IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'D', NEW DELHI

Before Sh. Saktijit Dey, Vice President

Dr. B. R. R. Kumar, Accountant Member

ITA No. 2397/Del/2023 : Asstt. Year: 2018-19

Lex Sportel Vision Pvt. Ltd., D-583, Basement Chittaranjan Park, New Delhi	Vs	Income Tax Officer, Ward, Intl. Taxation-2(2)(1), New Delhi-110002
(APPELLANT)		(RESPONDENT)
PAN No. AACCL7867K		

Assessee by : Sh. Ajay Vohra, Sr. Adv.
Revenue by : Sh. Sanjay Kumar, Sr. DR

Date of Hearing: 09.10.2023		**Date of Pronouncement: 26.12.2023**

ORDER

Per Dr. B. R. R. Kumar, Accountant Member:

The present appeal has been filed by assessee against the order of National Faceless Appeal Centre (NFAC), Delhi dated 10.08.2023.

2. Following grounds have been raised by the assessee:

"1. That on the facts and in the circumstances of the case, the National Faceless Appeal Centre ("NFAC") has grossly erred both in facts and law in passing the order("Impugned Order") under section 250 of the Income Tax Act, 1961 (the "Act") pursuant to appeal against order under section 201(1) & 201(1A) of the Act.

2. That on the facts and circumstances of the case, the NFAC has grossly erred in facts and in law in holding that the payment made to non-residents for acquiring broadcasting rights of live events is taxable as "royalty" under section 9(1)(vi) read with Double Taxation Avoidance Agreements ("DTAAs") and hence warrants withholding of tax under section 195.

2.1. That the NFAC has grossly erred in facts and in law in considering the right to broadcast live sport events and the separate right to use recorded audio-visuals of the sport events (non- live rights), as a single bundle of rights constituting "copyright" under the Copyright Act, 1957.

2.2. That the NFAC has grossly erred in facts and in law in considering the payment made to non-residents for acquiring broadcasting rights of live events as "royalty" under section 9(1)(vi) since the right to broadcast live event does not constitute "copyright" under the Copyright Act, 1957.

2.3. That the NFAC has grossly erred in facts and in law in considering the payment made to non-residents for acquiring broadcasting rights of live events as "royalty" under section 9(1)(vi) since the right to broadcast live event does not constitute "process" as per Explanation 6 to section 9(1)(vi).

2.4. That the NFAC has grossly erred in facts and in law in considering the payment made to X ' non-residents for acquiring broadcasting rights of live events as "royalty" under the respective DTAAs.

3. That the NFAC has passed the Impugned Order in complete violation of principles of natural justice and in contravention of the Faceless Appeal Scheme 2021 read with section 250(6B) of the Act in as much as the same is passed without providing an opportunity of personal hearing to the Appellant, despite having specifically asked for the same."

3. The assessee company engaged in the business of broadcasting or sub-licensing right to broadcast, sport events e.g., golf, cricket, soccer etc. on live and non-live basis. The assessee company filed return of income on 30.11.2018 declaring total income of Rs. Nil.

4. During the Financial Year 2017-18, the assessee had entered into agreements with various non-residents for acquisition of two types of rights:

a) Right to broadcast live sports events ("Live Rights") and
b) Right to use audio-visual recording of the sport events for subsequent telecasting, cutting small clips for advertisements, making highlights of the event etc. ("Non-Live Rights").

5. The assessee had entered into agreement with the following entities:

Sl. No.	Non-resident overseas rights holder	Country
1.	Trident8 Limited (Tennis Australia)	Australia
2.	Transworld International LLC	USA
3.	Global Sports Commerce Pte. Ltd.	Singapore
4.	Sri Lanka Cricket	Sri Lanka
5.	At the Races Limited	UK

6. The agreements and invoices pertaining to acquisition of "Live Rights" and "Non-Live Rights" from the aforesaid entities clearly bifurcate the total consideration between consideration for "Live Rights" and consideration for "Non-Live Rights".

