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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ ITA 812/2023

THE COMMISSIONER OF INCOME TAX - INTERNATIONAL TAXATION -1 ..... Appellant

Through: Mr. Ruchir Bhatia, SSC with Ms. Deeksha Gupta, Adv.

versus

FOX NETWORK GROUP SINGAPORE PTE LTD. ..... Respondent

Through: Mr. Porus Kaka, Sr. Adv. with Mr. Ashok Mathur, Mr. Divesh, Mr. Saurabh Jain & Ms. Sandy Sharma, Advs.

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\+ ITA 727/2023

THE COMMISSIONER OF INCOME TAX (INTERNATIONAL TAXATION)-1, NEW DELHI ..... Appellant

Through: Mr. Puneet Rai, SSC with Mr. Ashvini Kumar & Mr. Rishabh Nangia, St. Counsels.

versus

ESS (FORMERLY KNOWN AS ESPN STAR SPORTS) ..... Respondent

Through: Mr. Porus Kaka, Sr. Adv. with Mr. Ashok Mathur, Mr. Divesh, Mr. Saurabh Jain & Ms. Sandy Sharma, Advs.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE GIRISH KATHPALIA

O R D E R

% **05.01.2024**

CM No. 67322/2023 (480 days delay in refilling) in ITA 812/2023

Bearing in the mind the disclosures made, the delay of 480 days in filing the appeal is condoned.

The application shall stand disposed of.

ITA Nos. 812/2023 & 727/2023

1. These two appeals emanate from the decisions rendered by the Income Tax Appellate Tribunal ["**ITAT**"] on 20 March 2020 and 21 February 2023 pertaining to Assessment Years ["**AY**"] 2015-16 and 2014-15 respectively. Since the ITAT has while rendering its decision dated 21 February 2023 essentially followed the view taken while considering the appeal pertaining to AY 2015-2016 and which forms the subject matter of its judgment dated 20 March 2020, we propose to notice the relevant facts as disclosed in ITA No. 812/2023.

2. From the recordal of facts as appearing in the order drawn by the ITAT, it would transpire that the respondent assessee entered into a tripartite agreement titled as the "Novation Agreement" dated 31 December 2014 with ESS Singapore ["**ESS**"] and Star India Private Limited ["**SIPL**"] by way of which various existing agreements including agreements regulating the distribution of channels, advertisement sales, license agreements and other aspects governing the contractual arrangement between SIPL and ESS came to be novated.

3. For the purposes of AY 2015-16, the respondent assessee had in its return of income offered an amount of Rs. 65,44,67,199/- as royalty income subject to tax in terms of the provisions contained in Section 9(1)(vi) of the Income Tax Act, 1961 ["**Act**"]. The aforesaid

royalty income was stated to have been earned from sublicensing of broadcasting '*non live*' content as per the Master Rights Agreement ["**MRA**"] dated 31 October 2013 and which formed part of the Novated Agreements. The Assessing Officer required the respondent assessee to furnish an explanation as to why out of the total license fee earned by it, only Rs.65,44,67,199/- had been offered to tax as '*royalty*'. Responding to the aforesaid query, the respondent is stated to have asserted that out of the gross consideration of Rs.1181.63 crores earned from sub-licensing of sports broadcasting rights, it had earned an income of Rs. 65,44,67,199/- alone from '*non live*' feed and that the balance amount of Rs.1115.91 crores was attributable to '*live*' feed which would not fall within the ambit of '*royalty*' as contemplated under Section 9(1)(vi) of the Act. The submission essentially appears to have been that transmission of '*live feed*' through satellite would not fall within the ambit of Section 9(1)(vi) and the Explanations appended thereto. Insofar as the bifurcation of the royalty earned in the ratio of 95% and 5% was concerned, the respondent referring to the stipulations forming part of the Novation Agreement had contended that the latter alone was liable to be recognised as revenue generated from '*non live*' feed.

4. Insofar as the principal question of whether income derived from transmission of '*live feed*' would fall within the ambit of royalty, reliance appears to have been placed on the decision rendered by a Division Bench of our Court in **Commissioner of Income Tax v. Delhi Race Club(1940) Ltd**[1]. The attention of the ITAT was additionally drawn to the decisions rendered by the Mumbai Bench of the ITAT in the **Assistant Director of Income Tax, Mumbai v. M/s**

[1] 2014 SCC Online Del 7619

Neo Sports Broadcast Private Limited[2] and **Deputy Director of Income Tax, Mumbai v. Nimbus Communications Limited**[3] wherein the issue had come to be decided and answered in favour of the assessee.

