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

**BEFORE SHRI KUL BHARAT, JUDICIAL MEMBER &**
**SHRI M.BALAGANESH, ACCOUNTANT MEMBER**

**ITA No.1179/Del/2022**
**[Assessment Year : 2018-19]**

| Cricket Australia,<br>No.60, Jolimant Street, Jolimont Victoria, Australia-3002.<br>***PAN-AAECC5341D*** | vs | ACIT (International Taxation),<br>Circle-1(2)(1),<br>Delhi. |
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| **APPELLANT** | | **RESPONDENT** |

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| **Appellant by** | Shri Percy Pardiwala, Sr.Adv. &<br>Shri Nitesh Joshi, Adv. |
| **Respondent by** | Shri Vizay B.Vasanta, CIT DR |
| **Date of Hearing** | 06.06.2023 |
| **Date of Pronouncement** | 24.08.2023 |

**ORDER**

**PER KUL BHARAT, JM :**

The present appeal filed by the assessee for the assessment year 2018-19 is directed against the assessment order passed u/s 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961 ("the Act") dated 27.03.2022.

2. The assessee has raised following grounds of appeal:-

1. *"Based on the facts and circumstances of the case and in law, the learned Assessing Officer (hereinafter referred to as Ld. AO), pursuant to the directions of the learned Dispute Resolution Panel (hereinafter referred to as Ld. DRP), erred in considering that the license fees amounting to Rs. 5,12,77,558 earned by the appellant from Sony Pictures Networks India Private Limited (hereinafter referred to as Sony Pictures) pertaining to 'live' transmissions of the programmes i.c., cricket matches held in Australia as "Royalty" under the Act as well as under the India - Australia Double Tax Avoidance Agreement.*

2. *Based on facts and circumstances of the case and in law, the Ld. AO, pursuant to the directions of the Ld. DRP erred in holding that the receipts amounting to Rs. 5,12,77,558 from Sony Pictures pertaining to 'live' transmissions of the programmes i.e., cricket matches held in Australia involves transfer of rights in respect of a 'Process' as per Explanation 6 to Section 9(1Xvi) of the Act as well as under Article 12 of India-Australia Tax Treaty.*

3. *Based on facts and circumstances of the case and in law, the Ld. AO, pursuant to the directions of the Ld. DRP erred in holding that a unilateral amendment of the term 'process' under the Act would get imported into the definition of 'royalty' given under Article 12 of the India- Australia Tax Treaty.*

4. *Based on the facts and circumstances of the case and in law, the Ld. AO, pursuant to the directions of the Ld. DRP erred in not following the ratio laid down by the decision of the jurisdictional High Court in the case of CIT vs. Delhi Race Club (1940) Ltd. ([2014] 51 taxmann.com 550 (Delhi)) and New Skies Satellite BV (68 Taxmann.com 8).*

5. *Based on the facts and circumstances of the case and in law, the learned AO erred in holding that the tournament fees and reimbursement of dinner tickets amounting to Rs. 2,48,266 received by the appellant were in the nature of royalty and added the same to the total income of the appellant.*

6. *Based on the facts and in the circumstances of the case and in law, the Ld. AO erred in not granting credit of taxes withheld at source amounting to Rs.55,98,776.*

7. *Based on the facts and circumstances of the case and in law, the learned AO erred in computing interest liability under section 234B of the Act amounting to Rs.24,61,344.*

   *Based on the facts and circumstances of the case and in law, the learned AO erred in computing interest liability under section 234A of the Act amounting to Rs.51,278.*

*8. Based on the facts and circumstances of the case and in law, the learned AO erred in initiating penalty proceedings under section 270A of the Act without appreciating the fact that the Appellant has not misreported its income,*

*The appellant craves leave to add to, amend, alter, vary, omit, or substitute the aforesaid grounds of appeal or add a new ground or grounds of appeal at any time before or at the time of hearing of the appeal as they may be advised."*

3. Facts giving rise to the present appeal are that the assessee filed its return of income on 31.10.2018, declaring total income of INR 68,66,110/-. Thereafter, the case was selected for scrutiny through Computer Aided Scrutiny Selection ("CASS") and a notice u/s 143(2) of the Act was issued on 22.09.2019 and duly served upon the assessee. Thereafter, notices u/s 142(1) of the Act was issued to the assessee. The reason for scrutiny was stated to be high ratio of refund to TDS relating to Section 195 (Business ITR). The Assessing Officer ("AO") noticed that the assessee did not offer certain income for tax i.e. license fee for live and non-live transmission rights of INR 5,81,43,665/- and tournament fee of INR 2,48,266/-. Therefore, a draft assessment order was passed u/s 144C of the Act on 02.09.2021. Thereby, the AO had proposed to assess the income at INR 5,83,91,931/- after proposing addition in respect of Royalty of INR 2,48,266/- qua tournament fee and in respect of license fee of INR 5,12,77,558/-. Against the draft assessment order, the assessee filed its objections before Ld. Dispute Resolution Panel ("DRP") who vide its direction dated 10.02.2022 issued u/s 144C(5) of the Act, disposed off the objection of the assessee. Thereby, Ld.DRP sustained the findings of the AO related to license fee received for live and non-live transmissions rights. However, in respect of Royalty, the AO was directed

