 2 to Section 9(1)(vi) of the Act; and

*Lastly*, he also disallowed the up-linking charges of US $ 3,05,347 paid to PanAmSat and various other non-residents for rendering services in the form of up linking the

signal in respect of live events, taking place outside India, from the venue of the event to the satellite under section 40(a)(i) of the Act as no tax was deducted at source from such payment as according to him, it is in the nature of 'Royalty' and falls under clause (iva) of Explanation 2 to Section 9(1)(vi) of the Act.

6. First of all it is noted that the AO has accepted the business loss computed by the assessee as per its Profit & Loss Account computed for the income from Indian operation. Thereafter he has proceeded to disallow various payments after invoking the provisions of section 40(a)(i) on the ground that same would be allowable in the year of payment of tax at source and lastly, the distribution revenue has been taxed as 'royalty income'.

7. In the first appeal, so far as the issue of advertising revenue or income is concerned, the Ld. CIT(A) held that, the assessee did had an agency PE in the form of Taj India within the meaning of Article 5(4) of the India-Mauritius-DTAA. Assessee's case before the CIT(A) was that, Taj India is not a wholly owned subsidiary of Taj TV and in any case merely being a wholly owned subsidiary, it does not follow that the subsidiary is the agent of parent company and in support, reference was made to para (6) of Article 5. It was further submitted that, under the meaning of Article 5(4) also, there cannot be an agency PE, because, the assessee has paid the commission of 10% which is at arm's length price to Taj India for the services rendered by it and the said payment of

commission has been examined by the TPO both in the hands of the assessee as well as in the hands of the Taj India and no adjustment has been suggested. Thus, it was submitted that, once payment has been accepted to be at arm's length price then liability of the principal non-resident is extinguished in India. It was further submitted that, agent should have authority and also should have habitually exercised that authority to conclude contract in the name of non-resident principal, before any agent could be said to have constitute a PE under Article 5(4). Here Taj India does not have any authority to conclude contract in the name of Taj and, therefore, it cannot be said there existed an agency PE between assessee and Taj India under Article 5(4). The Ld. CIT(A), after considering the various clauses of the advertising sales agency agreement dated 08.05.2002, specifically with regard to clauses 1, 3, 5 and 6, came to the conclusion that Taj India was in fact, dependent agent of assessee in all respect and its income was from advertisement and distribution and the entire source of revenue of Taj India is from Ten Sports Channel. It did not have any income from any other source and, therefore, it was wholly dependent on assessee for its business. Thus, he concluded for all practical purpose, Taj India was exercising authority to conclude contract on behalf of the assessee in India and, therefore, there was an agency PE within the meaning and scope of Article 5(4). It is on this finding assessee had filed its appeal which is belated.

8. In respect of the "Distribution Income", Ld. CIT(A) noted that, the agreement between the assessee and Taj TV is an agreement on principal to principal basis and it is not acting as an agent of the assessee company *albeit* it has obtained the right of distribution of TV channel for itself and subsequently it enters into "sub-distribution agreement" with other parties in its own name to which the assessee company is not a party at all. The assessee had given exclusive right to Taj India for distribution of TV Channel and for such right it had agreed to pay 40% of the total subscription income earned as a consideration. Further, the agreement clearly stipulates that, Taj India shall be solely responsible for the marketing and promotion of the services to help drive cable operator sales and marketing support shall be at the discretion of Taj India. From the perusal of entire terms and conditions, he held that it is apparent that Taj India is an independent contractor. During the course of the Appellate proceedings, he also required the assessee to furnish copy of agreements entered into by the distributors with the cable operators. As a sample copy of sub-distribution agreement was filed which was entered between Taj India and HMA Udyog Ltd on 11.03.2002. On the perusal of the entire gamut of the materials and the submission of the assessee, Ld. CIT(A) observed that, the assessee has appointed Taj India exclusively for distribution in India and prohibits assessee from a distribution agreement to anybody else. He further observed that Taj India is not acting as an agent of the assessee to obtain TV Channel itself and secondly, it has

entered into contract with other parties and that too in his own name. From the perusal of the sub-distribution agreement, he noticed that, 75% of the revenue belongs to Taj India and balance 25% belongs to sub-distributors. In any sub-distributors agreement, assessee does not figure anywhere. Thus, he concluded that, assessee has given distribution right to Taj India for permitting and distributing TV Channel in India on principal to principal basis and there is no evidence to show or hold that, Taj India is acting as an agent of the assessee qua the distribution business. Accordingly he concluded that, there is no agency PE for distribution income in terms of Article 5(4).

9. As regards the AO's conclusion and finding that Distribution income earned by the assessee for the period 01.04.2002 to 12.07.2002, that is, for the period of little over 3 months, the distribution income earned by the assessee is to be treated as 'royalty' income within the meaning of section 9(1)(vi), because prior to 13.07.2002, assessee was not resident of Mauritius and therefore, the benefit of DTAA will not be applicable and accordingly the income shall be taxable as per the Domestic Law, that is, Indian Income-tax Act; Ld. CIT(A) held that post 12.07.2002, the AO himself has held that distribution income is not 'royalty' *albeit* is a business income and will not fall within the meaning of "royalty" as defined under Article 12 of the India Mauritius DTAA post 13.07.2002. Thus, there cannot be two different treatments for same income. The assessee's case before the CIT(A) in this