5. Insofar as the bifurcation of revenue is concerned, the Tribunal has returned the following findings:-

> "15. We have perused the various agreements placed in the paper book with various sporting and governing bodies of sports and in all the agreements, there are specific clause under the head 'Consideration' that the parties hereby acknowledged and agree that value commercial right fee is attributable 95% to live transmissions and 5% to non live transmissions. This specific clause is permeating in all the agreements between the parties that, 95% of the license fee/commercial right fee is via live transmission and only 5% is for non live transmission. Thus, if the parties to the agreement have clearly stated and agreed that there are two streams of fees, one from live transmission and other from non-live and even payments have been made separately under these distinctive heads, then to hold that both constitutes one and the same thing will not be correct specifically when the core issue involved in this appeal is, whether the fees from live transmission constitute copyright so as to fall within the ambit of 'royalty' or and whether it is taxable."

6. In view of the findings as expressed above, we find no merit in the contention of the appellants that the ratio adopted for the purposes of bifurcation of income was either unsubstantiated or arbitrary.

7. Before us, both Mr. Bhatia as well as Mr. Rai have assailed the view taken by the ITAT contending that the service from which income was generated would clearly fall within the ambit of Explanation 2 as placed in Section 9(1)(vi) of the Act.

8. We, however note that *Delhi Race Club* has clearly ruled on the scope and ambit of the expression "*the transfer of all or any rights*

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[2] Order of the Income Tax Appellate Tribunal (Mumbai Bench) dated 09.11.2011 in ITA No.99/Mum/2009

[3] Order of the Income Tax Appellate Tribunal (Mumbai Bench) in ITA No. 2270/Mum/2011

(including the granting of a license), in respect of any copyright, literary, artistic or scientific work including films or video tube tapes...." as finding place in clause (v) of Explanation 2 to Section 9(1)(vi).

9. On a due consideration of the relevant provisions contained in the Copyright Act, 1957, the Court in *Delhi Race Club* observed as follows:-

> **"16.** Adverting to the facts of this case we note that the assessee was engaged in the business of conducting horse races and derived income from betting, commission, entry fee, etc. and had made payment to other centres whose races were displayed in Delhi. It is not known whether such races had any commentary or analysis of the event simultaneously. It is not the case of the Revenue that the live broadcast recorded for rebroadcast purposes. Having held that the broadcast/live telecast is not a work within the definition of 2(y) of the Copyright Act and also that broadcast/live telecast does not fall within the ambit of s. 13 of the Copyright Act., it would suffice to state that a live telecast/broadcast would have no 'copyright'. This issue is well-settled in view of the position of law as laid down by this Court in *ESPIV Star Sports case* (supra), wherein this Court after analysing the provisions of the Copyright Act was of the view that legislature itself by terming broadcast rights as those akin to 'copyright' clearly brought out the distinction between two rights in Copyright Act, 1957. According to the Court, it was a clear manifestation of legislative intent to treat copyright and broadcasting reproduction rights as distinct and separate rights. It also held that the amendment of the Act in 1994 not only extended such rights to all broadcasting organizations but also clearly crystallized the nature of such rights. The Court did not accept the contention of the respondent that the two rights are not mutually exclusive by holding that the two rights though akin are nevertheless separate and distinct.
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> **17.** In view of the aforesaid position of law which brought out a distinction between a copyright and broadcast right, suffice would it be to state that the broadcast or the live coverage does not have a 'copyright'. The aforesaid would meet the submission of Mr. Sawhney that the word 'Copyright' would encompass all categories of work including musical, dramatic, etc. and also his submission that the Copyright Act acknowledges the broadcast right as a right similar to 'copyright'. In view of the conclusion of this Court in *ESPN Star Sports case* (supra), such a submission need to be rejected.

In this regard we also quote for benefit the judgment of this Court in the case of *Akuate Internet Services (P) Ltd.* v. *Star India (P) Ltd.* (supra) as relied upon by learned counsel for the respondent assessee wherein a Division Bench of this Court has applied the test of 'minimum requirement of creativity' for claiming a right under the Copyright Act, which is absent in a 'live telecast of an event'.

We note for benefit that the United States Court of Appeal Second Circuit Ruling in *National Basket Ball Association & NBA Properties NIC* v. *Motorola Inc*, 105 F.3d. 841 (1997) held that a sports event is a performance and not a work. It is not copyrightable.