7. The assessee has deducted tax at source u/s 195 of the Income Tax Act, 1961 on the payment remitted in lieu of acquisition of "Non-Live Rights" considering the same to be "Royalty" u/s 9(1)(vi) of the Act chargeable to tax in the hands of the non-resident overseas rights holder in India. The assessee has not deducted any tax at source u/s 195 on the payment made for "Live Rights".

8. The ld. CIT(A) passed the order u/s 201 of the Act by observing that the payment for "Live Rights" is chargeable to

tax as "Royalty" in the hands of the non-resident overseas rights holder warranting withholding of tax u/s 195 of the Act.

9. Aggrieved, the assessee filed appeal before the Tribunal.

10. The ld. AR reiterated the arguments taken up before the authorities below along with paper book and judicial precedents.

11. We have also gone through the written submission of the ld. DR which is as under:

"Most humbly it is submitted that in respect of the above appeal in addition to the legal and factual discussion made by the Ld AO in the assessment order and the Ld. CIT(A) in the appellate order and the verbal arguments made before the Hon'ble Bench during the course of hearings, and as a rejoinder to the written submissions dated 11.10.2023 field by the appellant, the following further written submissions are being filed before your Honours for kind consideration by your Honours.

No Dispute as to the taxability of receipts under the provisions of Income Tax Act- It is humbly submitted that there is no dispute as to the taxability of the payments made by the assessee to various non- resident persons under the provisions of Indian Income Tax Act 1961. The issue of taxability of the receipts and consequential treatment of the assessee as assessee in default for its failure in deducting tax at source is fully covered by the decision of the Hon'ble Delhi High Court in the case of DIT Vs. Today Network limited (2014) 41taxmann.com /92/221 (Delhi).

No relief under the DTAAs is allowable to the assessee in the absence of TRC of the recipients- Since the assessee has neither obtained nor placed on record TRCs of any of the recipients, the assessee is not entitled to claim the benefit of DTAA. It is humbly submitted that claim of benefit under DTAA is not automatic but the appellant assessee must satisfy the Hon'ble Bench that all the recipients of the sums paid by the appellant were duly entitled to claim the benefit of respective DTAAs. The appellant

must satisfy the Hon'ble Bench about the manner in which the recipients were entitled to the benefit of any DTAA. Since it has not been done, the appellant is not entitled to seek relief under the DTAAs.

Without prejudice the failure of the appellant in deducting tax at source is absolute in view of the position of law settled by the Hon'ble Supreme Court- It is humbly submitted that there is no disputing the fact that entire sums paid to various non residents were not exempt from chargeability to tax in India even under the DTAAs. Undisputedly the appellant has deducted tax at source on a portion of sums paid to the Nonresident. Entire payments have been made in pursuance of a single contract and not even through separate invoices in all cases. The position of law in this regard has been laid down by the Hon'ble Supreme Court long ago in the case of Transmission Corporation of AP Vs Commissioner of Income Tax (1999) 239 ITR 587 SC.

Reliance placed by the appellant on the decision in Engineering Analysis Centre of Excellence is totally misplaced- The Hon'ble Supreme Court in this case has only held that Transmission corporation decision does not apply to a case when the amounts paid to the non ^resident is not at all chargeable to tax in India which is not the case of the appellant. Admittedly, in the case of the appellant, as per its own admission a part of the sums paid to the Non residents is definitely chargeable to tax in India and therefore, reliance placed upon Engineering Analysis case is totally misplaced.

Decision of the Hon'ble Chennai Special Bench of the Tribunal in Prasad Productions Vs ITO 125TTD 263 (2010) squarely applies to the present case- Hon'ble Special Bench has held as under:

"24. Let us take sub-sections (1) and (2) together first. In this sub-section, the crucial expression is "any other sum chargeable under the provisions of this Act". This expression has been explained by the Supreme Court in the case of Transmission Corporation (supra) in the following words:

"Consideration would be-whether payment of sum to non-resident is chargeable to tax under the provisions of the Act or not? That sum may be income or income hidden or otherwise embedded therein. If so, tax is required to be deducted on the said sum-what would be the income is to be computed on the basis of various provisions of the Act including provisions for computation of the business income, if the payment is trade receipt. However, what is to be deducted is income-tax payable thereon at the rates in force. Under the Act, total income for the previous year would become chargeable to tax under section 4. Sub-section (2) of section 4 inter alia, provides that in respect of income chargeable under sub-section (1), income-tax shall be deducted at source where it is so deductible under any provision of the Act. If the sum that is to be paid to the non-resident is chargeable to tax, tax is required to be deducted."