regard was that, business of telecasting of channels process is continuous and non-stop, which is initiated by the channel companies and ultimately enjoyed by the viewers. The business carried on by the channel companies is an indivisible and wholesome chain of activities, which cannot be segregated and packed as independent modules. All the players involved in the business take part simultaneously in carrying on of the telecasting business which runs instantly. In support the assessee has referred and relied upon the decision of ITAT, Mumbai Bench in the case of Satellite Television Asian Region Ltd. in ITA No.5066/Mum/2004 dated 18.01.2006. Thus, it was submitted by the assessee that, subscription/distribution revenue earned does not fall in the nature of “royalty” as defined in section 9(1)(vi). The Ld. CIT(A) after examining the definition of “royalty” as given in Explanation 2 to section 9(1)(vi) held that, the distribution income even up to 12th July, 2002 cannot to be taxed as a ‘royalty’ under section 9(1)(vi) of the Act, as copyright over the programs belong to the Assessee Company, whereas the distributors or cable operators only transmit the signals received from the Assessee Company. They do not modify, alter, or replace the content of the telecast but broadcast the content as it is received by them from the Assessee Company. Therefore, it does not amount to transfer of any right over the copyright or granting any license over the copyright to the cable operators. Therefore, the AO has erred in taxing distribution income as 'Royalty' under the Act.

10. In respect of disallowance of US $ 3,29,966, paid to PanAmSat as Transponder fees, under section 40(a)(i) of the Act, Ld. CIT(A) observed that the Delhi Tribunal in the case of DCIT vs. PanAmSat International System (9 SOT 100) itself has held that payment made for transponder facility is considered to be paid for the use of service and not for use of any equipment, therefore, it did not amount to 'Royalty'. The Hon'ble Tribunal also held that fees paid for Transponder facility does not amount to 'Royalty' as it is not for a secret process; or 'Fees for Included Services' as it does not make available technical knowledge as per Article -12 of India-US DTAA. The ld. CIT(A) also held that the payment of 'transponder fees' was not borne by the PE in India, hence, even if payment is held to be 'Royalty', it is still not taxable as it is not borne by PE of US company in India therefore, there was no obligation to deduct tax at source in view of Article 12(7). In respect of allowance of payment of US $ 305,347, paid to PanAmSat and various other non-residents as Up linking charges which has been disallowed under section 40(a)(i) by the AO, the ld. CIT(A) held that Up linking charges

paid by the assessee company are in connection with the events taking place outside India for sending the signal from the venue of the event to the Satellite. The payment is made for rendering services by PanAmSat to uplink the signal from the venue of the event to the Satellite therefore, it is not in the nature of 'Royalty' or 'Fees for included services'. Ld. CIT(A) further held that the payment of Up linking charges is neither incurred in connection with the PE in India nor borne

by the PE in India, therefore, there was no obligation to deduct tax at source. In respect of Programming cost paid to various cricket board and sport associations, which has been disallowed under section 40(a)(i) of the Act, the ld. CIT(A) held that Programming cost paid to acquire live telecast rights of events was not in the nature of 'Royalty' as there is no copyright involved in live telecast of events. He further held that in any case, programming cost are neither in connection with the PE nor is it borne by the PE in India, therefore, even if the payments are characterized as 'Royalty' it will not be taxable as per Article 12(7) of DTAA. Hence, there was no obligation to deduct tax at source on programming cost paid to acquire live telecast rights. Thus, after detailed discussion, ld. CIT(A) held that none of the payments would be taxable in India even if it is deemed to be 'royalty', because the payment made to the parties do not have their PE in India, therefore, by virtue of article 12(7) the same cannot be taxed in India. Regarding programming fee also, he has relied upon the decision of CIT(A) in the order passed under section 201/(201A) dated 17.03.2004.

11. Against the aforesaid finding, the revenue has come in appeal on the grounds which has been incorporated in the earlier part of the order, as well as by the assessee where it has mainly challenged the observations and finding of the ld. CIT(A) qua the advertisement revenue, that Taj India is a dependent agency PE of the assessee and hence, the income

from advertisement revenue is chargeable to tax in India as business income.

12. Before us, the Ld. CIT(A) DR submitted that, so far as taxability of distribution income is concerned, there is a PE in India in the form of Taj India because entire distribution activity in India on behalf of the assessee is being done by the Taj India. In any case, such a distribution income falls within realm of "royalty" under the provisions of the Income-tax Act, because the distribution involves full/partial transfer of distribution rights which is in the form of copyright and trademark etc. The distribution activity could not have been carried out by the Taj India and the cable operators without the trademark and copyright transferred to it by the assessee. In support, he strongly relied upon the decision of ITAT Mumbai Bench in the case of NGC India Network LLc v DIT in ITA No. 7994 and 7631 of 2012 order dated 16th December, 2015, wherein, the Tribunal has held that such a distribution income amounts to "royalty" and has to be seen from the point of view of newly inserted Explanation (vi) to section 9(1)(vi). Regarding various disallowances on account of transponder charges, up linking charges to M/s PanAmSat he submitted that, now in view of the newly inserted Explanation (vi) by the Finance Act, 2012 with retrospective effect from 01.06.1976, such a payment will fall within the ambit of 'royalty' only. In support of this view, he strongly relied upon the decision of Hon'ble Madras High Court in Verizon Communications Singapore Pte Ltd. v ITO, reported in [2014]