18. Insofar as the submission of Mr. Sawhney that the live telecast of an event is the outcome of 'scientific work' and payment thereof would be covered under the definition of 'royalty' is concerned, the said submission is also liable to be rejected; first, it runs contrary to his earlier submission and also for the simple reason the cl. (v) of explanation 2 to clause (vi) of sub-section(1) of Section 9 would relate to work which includes films or video tapes for use in connection with television or tapes for use in connection with radio broadcasting. It is to be seen whether consideration for transfer of all or any rights of 'scientific work' including films or video tapes would include a live telecast. The clause is an inclusive provision for films or video tapes for use in connection with television or tapes for use in connection with radio broadcasting. We note such a case was not set up by the appellant-Revenue before the authorities below. It was held by the AO that when any person pays any amount for getting rights/licence to telecast any event (Which is a copyright of particular person i.e., no one can copy it for direct telecast or deferred telecast) then amount so paid is to be treated as 'royalty' and very much covered under s. 9(1)(vi). In other words, the" ground of the Revenue was limited to the aspect of copyright. That apart, we find, no such ground has, been taken by the appellant/Revenue even in this appeal. The 'scientific work' has not been defined in the Act nor in the Copyright Act. It is not necessary that because the live telecast of an event is being done at a distant place, the same would be a 'scientific work'. Even otherwise, even by stretching this meaning, it is difficult to include a live broadcast within 'scientific work'. Clause (v) expressly uses the words 'including films or video tapes for use in connection with television or tapes for use in connection with radio broadcasting'. These words become relevant to understand the scope of this part of the provision. Suffice to state, when reference is made to films or video tapes, then the intent of the provision is related to work of visual recording on any medium or video tape and can be seen on the television. Surely such a work does not

> include a live telecast. This submission is also need to be rejected. Insofar as the submission of Mr. Sawhney that analysis, commentary and use of technology to live feed make the broadcast a subject-matter of distant copyright is concerned, again neither such a case was set up before the authorities, nor in this appeal. In fact it is not known nor pleaded that the live telecast, in this case, was accompanied by commentary, analysis etc. It is an issue of fact, which cannot be gone into or raised at this stage. In view of our discussion above, we are of the view that no question of law arises in the present appeals. We dismiss the appeals filed by the appellant-Revenue."

10. In light of the unequivocal conclusions as expressed by the Division Bench in *Delhi Race Club* and with which we concur, we find that once the Court came to the conclusion that a live telecast would not fall within the ambit of the expression '*work*', it would be wholly erroneous to hold that the income derived by the assessee in respect of '*live feed*' would fall within clause (v) of Explanation 2 to S.9(1)(vi) of the Act.

11. Notwithstanding the above, Mr. Rai, learned counsel appearing for the appellant, additionally sought to place the respondent's income in clause (i) of Explanation 2 to Section 9(1)(vi) of the Act and sought to contend that the word '*process*' as occurring therein would make revenue earned from '*live feed*' taxable.

12. The aforesaid submission essentially proceeded on the basis of Explanation 6 to Section 9(1)(vi) which reads as under:-

> "Explanation 6.—For the removal of doubts, it is hereby clarified that the expression "process" includes and shall be deemed to have always included transmission by satellite (including up-linking, amplification, conversion for down-linking of any signal), cable, optic fibre or by any other similar technology, whether or not such process is secret;]"

13. As is evident from a reading of the said Explanation, the clarification which is entered pertains to "*transmission by satellite (including up-linking, amplification, conversion for down-linking of*

any signal), cable, optic fibre or by any other similar technology.....". The aforesaid Explanation is thus hinged upon the activity of transmission by satellite. It is the aforesaid activity which is sought to be captured and included in clause (i) of Explanation 2 to Section 9(1)(vi) of the Act.

14. However, in the facts of the present case, it is admitted to the appellant that the actual transmission of content was undertaken by SIPL and not by the respondent. The Explanation, therefore in our considered opinion does not detract from the correctness of the view as ultimately expressed by the ITAT.

15. In addition to the above, we note that the arguments addressed on the anvil of Explanation 6 to Section 9(1)(vi) of the Act lose sight of the salient principles which were enunciated by our Court in **Director of Income Tax vs. New Skies Satellite bv**[4], and where the Court had recognized the primacy of provisions contained in the Double Taxation Avoidance Agreements as opposed to domestic statutes.