If the above analysis by the Supreme Court is properly construed and understood, it would mean that the person making payment to the non-resident would be liable to deduct tax if the payment so made is chargeable to tax under the Act. Impliedly, if the payment is not chargeable to tax under the Act, the payer would not be liable to deduct tax at source. The chargeability to tax mentioned in the above provision is directly linked with sec. 4 of the Act which is the main charging section. In other words, if the charge under sec.4 fails, automatically sec. 195 would be inapplicable. This is very clear from the provisions of subsection (2) of sec. 4. It provides that income which is chargeable to income-tax under sub-section (1) of sec.4, the provisions of TDS and advance tax shall apply. Impliedly, if the income is not chargeable to tax, provisions of TDS and advance tax will not apply. This aspect has been again clarified by the Supreme Court in the case of Eli Lilly & Co. (312 ITR 225). In this case, it was argued that TDS provisions are independent of the charging provisions which are applicable to the recipient of income whereas the TDS provisions are applicable to the payer of income. In reply to this contention, the Court observed at placitum 30 as follows:

"To answer the contention herein we need to examine briefly the scheme of the 1961 Act. Section 4 is the charging section. Under sec. 4(1), total income for the previous year is chargeable to tax. Sec.4(2), inter alia,

provides that in respect of income chargeable under sub-section (1), income-tax shall be deducted at source whether it is so deductible under any provision of the 1961 Act which, inter alia, brings in the TDS provisions ITA 663/03 contained in Chapter XVII- B. In fact, if a particular income falls outside sec. 4(1) then the TDS provisions cannot come in." (Underline by us).

From the above two decisions of the Supreme Court, it is abundantly clear that sec. 195 will be applicable only if the payment made to the non-resident is chargeable to tax. Let us revert to the case of Transmission Corporation (supra). In that case, the argument of the assessee was that sec. 195 would be applicable only if the whole of the payment constitutes income chargeable to tax. This argument of the assessee is on page 591 of 239 ITR. The Supreme Court negatived this argument. At page 594 of the report, the Supreme Court observed that the scheme of tax deduction at source applies not only to the amount paid which wholly bears "income" character such as salaries, dividends, interest on securities, etc., but also to gross sums, the whole of which may not be income or profits of the recipient, such as payments to contractors and sub-contractors and the payment of insurance commission. It further observed that a receipt may contain a fraction of the sum as taxable income, but in other cases such as interest, commission, transfer of rights of patents, goodwill or drawings for plant and machinery and such other transactions, it may contain a large sum as taxable income under the provisions of the Act. Whatever may be the position, if the income is from profits and gains of business, it would be computed under the Act as provided at the time of regular assessment. The purpose of sub-section (1) of sec. 195 is to see that the sum which is chargeable under sec.4 of the Act for levy and collection of income-tax, the payer should deduct income-tax thereon at the rates in force, if the amount is to be paid to a non resident. Thus, the reply of the Supreme Court has to be considered in the light of the assessee's contention that sec. 195 is applicable only when whole of the payment is income chargeable to tax. According to our understanding, what the court meant is that even if a fraction of income is embedded in the total payment, sec. 195(1) will apply and tax will have to be deducted at source. This observation of the Court is based on the interpretation of sub-

section (2). Sub-section (2) provides that if the payer ''considers that the whole of such sum would not be income chargeable in the case of the recipient……", the payer may make application for deduction of tax at appropriate rates.
The expression "the whole of such sum would not be income chargeable", is to be understood as

- *that only part of such sum has income character, and it is not to be understood to mean*
- *that the entire payment is without income character*

If the payer fails to make an application under sec. 195(2), then the payer will have to deduct tax from the entire payment. We repeat that this ruling of the Supreme Court is applicable only where the entire payment bears income character and also where part of the payment bears income character. To put it differently, if the payer has a bona fide belief that no part of the payment has income character, then sec. 195(1) will not apply because as we have observed earlier, sec. 195 will apply only if the payment is chargeable to income-tax, either wholly or partly.