361 ITR 575; Tribunal order in Atos Information Technology HK Ltd vs DCIT in ITAT Mumbai Bench in ITA No. 1464/Mum/2015; and also decision of Hon'ble Bombay High Court in the case of CIT. Vs. Siemens Aktiongesellschaft, reported in [2009] 310 ITR 320 which is in the context of Explanation 2 to section 9(1)(vii) brought by the Finance Act, 2007 and drew our specific to para 27 of the said judgment. He further submitted even in the context of DTAA also, the definition of 'royalty' under Income-tax Act will have to be applied and this view finds support from the decision of Hon'ble Madras High Court in the case of Verizon Communications Singapore Pte Ltd. (supra) and the decision of Viacom 18 Media Pvt. Ltd, reported in, [2014] 153 ITD 384 wherein, it has been held that since term 'process' used in Article 12(3) of India US DTAA has not been defined, therefore, the same has to be seen in the light of Explanation (vi) brought by way of retrospective amendment which is clarificatory in nature. Thus, he summarized that the income from distribution as well as all the payments are covered under the definition of royalty.

13. Before us, the Ld. Senior Counsel, Mr. Percy Pardiwalla submitted that, so far as distribution agreement between Taj India and the assessee is concerned, clearly there is no principal-agent relationship, because Taj India has obtained the right of distribution for its own business and subsequently entered into the contract with sub-distributors on its own. This fact is evident from the "Distribution

agreement", dated 11th March, 2002 placed in the paper book at pages 8 to 17 and drew our attention to various clauses given in paras 1, 2 & 3. This aspect of the matter has been appreciated by the Ld. CIT(A) also, who has analyzed the terms of the distribution agreement and came to a conclusion that the agreement between assessee and Taj India is on principal to principal basis. In any case, under Article 5(4) of India-Mauritius DTAA the first and foremost condition which needs to be seen that, the agent must habitually exercise the authority to conclude contracts in the name of the assessee or he habitually maintains a stock of goods or merchandise belonging to the assessee. Here, none of the conditions are applicable, because Taj India has obtained all the right of distribution of TV Channels for itself and has subsequently entered into contract with other parties on its own in which assessee is not a party. The sub-distribution agreement with Taj India and HMA Udyog Ltd, which has been referred by the Ld. CIT (A), provides that Taj India gets 75% of the revenue from such sub-distributorship. The finding given by the ld. CIT (A) in his order at para 2.8 is based on appreciation of facts and also after analyzing the scope and meaning of Article 5(4), therefore, the same should be affirmed. Regarding treatment of distribution revenue as 'royalty', he submit that there is an inherent contradiction in the finding of the AO, because for the first three months, he is saying that the revenue from distribution would be treated as "royalty" and post July-2002, when assessee company got incorporated in Mauritius and India-Mauritius Treaty is applicable, then

same distribution income is to be treated as "business income". There cannot be two treatment of one source of income, either it could be 'royalty income' or it could be 'business income'. Regarding other payments, like transponders fees paid to PanAmSat, he submitted that it needs to be examined from the angle of Article 12 of India-US DTAA (as PanAmSat is a US based company). The assessee does not get any right to use the transponder because it does not get any physical control or possession over the transponder to use it in its own manner. PanAmSat is mainly providing the services to the assessee company through the transponder and the assessee does not receive any knowhow in relation to the secret process of transmitting the signals through transponder. In any case, the payment which has been characterized as a 'royalty' would not be taxable in India, because the transponder fee has been paid by the assessee company to a non-resident company outside India for availing the service of an equipment placed outside India and cannot be regarded as income arising in India as per provisions of Article 12(7), because the US company does not have any PE in India. In support of his contention, he strongly relied upon the decision of Hon'ble Bombay High Court in the case of DIT vs. Set Satellite (Singapore) Pte Ltd, reported in [2014] 269 CTR 197.

14 As regards the argument of Ld. DR that, now in wake of newly inserted Explanation (v) and (vi) to section 9(1)(vi) by the Finance Act, 2012 w.r.e.f. 1st April, 1976, he submitted

that, first of all the said definition under the Act cannot be read into the Treaty because the definition of 'royalty' in the India-US DTAA has been clearly defined. The enlargement of definition of "Royalty" under the amended provision of domestic law cannot be imported in Treaty and this view now founds support by a latest decision of Hon'ble Delhi High Court in the case of DIT vs. New Skies Satellite BV and others, reported in [2016] 95 CCH 0032 wherein the Hon'ble High Court after taking note of various provisions of the Act, decisions of various High Court and relevant provision of the DTAA held that the amendment brought by the Finance Act, 2012 would apply to the payments chargeable to tax under the Act, and such an amendment does not alter the definition under the DTAA, therefore, the benefits under the Treaty are available even after the retrospective amendment w.r.e.f. 1.04.1976. He pointed out that, similar view was upheld by the Tribunal in the case of Dy. Director Income-tax vs B4U International Holdings Ltd., 137 ITD 346. As regards the reliance placed by Madras High Court decision in the case of Verizon Communications Singapore Pte Ltd. (supra) and the ITAT decision in the case of Viacom 18 Media Pvt. Ltd, he submitted that the Hon'ble Delhi High Court has taken note of the decision of Hon'ble Madras High Court and have discussed the same in detail and did not follow the proposition laid down by the High Court on the ground that, no reasons were cited by the Hon'ble High Court for extending the amendment to DTAA. By this reasoning also the decision of ITAT Mumbai Bench in the case of Viacom 18 Media Pvt.