to pass a speaking order in accordance with law. In pursuance of the direction of Ld.DRP, the impugned assessment order was passed. The AO sustained its findings and made addition of Royalty of INR 2,48,266/- and license fee of INR 5,12,77,558/-.

4. Aggrieved against this, the assessee preferred appeal before this Tribunal.

5. Apropos to **Grounds of appeal Nos. 1 to 4,** Ld. Counsel for the assessee vehemently argued that the authorities below failed to appreciate the facts and made the impugned additions contrary to the judicial pronouncements on the issues. Ld. Counsel for the assessee took us through the findings of the AO and also relied upon various case laws during the course of hearing. At the outset, he submitted that issue in question is squarely covered by the judgement of Hon'ble Delhi High Court in the case of ***CIT vs Delhi Race Course Club [2014] 51 taxman.com 550 (Delhi)*** and in the case of ***Director of Income Tax vs New Skies Satellite BV [2016] 68 taxmann.com 8 (Delhi)*** and decision of other Co-ordinate Benches of this Tribunal. He took us through the draft assessment order, findings of Ld.DRP and final assessment order passed by the authorities below. Ld. Counsel laid great emphasis on the argument that live telecast would not fall under the term process. He submitted that have incorrectly relied on explanation 6 to section 9 of the Act. He contended that any change into domestic law would not alter terms of DTAA. He submitted that even otherwise also explanation 6 of section 9 of the Act, cannot be applied under the facts of the present case.

6. On the other hand, Ld.CIT DR vehemently opposed the contentions of Ld. Counsel for the assessee and heavily relied on the impugned order. He submitted that the AO and Ld.DRP have pointed out that it is not a simplicitor live telecast but value addition is made by way of expert comments and advertisements etc. He contended that it is not mere transmission and telecast. He contended that the facts are distinguishable. He placed reliance on the judgmenet of Hon'ble Madras High Court rendered in the case of ***Verizon Communications Singapore Pte Ltd. (formerly MCI Worldcom Asia Pte Ltd.) vs Tax Case (Appeal) Nos.147 to 149 of 2011 and 230 of 2012 & connected Miscellaneous Petitions dated 07.11.2013.***

7. In re-joinder, Ld. Counsel for the assessee contended that the facts are identical. He drew our attention towards various provisions of Double Taxation Avoidance Agreement ("DTAA") and relevant contents of the case laws as relied upon by the Ld. Counsel for the assessee. To buttress the contention that change into domestic law would have no effect if DTAA is not amended accordingly.

8. We have heard Ld. Authorized Representatives of the parties and perused the material available on record and gone through the orders of the authorities below. The AO made addition of INR 5,12,77,558/- in respect of license fee for live and non-live transmission qua Sony Pictures Networks India Pvt.Ltd. on the ground that live transmission of sports events in the modern era is not merely a process of streaming event from the venue to the television set of the viewer. As per the AO, there is a value addition in live transmission likely there are studios having hosts speaking vernacular languages, interviewing experts

and celebrity guests and playing short bites of replay of important moments in the game/match even as the game continues. The Co-ordinate Bench of the Tribunal in the case of ***Fox Network Group Singapore Pte. Ltd. vs ACIT (International Taxation), Circle 1(3)(1), New Delhi [2020] 121 taxmann.com 330 (Delhi-Trib.) [20.03.2020]*** examined this aspect wherein it has been held as under:-

> *22. "The aforesaid principle and sequitur of the judgment of the Hon'ble Jurisdictional High Court clearly clinches the issue in favour of the assessee, wherein it has been categorically held that there is a clear distinction between a copyright and a broadcasting right, broadcast or live coverage which does not have a copyright, and therefore, payment for live telecast is neither payment for transfer of any copyright nor any scientific work so as to fall under the ambit of royalty under Explanation 2 to Section 9(1)(vi).*
>
> *23. In so far as reference of phrase 'process' in Explanation 6, the same will not be applicable in the case of the assessee, because admittedly it is SIPL which is doing the transmission and makes the payment to Asia Satellite and it is not a case of transfer of process.*
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> *24. Further, on similar set of issues on live broadcast of sporting and cricket events, ITAT Mumbai Bench in the case of Neo Sports Broadcast Pvt. Ltd. (supra) and Nimbus Communication Ltd. (supra) have held that there is no copyright on live events, and therefore, it is not taxable as 'royalty'. Thus, we hold that the fee received towards live transmission cannot be taxed as 'royalty' in terms of Section 9(1)(vi) as held by the Hon'ble Jurisdictional High Court and also by the Co-ordinate Bench of ITAT. Accordingly, we decide this issue in favour of the assessee."*