16. We deem it apposite to extract the following passages from the judgment of the Court in *New Skies Satellite***:-**

> "**40.** In Asia Satellite the court, while interpreting the definition of royalty under the Act, placed reliance on the definition in the OECD Model Convention. Similar cases, before the tax tribunals through the nation, even while disagreeing on the ultimate import of the definition of the word royalty in the context of data transmission services, systematically and without exception, have treated the two definitions as pari materia. This court cannot take a different view, nor is inclined to disagree with this approach for it is imperative that definitions that are similarly worded be interpreted similarly in order to avoid incongruity between the two. This is, of course, unless law mandates that they be treated differently. The Finance Act of 2012 has now, as observed earlier,

[4] 2016 SCC Online Del 796

introduced Explanations 4, 5, and 6 to the section 9(1)(vi). The question is therefore, whether in an attempt to interpret the two definitions uniformly, i.e. the domestic definition and the treaty definition, the amendments will have to be read into the treaty as well. In essence, will the interpretation given to the double taxation avoidance agreement fluctuate with successive Finance Act amendments, whether retrospective or prospective? The Revenue argues that it must, while the assessees argue to the contrary. This court is inclined to uphold the contention of the latter.

41. This court is of the view that no amendment to the Act, whether retrospective or prospective can be read in a manner so as to extend in operation to the terms of an international treaty. In other words, a clarificatory or declaratory amendment, much less one which may seek to overcome an unwelcome judicial interpretation of law, cannot be allowed to have the same retroactive effect on an international instrument effected between two sovereign states prior to such amendment. In the context of international law, while not every attempt to subvert the obligations under the treaty is a breach, it is nevertheless a failure to give effect to the intended trajectory of the treaty. Employing interpretive amendments in domestic law as a means to imply contoured effects in the enforcement of treaties is one such attempt, which falls just short of a breach, but is nevertheless, in the opinion of this court, indefensible.

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45. At the very outset, it should be understood that it is not as if the double taxation avoidance agreements completely prohibit reliance on domestic law. Under these, a reference is made to the domestic law of the Contracting States. Article 3(2) of both double taxation avoidance agreements state that in the course of application of the treaty, any term not defined in the treaty, shall, have the meaning which is imputed to it in the laws in force in that State relating to the taxes which are the subject of the Convention.

> "Indo-Thailand Double Taxation Avoidance Agreements ((1986) 161 ITR (St.) 82, 83):
>
> 'Article 3: General definitions
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> 2. In the application on the provisions of this Convention by one of the Contracting States, any term not defined herein shall, unless the context otherwise requires, have the meaning which it has for the purposes of the laws in force in that State relating to the taxes which are the subject of this Convention.'
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> Indo-Netherlands Double Taxation Avoidance Agreement (see (1989) 177 ITR (St.) 72, 74):

'Article 3: General definitions

2. As regards the application of the Convention by one of the States any term not defined herein shall, unless the context otherwise requires, have the meaning which it has under the law of that State concerning the taxes to which the Convention applies."

The treaties therefore, create a bifurcation between those terms, which have been defined by them (i.e the concerned treaty), and those, which remain undefined. It is in the latter instance that domestic law shall mandatorily supply the import to be given to the word in question. In the former case however, the words in the treaty will be controlled by the definitions of those words in the treaty if they are so provided.

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50. There are therefore two sets of circumstances. First, where there exists no definition of a word in issue within the double taxation avoidance agreements itself, regard is to be had to the laws in force in the jurisdiction of the State called upon to interpret the word. The Bombay High Court seems to accept the ambulatory approach in such a situation, thus allowing for successive amendments into the realm of "laws in force". We express no opinion in this regard since it is not in issue before this court. This court's finding is in the context of the second situation, where there does exist a definition of a term within the double taxation avoidance agreements. When that is the case, there is no need to refer to the laws in force in the Contracting States, especially to deduce the meaning of the definition under the double taxation avoidance agreements and the ultimate taxability of the income under the agreement. That is not to say that the court may be inconsistent in its interpretation of similar definitions. What that does imply however, is that just because there is a domestic definition similar to the one under the double taxation avoidance agreement, amendments to the domestic law, in an attempt to contour, restrict or expand the definition under its statute, cannot extend to the definition under the Double Taxation Avoidance Agreement. In other words, the domestic law remains static for the purposes of the double taxation avoidance agreement. The court in Sanofi (supra) had also held similarly (page 442 of 354 ITR):

"We are in agreement with the petitioners and in the light of our preceding analyses, discern no textual, grammatical or syntactic ambiguity in article 14(5), warranting an interpretive recourse. In the circumstances, invoking the provisions of article 3(2) by an artificial insemination of ambiguity (to accommodate an expanded meaning to the double tax avoidance agreement provision), would be contrary to good faith interpretation. A further problematic of contriving an ambiguity to unwarrantedly

invite application of domestic law of a Contracting State would be that while India would interpret an undefined double taxation avoidance agreement provision according to the provisions of the Act, France could do so by reference to its tax code. As a consequence, the purpose of entering into a treaty with a view to avoiding double taxation of cross-border transactions would be frustrated."