Ltd will not be applicable. As regards the decision of Hon'ble Bombay High Court in the case of CIT vs. Siemens Aktiongesellschaft (supra), the Hon'ble Delhi High Court has also dealt with this point that the issue and situation before the Hon'ble High Court was materially different and also the term 'royalty' was not defined in the German DTAA. Regarding the decision of ITAT in the case of Atos Information Technology HK Ltd (supra), he submitted that, first of all, this case pertains to HongKong based company wherein there is no DTAA and secondly, the issue involved therein was different. On the decision of ITAT Mumbai in the case of NGC Network (supra), he submitted that in that case matter was set-aside to AO and no final decision was taken by Tribunal qua the distribution income. In any case, here in this case AO for the period of 9 months and in subsequent years has himself held that the income from distribution is business income; therefore, this decision will not apply at all.

15. Without prejudice to the above submissions, he submitted that, even if the retrospective amendment brought by the Finance Act, 2012 are invoked, then also disallowance under section 40(a)(i) cannot be made for non-deduction of TDS, because at the time of making the payment there was no such law, therefore, assessee could not have foreseen such an amendment and deducted the TDS. In support of this contention, he strongly relied upon the ITAT Mumbai in the case of Channel Guide India Ltd. v. ACIT, reported in [2012] 139 ITD 49. Coming to the issue raised in ground

no.3, he again reiterated that, the income cannot be distributed under two heads, firstly, as a 'royalty' for the first three months and then as a 'business income' for the balance 9 months. In any case, under the distribution agreement, the assessee has not granted any license to use or any copyright to the distributor or to the cable operators. The assessee company makes available the content to the cable operator which is transmitted by them to the ultimate consumer. The distributor or the cable operator cannot add, modify, delete or replace the contents of the channel transmitted to them. Thus, it is nothing but a business income only and in support he relied upon the following decisions:-

i) *DDIT(IT) v Set India Pvt. Ltd (ITA No.4372/Mum/2004);*

ii) *DDIT(IT) vs. MSM Satellite (Singapore) Pte Ltd.(ITA No.2870/Mum/2010); and*

iii) *MSM Satellite (Singapore) Pte Ltd vs ADIT (IT) (ITA No. 8478/Mum/2011)*

16. Lastly, coming to disallowance under section 40(a)(i) for programming was paid to various non-resident, he submitted that this issue is squarely covered in favour of the assessee by the order of the Tribunal in assessee's own case in ITA No. 109/Mum/2008 and ITA No.3702/Mum/2008.

17. We have carefully considered the entire gamut of facts as discussed in the impugned orders, rival submissions made before us, materials relied upon and the decisions relied upon. The assessee company is incorporated and registered under the Mauritius Law and is also the Tax Resident of Mauritius, therefore, qua its various streams of income,

India-Mauritius DTAA has to be seen. The assessee is engaged in the business of telecasting sports channel called *"Ten Sports"* and for generating revenue, it has been collecting advertisement revenue and distribution of channel in India. It has appointed Taj India as its advertising sales agent to sell commercial slot/spot to the prospective advertisers and other parties in India in connection with the business of programming and telecasting of 'Ten Sports' Channel. As per the agreement, commission @ 10% of the advertisement revenue was paid to Taj India. The assessee has claimed that, such an income is not taxable in India, because there is no PE in India as Taj India is not a dependent agent of the assessee within the terms of Article 5(4). This contention of the assessee has been negated by the Ld. CIT(A) after discussing the issue in detail and holding that, there is no agency relationship between the assessee and the Taj India qua the advertisement income within the scope of Article 5(4). However, in the revenue's appeal, the main issue involved in ground no.1 is with regard to taxability of distribution revenue in terms of "Distribution Agreement" dated 1st March, 2002. Under the terms of the distribution agreement, the assessee has appointed Taj India as exclusive distributor in India and prohibits the assessee for entering into distribution agreement with anybody else. The Ld. CIT(A) after taking note of the 'Distribution Agreement' and examining various terms and clauses used therein and also taking into consideration the conduct of the parties, came to the conclusion that, Taj India is not acting as agent of the

assessee but it had obtained the right of distribution of channel for itself and subsequently it is entering into contract with other parties in its own name in which the assessee is not party. The distribution of the revenue between the assessee and Taj India has been allocated in the ratio of 60:40 and the entire relationship is principal to principal basis. The Ld. CIT(A) has also noted that, there is no evidences on record to show that, Taj India was acting as agent of the assessee for the distribution business in any manner. This finding of fact of the Ld. CIT(A) is corroborated by the terms and conditions of the distribution agreement as well as sub-distributor agreement as placed in the paper book. Thus, such a finding of fact by the Ld. CIT(A) without there being any rebuttal by way of any contrary material, is affirmed. Even if we independently examine the facts of the case vis-a-vis the provisions contained in Article 5(4) to 5(6) which deals with the agency PE, it can be seen that there is no agency PE of the Assessee in India. Relevant Article 5 dealing with the agency PE is reproduced here under:-