8.1. Further, the Co-ordinate Bench of this Tribunal rendered in the case of ***ESS (Formerly known as ESPN Star Sports) vs ACIT in ITA***

***No.7903/Del/2018*** order dated ***21.02.2023*** followed this decision and the judgement of the Hon'ble High Court of Delhi in the case of ***Director of Income Tax vs New Skies Satellite BV [2016] 68 taxmann.com 8 (Delhi).*** The Hon'ble Delhi High Court has held as under:-

*59. "On a final note, India's change in position to the OECD Commentary cannot be a fact that influences the interpretation of the words defining royalty as they stand today. The only manner in which such change in position can be relevant is if such change is incorporated into the agreement itself and not otherwise. A change in executive position cannot bring about a unilateral legislative amendment into a treaty concluded between two sovereign states. It is fallacious to assume that any change made to domestic law to rectify a situation of mistaken interpretation can spontaneously further their case in an international treaty. Therefore, mere amendment to Section 9(1)(vi) cannot result in a change. It is imperative that such amendment is brought about in the agreement as well. Any attempt short of this, even if it is evidence of the State's discomfort at letting data broadcast revenues slip by, will be insufficient to persuade this Court to hold that such amendments are applicable to the DTAAS.*

*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, when the definitions were in fact pari materia (in the absence of any contouring explanations), will continue to hold the field 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 parties 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.*

*61. For the above reasons, it is held that the interpretation advanced by the Revenue cannot be accepted. The question of law framed is accordingly answered against the Revenue. The appeals fail and are dismissed, without any order as to costs."*

9. In the light of above-mentioned binding precedents, more particularly ratio laid down by Hon'ble Jurisdictional High Court in the case of ***Director of Income Tax vs New Skies Satellite BV*** (supra), we are of the considered view that the AO was not justified in making the impugned addition. The Revenue has not pointed out that corresponding amendment has been made in DTAA. In the absence of any corresponding change into DTAA in terms, ratio laid down by Hon'ble Delhi High Court in the case of ***Director of Income Tax vs New Skies Satellite BV*** (Supra) the amended provision of section 9 of the Act, would have no application. The AO is therefore, directed to delete the addition. Ground Nos. 1 to 4 raised by the assessee is allowed.

10. **Ground No.5** raised by the assessee is against the holding of tournament fees and reimbursement of dinner tickets amounting to INR 2,48,266/- as Royalty.

11. We have heard Ld. Authorized Representatives of the parties and perused the material available on record. Ld. DRP had directed the AO to spell out the reasons for treating the amount in question as "Royalty". The AO failed to spell out the reasons in final assessment order. He has simply repeated the findings

of draft order. Therefore, in the absence of clear finding on the part of the AO as to how this amount should be treated as "Royalty". The findings cannot be sustained. We therefore, direct the AO to delete this addition. Ground No.5 raised by the assessee is thus, allowed.

12. **Ground No.6** raised by the assessee is against the non-granting credit of tax withheld at source.

13. Ld. Counsel for the assessee submitted that appropriate direction may be given to the AO for granting of credit of taxes withheld at source amounting to INR 55,98,776/-.

14. Ld.Sr.DR opposed these submissions and supported the assessment order.

15. We have heard Ld. Authorized Representatives of the parties and perused the material available on record. Considering the submissions made by the Ld. Counsel of the assessee, we hereby, direct the AO to verify the factum of withholding of tax at source amounting to INR 55,98,776/- and grant credit in accordance with law. Ground No.6 raised by the assessee is thus, allowed.

16. **Ground No.7** raised by the assessee is against the levy of interest. This ground is consequential in nature. We hold accordingly.

17. **Ground No.8** raised by the assessee is premature in nature, hence does not need adjudication. Thus, Ground No.8 raised by the assessee is dismissed.

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

Order pronounced in the open Court on 24th August, 2023.

| ***Sd/-*** | ***Sd/-*** |
|---|---|
| **(M.BALAGANESH)** | **(KUL BHARAT)** |
| **ACCOUNTANT MEMBER** | **JUDICIAL MEMBER** |

* *Amit Kumar* *

Copy forwarded to:

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2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT, NEW DELHI