51. Pertinently, this court in DIT v. Nokia Networks OY (2013) 358 ITR 259 (Delhi) specifically dealt with the question of the effect of amendments to domestic law and the manner of their operation on parallel treaties. The court delivered its judgment in the context of the very amendments that are in question today ; the Explanations to section 9(1)(vi) vis a vis the interpretation of a double taxation avoidance agreement. This court rejected that any amendment could change the situation and render the service or activity taxable, in the following observations (page 281 ITR 358 ITR):

"He, thus submitted that the question of 'copyrighted article' or actual copyright does not arise in the context of software both in the double taxation avoidance agreement and in the Income-tax Act since the right to use simpliciter of a software program itself is a part of the copyright in the software irrespective of whether or not a further right to make copies is granted. The decision of the Delhi Bench of the Income-tax Appellate Tribunal has dealt with this aspect in its judgment in Gracemac Corporation v. Asst. DIT [2010] 134 TTJ (Delhi)257 ; (2011) 8 ITR (Trib) 522 (Delhi) pointing out that even software bought off the shelf, does not constitute a 'copyrighted article' as sought to be made out by the Special Bench of the Income-tax Appellate Tribunal in the present case. However, the above argument misses the vital point namely the assessee has opted to be governed by the treaty and the language of the said treaty differs from the amended section 9 of the Act. It is categorically held in CIT v. Siemens Aktiongesellschaft (2009) 310 ITR 320 (Bom) that the amendments cannot be read into the treaty. On the wording of the treaty, we have already held in Ericsson A. B. (2012) 343 ITR 470 (Delhi) that a copyrighted article does not fall within the purview of royalty. Therefore, we decide question of law Nos. 1 and 2 in favour of the assessee and against the Revenue."

52. Thus, an interpretive exercise by Parliament cannot be taken so far as to control the meaning of a word expressly defined in a treaty. Parliament, supreme as it may be, is not equipped, with the power to amend a treaty. It is certainly true that law laid down by Parliament in our domestic context, even if it were in violation of treaty principles, is to be given effect to ; but where the State

> unilaterally seeks to amend a treaty through its Legislature, the situation becomes one quite different from when it breaches the treaty. In the latter case, while internationally condemnable, the State's power to breach very much exists ; courts in India have no jurisdiction in the matter, because in the absence of enactment through appropriate legislation in accordance with article 253 of the Constitution, courts do not possess any power to pronounce on the power of the State to enact a law contrary to its treaty obligations. The domestic courts, in other words, are not empowered to legally strike down such action, as they cannot dictate the executive action of the State in the context of an international treaty, unless of course, the Constitution enables them to. That being said, the amendment to a treaty is not on the same footing. Parliament is simply not equipped with the power to, through domestic law, change the terms of a treaty. A treaty to begin with, is not drafted by Parliament; it is an act of the executive. Logically therefore, the executive cannot employ an amendment within the domestic laws of the State to imply an amendment within the treaty. Moreover, a treaty of this nature is a carefully negotiated economic bargain between two States. No one party to the treaty can ascribe to itself the power to unilaterally change the terms of the treaty and annul this economic bargain. It may decide to not follow the treaty, it may chose to renege from its obligations under it and exit it, but it cannot amend the treaty, especially by employing domestic law. The principle is reciprocal. Every treaty entered into be the Indian State, unless self-executory, becomes operative within the State once Parliament passes a law to such effect, which governs the relationship between the treaty terms and the other laws of the State. It then becomes part of the general conspectus of domestic law. Now, if an amendment were to be effected to the terms of such treaty, unless the existing operationalising domestic law states that such amendments are to become automatically applicable, Parliament will have to by either a separate law, or through an amendment to the original law, make the amendment effective. Similarly, amendments to domestic law cannot be read into treaty provisions without amending the treaty itself."

17. Accordingly, and for all the aforesaid reasons, we hold that the ITAT did not commit any error in passing the impugned orders dated 20 March 2020 and 21 February 2023 and that it was completely justified in arriving at the finding that the fees received by the respondents towards live transmission could not be classified as royalty income under Section 9(1)(vi) of the Act. Consequently, no

substantial question of law arises in the instant appeals and the appeals stand dismissed on the aforesaid terms.

YASHWANT VARMA, J

GIRISH KATHPALIA, J

JANUARY 5, 2024/neha