> *"4. Notwithstanding the provisions of paragraphs 1 and 2 of this Article, a person acting in a Contracting State for or on behalf of an enterprise of the other Contracting State (other than an agent of an independent status to whom the provisions of paragraph 5 apply) shall be deemed to be a permanent establishment of that enterprise in the first-mentioned State if:*
>
> > *i. he has and habitually exercises in that first mentioned State, an authority to conclude contracts in the name of the enterprise unless his activities are*

*limited to the purchase of goods or merchandise for the enterprise; or*

*ii. he habitually maintains in that first-mentioned State a stock of goods or merchandise belonging to the enterprise from which he regularly fulfils orders on behalf of the enterprise.*

*5. An enterprise of a Contracting State shall not be deemed to have a permanent establishment in the other Contracting State merely because it carries on business in that other State through a broker, general commission agent or any other agent of an independent status, where such persons are acting in the ordinary course of their business. However, when the activities of such an agent are devoted exclusively or almost exclusively on behalf of that enterprise, he will not be considered an agent of an independent status within the meaning of this paragraph.*

*6. The fact that a company, which is a resident of a Contracting State controls or is controlled by a company which is a resident of the other Contracting State, or which carries on business in that other Contracting State (whether through a permanent establishment or otherwise) shall not, of itself, constitute either company a permanent establishment of the other".*

Thus, an agent is deemed to be a PE of a foreign enterprise, if he is not independent and has habitually exercises an authority to conclude contracts in the name of the enterprise unless the activities of such person are limited to those mentioned in paragraph 4 that is, to the purchase of goods or merchandise for the enterprise; or if he has no such

authority, but habitually maintains a stock of goods or merchandise from which he regularly delivers goods or merchandise on behalf of the enterprise. Thus, the character of an agent, who can be said to be a dependent only if, firstly, the commercial activity for the enterprise is subject to instructions or comprehensive control and secondly, he does not bear the entrepreneur risk. It is sufficient for the establishment of an agency PE that the agent has sufficient authority to bind the enterprise's participation in the business activity. Here in this case, none of the conditions as stipulated in Article 5(4) is applicable because Taj India is acting independently qua its distribution rights and the entire agreement ostensibly is on principal to principal basis as analyzed and found by ld. CIT (A). When the entire relationship qua the distribution revenue is that of principal to principal basis and the Taj India is acting independently, then it moves out from the conditions laid down in Article 5(4). Thus the distribution income by the assessee cannot be taxed in India, because Taj India does not constitute an agency PE under the terms of Article 5(4). Thus, the order of the CIT (A) is upheld and ground No.1 as raised by the revenue is dismissed.

18. Now, coming to the issue of disallowance of various expenses under section 40(a)(i) like, 'transponder charges' and 'uplinking charges' as raised in ground No.2(i) and 2(ii), it is seen that these, payments has been paid to PanAmSat International Systems Inc. USA for providing facility of

transponder for telecasting 'Ten Sports' channel in various countries including India. The assessee entered into an agreement with PanAmSat to utilize the transponder facility providing by the said US based company for telecasting its sports channel which are on the footprint of transponder of PanAmSat. The Revenue's case before us is that, firstly, it is taxable under section 9(1)(vi) as 'royalty' and also under Article 12(3)(b) of Indo-US-DTAA. Similarly, the up linking charges paid for up linking the channels to PanAmSat Satellite for delay in transmission and for up linking signals for live events from the venue of the events to the satellite have been treated to be 'royalty'. Since, the assessee had not deducted TDS under section 195, disallowance under section 40(a)(i) has been made. The assessee's case before us is that, *firstly,* PanAmSat is a USA based company, therefore, Indo-US DTAA is applicable and since it does not have any PE or business connection in India, therefore, the payment made to a non-resident outside India for availing service of equipment placed outside India cannot be taxed in India. In support of such a contention decision of Hon'ble Bombay High Court in the case of DIT vs. Set Satellite (supra) has been relied upon. In any case, it has been submitted that, even otherwise also the definition of "royalty" under Article 12(3) of Indo-US-DTAA is also not applicable, because transponder charges is only use of facility and it is not an equipment and does not amount to use of any copyright effecting work, secret formula, process etc or any other term described in para 3 of Article 12. The Ld. CIT(A) has held that it is not a 'royalty' and

secondly, even otherwise also by virtue of Article 12(7) such a royalty cannot be taxed in India, because it is not borne by PE or fixed place of the US company in India. The Ld. DR has strongly relied upon amended definition of the 'royalty' under the Act, wherein, the scope and definition of 'royalty' has been enlarged by the newly inserted Explanation (vi) and (vi) by the Finance Act, 2012 with retrospective effect from 01.06.1976 and has contended that the said definition is to be read into DTAA also, that is, the definition of 'royalty' has to be taken from the Domestic Law. In support, Ld. DR has strongly relied upon the decision of Madras High Court in the case of Verizon Communications Singapore Pte Ltd. (supra) and the ITAT decision in the case of Viacom 18 Media Pvt. Ltd.