25. We now take up the discussion with regard to sub- sections (2) and (3) of sec. 195 together. In para 24 above, on the basis of the judgment in the case of Transmission ITA 663/03 Corporation (supra), it is observed that where only a part of the payment bears income character, the payer may make an application under sec. 195(2) for deduction of tax at appropriate rates. This is the purport of sub-section (2). Sub-section (3) is materially different from sub-section (2) in two ways. Firstly, under sub-section (2), it is the payer who applies to the Assessing Officer for deduction of tax at lower rates. Under sub-section (3), it is the payee who makes an application to the Assessing Officer. The second and the more important difference between the two sub-sections is that under sub-section (2), the payer can make application only for deduction of tax at a lower rate, whereas under sub-section (3), the payee can make application to receive the payment without any deduction of tax. The question that arises is that why it is only the payee who can make an application to receive payment without deduction of tax and why not the payer can make an application to make payment without deduction of tax. The reply is very

obvious that when the payer has a bona fide belief that no part of the payment bears income character, sec. 195(1) itself would be inapplicable and hence no question of going into the procedure prescribed in sec. 195(2) of the Act. Sub-section (3) is enacted to deal with a situation where the payer wants to deduct tax from the payment but the payee believes that he is not chargeable to tax in respect of that payment and hence, sub-section (3) provides an opportunity to the payee to seek approval to receive the payment without deduction of tax.

26. A pertinent question was raised by the Id. DR as to who decides whether the payment bears any income character or not. In his view, it could be either the Assessing Officer or a Chartered Accountant as prescribed by the Board, but certainly not the assessee (the payer). The role of the Chartered Accountant comes into play in the alternative procedure prescribed by the Board and to which we shall advert to it a little later. However, we are not in agreement with the Id. D.R. that the assessee (i.e. the payer) has no role to play. The Income-tax Act is enacted to levy taxes on income earned by a person. It is the statutory obligation of the person earning income to prepare his tax return, determine his tax liability, pay the same and furnish the return. He also pays tax in advance during the financial year as he earns income. All these obligations are on the person earning the income and he is to fulfill these obligations according to his understanding of the various provisions of the Act. The question is, if he is expected to know what income is taxable or not taxable in his own case, why can't he decide in respect of the payment he is making to non-resident. It is to be appreciated that the payer has not to determine the tax liability of the total income of the payee. He has to consider the chargeability only in respect of the payment he is making to the payee. Further, sub- section (2) states, "Where the person responsible for paying (emphasis supplied) any such sum chargeable under this Act to a non-resident considers (emphasis supplied) that the whole of such sum would not be income chargeable in the case of the recipient,..." (emphasis supplied). Consider the words which are underlined by us. They clearly indicate that it is the payer who will first consider whether the payment or any part of it bears income character. Therefore, in our view, it is the payer who is the first person to decide whether the payment he is

making bears any income character or not. Now we can visualize various situations that can arise for the applicability of sec.195:

a) *If the bona fide belief is that no part of the payment has any portion chargeable to tax, sec. 195 would be totally inapplicable.*
b) *If the payer believes that whole of the payment is income chargeable to tax, he will be liable to deduct tax under sec. 195(1) of the Act.*
c) *If he believes that only a part of the payment is chargeable to tax, he can apply under sec. 195(2) for deduction at appropriate rates.*
d) *If the payer believes that a part of the payment is income chargeable to tax, and does not make an application under sec. 195(2), he will have to deduct tax from the entire payment.*
e) *If the payer believes that the entire payment or a part of it is income chargeable to tax and fails to deduct tax at source, he will face all the consequences under the Act.*
f) *If the payer believes that he has to deduct tax and expresses this duty of his to the payee, it is for the payee then to apply under sec. 195(3) to receive the payment without any deduction at source.*
g) *If the payee fails to obtain certificate under sec. 195(3), the payer, based on his belief will certainly withhold the tax.*
h) *Thus it is evident that the assessee has rightly been held as an assessee in default.*

Reliance upon decision in Mahindra & Mahindra is totally misplaced - The reliance placed by the appellant on the decision of the Hon'ble Special Bench is totally misplaced and does not apply to the facts of the present case. The Hon'ble Special Bench has only observed that in a case where time limit for taking action on the payee under any other provisions has also passed out in such a situation passing of order under section 201 (1) will be mere ritual.

