



SATURDAY INTERNATIONAL TAX GYAN !!!

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SITG No. 232

Commissioner of Income-Tax

VS

ESPN Star Sports Mauritius S.N. C ET Compagnie*

Non Exclusive distribution rights are not royalty

Distribution of television channels will not give rise to transfer of copyright in favour of Indian entities, payments made by Indian entities to assessee would not fall within ambit of consideration for use of, or right to use, any copyright of literary, artistic or scientific work and, thus, would not be taxable as royalty under section 9(1)(vi).

16.11.2024



Facts of the Case

- ❖ ESPN Star Sports Distribution (Mauritius) (ESS) is a company incorporated in Mauritius, was engaged in the business of distribution of televisions channels.
- ❖ Assessee company entered into distribution agreements with ESPN Star Sports and ESPN India for distribution of sports channels in India.
- ❖ Assessing Officer held that assessee had a fixed place PE in India and, consequently, 70 per cent of the gross distribution revenue was liable to be treated as business income of the assessee in India.
- ❖ Distribution agreement between ESS and ESPN India was on a principal-to-principal basis.

Assessee's Contention

- ❖ Assessee is of the view that it had **no PE** in India due to following reasons:
 - Assessee has claimed that ESPN India operated independently without a fixed place at the disposal of ESS
 - No authority granted to ESPN India to conclude contracts on behalf of ESS.
- ❖ Assessee's contention regarding royalty classification dispute:
 - that Payments made were for distribution rights and not for copyright use.
- ❖ Assessee's contention that payment received from distributor will become part of business income not the part of royalty.
- ❖ Fact that there was no transfer of copyright in favour of Indian entities, payments made by Indian entities to assessee would not fall within ambit of consideration for use of, or right to use, any copyright of literary, artistic or scientific work and, thus, would not be taxable as royalty under section 9(1)(vi)
- ❖ Since there is no PE in India attribution of profit did not arise

Revenue's Contention

❖ Contentions of revenue are as under:-

- i) Assessee has Fixed Place PE and DAPE due to close operational alignment and revenue-sharing model
- ii) Payments constituted royalty under Section 9(1)(vi) of the Income-tax Act
- iii) Profits from Indian revenue sources should be attributed to ESS and taxed in India.
- iv) The Assessing Officer argued that ESPN India constituted a Fixed Place PE (Permanent Establishment) or Dependent Agent PE (DAPE).
- v) The Assessing Officer is of the contention that payments made to ESS were taxable as royalty in India.

Legal provisions

Section 9 (1)(vi) of the Act:

Taxable in India if payable by-

- Govt.
- Resident- **except** payable in respect of right, property, information ('RPI'), services utilized for **Foreign business or foreign income**.
- Non-resident- for **business & profession in India**.

Definition

Consideration for

- **Transfer of all/ any rights** (including granting of license) in respect of:
- A patent, invention, model, design, secret formula or process or trademark or similar property
- Any copyright, literary, artistic or scientific work including films/ video tapes for use in connection with television or tapes for use in connection with radio broadcasting, but not including consideration for sale, distribution or exhibition of cinematographic films.
- Imparting of any information concerning: Working of, or use of, a patent, invention, model, design.....

Legal provisions

Section 9 (1)(vi) of the Act:

Definition

Consideration for

- Use of: any patent, invention, model, design, secret formula.....Rendering of services in connection with above activities.

Expl. 4 to sec 9(1)(vi)-

- Transfer of all or any right for use or right to use **computer software** (including granting of license)
- Irrespective of medium through which such right is transferred

Legal provisions

Article 5 of India-Mauritius DTAA:

1. For the purposes of this Convention, the term "permanent establishment" means a fixed place of business through which the business of the enterprise is wholly or partly carried on.

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.

Legal provisions

Article 5 of India-Mauritius DTAA:

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.

Article 12 of India-Mauritius DTAA:

1. Royalties arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.
2. However, such royalties may also be taxed in the Contracting State in which they arise, and according to the law of that State, but the tax so charged shall not exceed 15 per cent of the gross amount of the royalties.

Legal provisions

3. The term "royalties" as used in this Article means payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work (including cinematograph films, and films or tapes for radio or television broadcasting), any patent, trade mark, design or model, plan, secret formula or process or for the use of, or the right to use, industrial, commercial or scientific equipment, or for information concerning industrial, commercial or scientific experience.

4. The provisions of paragraphs (1) and (2) shall not apply if the recipient of the royalties, being a resident of a Contracting State carries on business in the other Contracting State in which the royalties arise, through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the right or property in respect of which the royalties are paid is effectively connected with such permanent establishment or fixed base. In such a case, the provisions of article 7 or article 14, as the case may be, shall apply.

Ruling

❖ On Fixed Place PE:

- No evidence that ESPN India's premises were at the disposal of ESS.
- ESPN India provided support services, not core business activities hence assessee has no fixed place in India.

❖ On Dependent agent PE

- ESPN India did not conclude contracts on behalf of ESS.
- No habitual authority granted under the agreement.

- ❖ As far as the additional issue of profit attribution is concerned, we note that since there is no PE, the issue of profit attribution would clearly not arise. This issue, in any case, stands concluded in light of the judgment rendered by **the Supreme Court in CIT v. E-Funds IT Solution Inc.** [2017] 86 taxmann.com 240/251 Taxman 280/399 ITR 34/[2018] 13 SCC 294

Ruling

- ❖ Taking up the issue of royalty, it is manifest from a reading of Article 12(3) that payments would fall within its ambit provided they represent "consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work.....". This aspect, in any case, is liable to be answered in favour of the assessee bearing in mind the decision of the Supreme Court in **Engineering Analysis Centre of Excellence (P). Ltd. v. CIT [2021] 432 ITR 471/[2022] 3 SCC 321**
- ❖ The consequences for infringement of copyright and broadcast reproduction right have been dealt with differently under the Copyright Act. Thus, on a conjoint reading of section 14 and 37 of the Copyright Act, a holistic view can be taken that broadcast reproduction right is distinct and separate from Copyright Act. **In case of DDIT v. SET India Pvt. Ltd, the Coordinate Bench** held that Broadcasting Reproduction Right is not covered under the definition of Royalty under section 9(1)(vi) of the Income tax Acts well as Article 12 of the Treaty

Our Comments

- ❖ In such cases we have seen that ld. AO assessed that distribution fee will be construed as royalty. However, at a higher level such transactions have not been considered as royalty as there is no transfer of copyright in such kind of distribution rights.
- ❖ Cases where similar view has been taken:
 - BBC World Distribution Ltd. v. ADIT (IT) [2023] 148 taxmann.com 122 (Delhi - Trib.)
 - Google Ireland Ltd. v. Deputy Commissioner of Income-tax (IT) [2023] 148 taxmann.com 106 (Beng. – Trib.)
 - Factiva Ltd. v. Assistant Commissioner of Income-tax [2023] 156 taxmann.com 696 (Mumbai - Trib.)

Section/Article	Section 9(1) (vi) of the Income-tax Act, 1961 and article 5 and article 12 of DTAA
DTAA/Country	India Mauritious DTAA
Court	High Court of Delhi
Date of decision	13-02-2024

Note: Case law name in **Red**- in favor of the revenue, **Green**-In favor of the Assessee, **Orange** = Partial



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