19. First of all, let us examine the definition of "royalty" as been defined under Article 12 of the Indo-US-DTAA, which has been defined in the following manner:

*"3. The term "royalties" as used in this Article means:*

*a) payments of any kind received as a consideration for the use of or the right to use, any copyright of a literary, artistic, or scientific work, including cinematograph films or work on film, tape or other means of reproduction for use in connection with radio or television broadcasting, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience, including gains derived from the alienation of any such right or property which are*

*contingent on the productivity, use, or disposition thereof; and*

b) *payments of any kind received as consideration for the use of or the right to use, any industrial, commercial, or scientific equipment, other than payments derived by an enterprise described in paragraph 1 of Article 8 (Shipping and Air Transport) from activities described in paragraph 2(c) or 3 of Article 8".*

The article gives exhaustive definition of the term 'royalty' and therefore, the definition and scope of 'royalty' is to be seen from the Article alone and no definition under the domestic Act or law is required to be considered or seen or any amendment made in such definition whether retrospective or prospective which can be read in a manner so as to extend any operation to the terms as defined or understood in the Treaty. The Legislature or Parliament while carrying out amendment to interpret or define a given provision under the Domestic Law of the country cannot supersede or control the meaning of the word which has been expressly defined in a Treaty negotiated between executives of two sovereign nations. The payment of transponder charges to PanAmSat and up linking charges cannot be treated as a consideration for 'use' or 'right to use' any copyright of various terms used in para 3(a) like copyright of a literary, artistic, or scientific work, including cinematograph films or work on film, tape or other means of reproduction for use in connection with radio or television broadcasting or in any manner relates to any patent or trademark, design, secret formula or process. It is

also not use or right to use any industrial, commercial, or scientific equipment. There is no such kind of right to use which is given by Pan Am Sat to asessee. Thus, the said payment does not fall within the ambit of the terms used in para 3 of Article 12. So far as the reading of amended definition of 'royalty' as given in section 9(1)(vi) into treaty, Hon'ble Delhi High Court in its latest judgment in the case of DIT vs. New Skies Satellite(supra), wherein it has considered Hon'ble Madras High Court decision in the case of Verizon Communications Singapore Pte Ltd. (supra) also, have discussed the issue threadbare and came to the conclusion in the following manner:-

> *"60. Consequently, since we have held that the Finance Act, 2012 will not affect Article 12 of the DTAAs, it would follow that the first determinative interpretation given to the word "royalty" in Asia Satellite, supra note 1, when the definitions were in fact pari material (in the absence of any contouring explanations), will continue to hold the filed for the purpose of assessment years preceding the Finance Act, 2012 and in all cases which involve a Double Tax Avoidance Agreement, unless the said DTAAs are amended jointly by both partners to incorporate income from data transmission services as partaking of the nature of royalty, or amend the definition in a manner so that such income automatically becomes royalty. It is reiterated that the Court has not returned a finding on whether the amendment is in fact retrospective and*

> *applicable to cases preceding the Finance Act of 2012 where there exists no Double Tax Avoidance Agreement".*

The aforesaid decision takes care of all the arguments relied upon by the ld. DR including that of the Verizon Communications Singapore Pte Ltd's. The Hon'ble High Court has specifically clarified as to why the said decieion of Madras High Court cannot be applied in such cases after observing as under:-

> *"31. In a judgment by the Madras High Court in Verizon Communications Singapore Pte Ltd. V. The Income Tax Officer, International Taxation I, [2014] 361 ITR 575 (Mad), the Court held the Explanations to be applicable to not only the domestic definition but also carried them to influence the meaning of royalty under Article 12. Notably, in both cases, the clarificatory nature of the amendment was not questioned, but was instead applied squarely to assessment years predating the amendment. The crucial difference between the judgments however lies in the application of the amendments to the DTAA. While TV Today, supra note 22 recognizes that the question will have to be decided and the submission argued, Verizon, supra note 23 cites no reason for the extension of the amendments to the DTAA.*

Thus, respectfully following the ratio laid down by the Hon'ble Delhi High Court, we hold that, the definition of royalty as

enlarged by Finance Act, 2012 with retrospective effect will not have any affect in Article 12 of DTAA.

20. Otherwise also, now it is quite trite position that, at the time of making the payment when there is no amendment in the statute, then assessee cannot be expected to withhold the tax, especially when under the old provision or by virtue of any judicial precedent such payment does not fall or has been held to be not falling within the ambit and scope of 'royalty'. In these kinds of cases there were various decisions including that of the Hon'ble Bombay High Court in the case of CIT vs. Set Satellite that payment made to the non-resident outside India for rendering the services of equipment outside India is not taxable in India. Hon'ble Delhi High Court in the case of Asia Satellite Telecommunications vs. DIT, reported in (2011) 332 ITR 340 later on reiterated that there is no royalty payment in such cases under the domestic law, that is, section 9(1)(vi), prior to amendment. Thus judicial precedents supported the case of the assessee. Here, the maxim of *"lex non cogit ad impossplia,* that is, the law of the possibly compelling a person to do something which is impossible, that is, when there is no provision for taxing an amount in India then how it can be expected that a tax should be deducted on such a payment. This view has been upheld by in catena of decisions including the ITAT Mumbai Benches in the case of Channel Guide India Ltd (supra) wherein, it has been held that, assessee cannot held to be liable for deducting TDS in view of the retrospective amendment which has come at a

much later date. Thus, we hold that assessee was not liable to deduct TDS at the time of making the payments. Accordingly, disallowance under section 40(a)(i) could not have been made by the AO and the order of the CIT(A) is affirmed. Ground No.2(a) & (b) raised by the revenue are dismissed.