The decision is not at all applicable to the present case for the following reasons:

1. *The Appellant has been treated as assessee in default for its failure in deducting tax at source for the A.Y.2018-19.*

2. *The order u/s 201 (1) & 201(1A) of the Income Tax Act treating the assessee as an assesse in default was passed on 24/02/2021.*
3. *At the time of passing of order u/s 201, the time limit for taking action in the case of the recipients was very much available.*
4. *In accordance with the provision of section 149 of the Income Tax Act, time limit for taking action in the cases of the recipients has not yet expired.*
5. *In accordance with the provisions of section 163 of the Income Tax Act the principal liability in respect of all the recipients can still be fastened on the appellant.*

All these submissions are irrespective of the fact whether assessments in the cases of recipients have yet been made or not. However, the factum of assessments in the case of recipients is required to be ascertained from the field authorities.

In view of the above submissions it is humbly submitted that failure of the assessee in deducting tax at source in accordance with the provisions of Income Tax Act is absolute and the appellant has rightly been treated as an assessee in default in respect of tax which has not been deducted at source along with the compensatory interest. The appeal being devoid of merit be dismissed. It is prayed accordingly."

12. Heard the arguments of both the parties and perused the material available on record.

13. The question before us is as to, whether the right to broadcast "Live events" is not "copyright" and payment made thereto is "Royalty" under section 9(1)(vi) or not?

14. After detailed examination of the following judgments namely,

i. CIT vs. Delhi Race Club [2014] 51 taxmann.com 550 (Hon'ble Delhi HC)

ii. Fox Network Group Singapore Pvt. Ltd. vs. ACIT(IT) (2020) 121 taxmann.com 330 (ITAT Delhi)
iii. Cricket Australia vs. ACIT(IT) (ITA No. 1179/Delhi/2022) (ITAT Delhi)
iv. ESS (formerly known as ESPN Star Sports) vs. ACIT (ITA No. 7903/DEL/2018) (ITAT Delhi)
v. ESPN Star Sports vs. Global Broadcast News Ltd. 2008 (38) PTC 477 (ITA T Delhi)
vi. ADIT (IT) vs. Neo Sports Broadcast Pvt. Ltd. (2011) 133 ITD 468 (ITAT Mumbai)
vii. DDIT(IT) vs. Nimbus Communications Ltd (2013) 20 ITR(T) 754 (ITAT Mumbai),

we hold that broadcasting "Live events" does not amount to a work in which copyright subsists, meaning thereby right to broadcast live events i.e., "Live Rights", is not "copyright" and therefore any payment made thereto can't be said to be chargeable to tax as royalty under section 9(1)(vi). Further the courts have held that when the agreements clearly bifurcate the consideration paid towards Live and "Non-Live Rights", the Department can't deem the payment made for "Live Rights" to have been made for a bouquet of rights.

15. The other issue examined during the hearing was, whether the payments were made for the use of "process" or not?

16. We find that the payments in dispute are made to overseas rights holder. The said payments are neither made to any satellite operators nor for use of any satellite. Thus, the payments in dispute are not made for use of any "process" as defined u/s 9(1)(vi) of the Act and can't be charged to tax as

"Royalty" in the hands of the overseas rights holders. Accordingly, we hold that the AO while passing the order u/s 201 of the Act has erred in law by treating the remittances to have been made for use of a "Process".

17. In the result, the appeal of the assessee is allowed.

Order Pronounced in the Open Court on 26/12/2023.

Sd/-	Sd/-
(Saktijit Dey)	**(Dr. B. R. R. Kumar)**
Vice President	**Accountant Member**

Dated: 26/12/2023

Subodh Kumar, Sr. PS

Copy forwarded to:

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

ASSISTANT REGISTRAR