21. So far as ground No.3 is concerned, that the distribution of income should be taxable as 'royalty' under section 9(1)(vi) up to 12th July, 2002, we are unable to concur with the divergent stand taken by the AO that for three months the payment will constitute 'royalty' and for balance nine months, the payment will constitute 'business income'. It has also been brought to our knowledge that in the subsequent years the AO has treated 'distribution income' as business income and not as royalty. Thus, prior to period 12th July, 2002, also when assessee was not registered under the Laws of Mauritius then also it will not affect the nature of income. In any case, as stated earlier, under the distribution agreement, the assessee company has not granted any license to use any copyright to the distributor or to the cable operators. The assessee only makes available the content to the cable operators which are transmitted by them to the ultimate customer/viewers. Further, rights over the content at all times lies with the Assessee Company and are never made available with the distributors or cable operators. Thus, the finding of the CIT(A) on this score is also confirmed that even for the first period 01.04.2002 to 12th July, 2002 the said income will not constitute 'royalty'.

22. So far as the reliance placed by the Ld. DR on the decision of ITAT Mumbai Bench in the case of NGC Network (*supra*), we find that in that case the issue of distribution income was set aside to the file of the AO to examine whether it falls within the ambit of 'royalty' as defined under the Income-tax Act or not. Here in this case, as pointed out by the Ld. Sr. Counsel, the AO himself has treated the income from distribution activity as business income for the period of 9 months and in the subsequent years. The same income cannot have two treatments, one as royalty and other as business income. Thus, the said decision will not apply on facts of the present case.

23. Coming to the disallowance, as raised in ground No.4 the Ld. Counsel had stated that the impugned issue is covered by the decision of the Tribunal in its own case in ITA No. 1099 vide order dated 17.04.2012 and in ITA No.3702 vide order dated 18.05.2012. In these cases, the Tribunal has relied upon a decision of Set Satellite (132 TTJ 459) which decision has now been affirmed and approved by the Hon'ble Bombay High Court in the case of DIT vs Set Satellite Singapore Pte Ltd (*supra*) on the ground that, the programming cost is paid to the assessee to various non-resident outside India for acquiring right brought on sports events taking place outside India. Thus, such programming cost cannot be deemed to arise in India as liability to pay programming cost as assumed by the assessee company

outside India and it cannot be held to be borne by any PE in India. Thus, ground no.4 is also dismissed.

24. In the result, appeal of the revenue for AY 2003-04 stands dismissed.

25. Now we will take-up revenue's appeal for AYs 2004-05 and 2005-06 being ITA No. 412 of 2008 and ITA No. 4176 of 2009 respectively and grounds of appeal raised in these appeals are:-

**(<u>Assessment year: 2004-05</u>):**

*"1. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in holding that Taj India does not constitute an agency PE of the assessee within the meaning of Article 5(4) of the DTAA with regard to the distribution income received by it.*

*2.(i) On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting disallowances made by the Assessing Officer u/s.40(a)(i) of the I.T. Act in respect of claims of transponder charges expenses amounting to US$ 1,87,328 and uplinking charges of US $ 50,254.*

*2.(ii) On the facts and in the circumstances of the case and in law, the Ld. CIT(A) failed to appreciate that the income received from the assessee by M/s. PanAmSat being in the nature of transponder charges and received by other non-residents being in the nature of uplinking charges have arisen in India and accordingly tax should have been deducted at source on such expenses.*

*3. The Appellant prays that the order of CIT(A) on the above grounds he set aside and that of the A.O. restored.*

*4. The appellant craves leave to amend or alter any ground or add a new ground which may be necessary".*

**(Assessment year: 2005-06):**

*"1. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in holding that Taj India does not constitute an agency PE of the assessee within the meaning of Article 5(4) of the DTAA with regard to the distribution income received by it.*

*2.(i) On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting disallowances made by the Assessing Officer u/s.40(a)(i) of the I.T. Act in respect of claims of transponder charge expenses amounting to US$ 2,63,149 and uplinking charges of US $ 4,57,939.*

*2.(ii) On the facts and in the circumstances of the case and in law, the Ld. CIT(A) failed to appreciate that the income received from the assessee by M/s. PanAmSat being in the nature of transponder charges and received by other non-residents being in the nature of uplinking charges have arisen in India and accordingly tax should have been deducted at source on such expenses.*

*3(i). On the facts and in the circumstances of the case and in law the Ld. CIT(A) erred in holding that payment of programming fees in respect of live progammes does not constitute Royalty as provided under Article 12 of the DTAA between India and Mauritious.*

*3(ii) On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in holding that programming fee in respect of live programming even if taken as royalty would not be deemed to accrue or arise in India as per Article 12(7) of the relevant treaty and accoridnlgy would not be taxable in India.*

*4. The Appellant prays that the order of CIT(A) on the above grounds he set aside and that of the A.O. restored.*

26. From the perusal of the grounds it can be seen that they are same and facts raised in the aforesaid appeals of the revenue are similar to the facts and issues involved in

revenue's appeal which we have dealt and deliberated in detail and decided by us herein above for the AY 2003-04, which will apply *mutatis mutandis* to impugned appeals of the revenue also as the same facts are permeating in these years also. Accordingly, both the appeals of the revenue stands dismissed.

27. Now, we shall take up assessee's appeals being ITA No. 5537 of 2008; ITA No. 5536 of 2008 and ITA No.4706 of 2009 for AYs 2003-04, 2004-05 and 2005-06 respectively. In all these year, the assessee has raised identical grounds, thus we take-up grounds for AY 2003-04 for ready reference, which reads as under:-

> *"On the facts and in the circumstances of the case, the Commissioner of Income Tax Appeals XXX [hereinafter referred to as learned CIT(A) has erred in law and in facts in concluding that Taj TV Ltd (Taj) has the income chargeable to tax in India on the grounds that it has Permanent Establishment In India"*

28. At the outset, it is noticed that, appeal of the assessee are barred by limitation by several days. In support of its condonation of delay, the assessee contended and stated as under:-

> *With reference to the captioned subject, Taj submits as under:-*
>
> *Taj has received an order passed by Honorable Commissioner of Income Tax (Appeals)-)XXXI [(A)'], pertaining to AY 2003-04 on 26.02.2007*
>
> *In this regard, we state that the Deputy Director of Income Tax (International Taxation) -2(1) Mumbai,*

*(DDIT) has preferred an appeal against the said CIT (A) order. The copy of Form 36 filed by the income-tax Department is attached herewith for your ready reference. Further, no hearing for the appeal filed by the tax department has been taken place till date.*

*In view of the appeal preferred by the Income-tax Department and in view of certain recent judicial pronouncements, which is applicable in the present case of Taj, Taj would like to prefer an appeal against the order of CIT (A) for A Y 2003-04.*

*Certain relevant judicial pronouncements on arms length principle as similar to the facts of case of Taj, are as under:-*

- *DIT V Morgan Stanley & Co Inc (2007) 79 lTD 417 (Supreme Court)*
- *Galileo International Inc. V DCIT (2008) 19 SOT 257 (Delhi Tribunal)*
- *Amadeus Global Travel Distribution S A Vs DCIT, Delhi (2008) TA Nos. 2143, 2144 & 2145 IDeII2000 (Unreported)*

*In the aforesaid judicial pronouncements, the Honorable Apex Court / Honorable Tribunal had observed as under:*

*"... the said ruling equates an arm's length analysis (ALA) with attribution of profits. It holds that once a transfer pricing analysis is undertaken: there is no further need to attribute profits to a PE. The impugned ruling is correct in principle insofar as an associated enterprise, that also constitutes a PE, has been remunerated on an arm's length basis taking into account all the risk-taking functions of the enterprise. In*

*such cases nothing further would be left to be attributed to the PE,"*

*In this regard, Taj prays to your Honor for condoning the delay in filing an appeal on account of following ground:-*

*The DDIT had held that Taj is having PE in India and without considering the Circular No. 23 based on Arm's length principle, it has held that Taj's income is liable to tax in India.*

*Now, in view of the aforesaid judicial pronouncements on the subject matter relevant to the facts of the Taj, Taj humbly prays to your Honor to admit an appeal to consider the submission while dealing with the appeal filed by the income-tax department for the same assessment year.*

*Taj further submits that it has also recently obtained a opinion from the Indian legal consultant opining that the ratio laid down in the aforesaid judicial pronouncements would be similar to the case of Taj and appeal may be filed before the appellate authorities in this context.*

*Taj humbly prays to your Honor to condone the delay which is at the discretion of the Honorable Court and provide an opportunity of being heard.*
*In view of above, Taj humbly requests your Honor to admit the appeal and further request your Honor to combine the said appeal with the appeal filed by the income-tax department for the same assessment year".*

This reason is common in all the three appeals of the assessee. The aforesaid reason for condoning the delay does not fall within the realm of "reasonable cause", because assessee was not aggrieved initially by the order of the CIT(A) and took a conscious decision that no appeal is to be filed. Later on, when certain decisions have come-up, it decided to file the appeal. This shows that, assessee was not interested in prosecuting the appeal after receiving the CIT(A)'s order. Thus, it was a conscious and deliberate decision not to file the appeal; therefore, we do not find any reason to condone the delay on the reasons as stated by the assessee before us. However, we are making it clear that, *qua* the advertisement revenue whether the assessee has PE in India or not as raised in grounds of appeal before us is left open and assessee would be free to take-up this issue in subsequent years, if at all the dispute arises. Thus, the dismissal of appeal on the ground of limitation will not affect the merits of ground raised before us. With this direction, all the three appeals raised by the assessee are treated as dismissed.

To sum-up:

All the appeals filed by the revenue as well by the assessee stands dismissed.

Order pronounced in the open court on 5th July, 2016

| Sd/- | Sd/- |
|---|---|
| (जी.एस. पन्नू) | (अमित शुक्ला) |
| लेखा सदस्य | न्याईक सदस्य |
| **(G S PANNU)** | **(AMIT SHUKLA)** |
| **ACCOUNTANT MEMBER** | **JUDICIAL MEMBER** |

**Mumbai, Date: 5th July, 2016**

प्रति/Copy to:-

1) अपीलार्थी /The Appellant.
2) प्रत्यर्थी /The Respondent.
3) The CIT(A) –XXXI, Mumbai.
4) The DIT(International Taxation)/CIT- Concerned, Mumbai.
5) विभागीय प्रतिनिधि "एल", आयकर अपीलीय अधिकरण, मुंबई/
   The D.R. "L" Bench, Mumbai.
6) गार्ड फाईल \
   Copy to Guard File.

आदेशानुसार/By Order

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Dy./Asstt. Registrar
I.T.A.T., Mumbai

*चव्हान व.नि.स
*Chavan, Sr.PS