IN THE INCOME TAX APPELLATE TRIBUNAL (VIRTUAL COURT), 'I' BENCH MUMBAI

BEFORE SHRI M.BALAGANESH, AM

&

SHRI RAM LAL NEGI, JM

ITA No.8671/Mum/2004
(**Assessment Year :2000-01**)

M/s.NGC Network Asia LLC C/o. DSK Legal 4th Floor, Express Towers Nariman Point Mumbai – 400 021	Vs.	Dy. Director of Income Tax (International Tax)– 3(2) Scindia House Ballard Estate Mumbai – 400 038
PAN/GIR No.AABCN3136G		
(Appellant)	..	**(Respondent**)

ITA No.3834/Mum/2007
(Assessment Year : 2001-02)

M/s.NGC Network Asia LLC C/o. NGC Network(India) Private Limited Star House, Dr. E. Moses Road, Mahalaxmi Mumbai – 400 001	Vs.	Assistant Director of Income Tax (International Tax)– 3(2) 1st Floor, Scindia House Ballard Estate Mumbai – 400001
PAN/GIR No.AABCN3136G		
(Appellant)	..	**(Respondent**)

ITA No.3835/Mum/2007
(Assessment Year: 2002-03)

M/s.NGC Network Asia LLC C/o. NGC Network(India) Private Limited Star House, Dr. E. Moses Road, Mahalaxmi Mumbai – 400 001	Vs.	The Income Tax Officer (International Tax) 3(1) Scindia House Ballard Estate Mumbai – 400001
PAN/GIR No.AABCN3136G		
(Appellant)	..	**(Respondent**)

ITA No.3836/Mum/2007
(Assessment Year: 2003-04)

M/s.NGC Network Asia LLC C/o. NGC Network(India) Private Limited Star House, Dr. E. Moses Road, Mahalaxmi Mumbai – 400 001	Vs.	The Income Tax Officer (International Tax) 3(1) Scindia House Ballard Estate Mumbai – 400038
PAN/GIR No.AABCN3136G		
(Appellant)	..	**(Respondent**)

&
ITA No.1662/Mum/2008
(Assessment Year: 2004-05)

M/s.NGC Network Asia LLC C/o. NGC Network(India) Private Limited Star House, Dr. E. Moses Road, Mahalaxmi Mumbai – 400 001	Vs.	The Income Tax Officer (International Tax) 3(2) Scindia House Ballard Estate Mumbai – 400038
PAN/GIR No.AABCN3136G		
(Appellant)	..	**(Respondent**)

Assessee by	Shri Porus Kaka
Revenue by	Shri Shreenivasaraghava Iyengar
Date of Hearing	**18/12/2020**
Date of Pronouncement	**30/12/2020**

आदेश / O R D E R

PER BENCH:

ITA No.8671/Mum/2004 A.Y.2000-01 (Assessee Appeal)

This appeal in ITA No.8671/Mum/2004 for A.Y.2000-01 arises out of the order by the ld. Commissioner of Income Tax (Appeals)-XXXIII,

Mumbai in appeal No.CIT(A)XXXIII/Intl.Tax Rg 3/1-N/03-4 dated 12/08/2004 (ld. CIT(A) in short) against the order of assessment passed u/s.143(3)of the Income Tax Act, 1961 (hereinafter referred to as Act) dated 26/02/2003 by the ld. Asst. Director of Income Tax (International Taxation)-2(2), Mumbai (hereinafter referred to as ld. AO).

ITA No.3834/Mum/2007 A.Y.2001-02 (Assessee Appeal)

This appeal in ITA No.3834/Mum/2007 for A.Y.2001-02 arises out of the order by the ld. Commissioner of Income Tax (Appeals)-XXXIII, Mumbai in appeal No.CIT(A)XXXIII/Intl.Tax/IT/53-N/04-05 dated 14/03/2007 (ld. CIT(A) in short) against the order of assessment passed u/s.143(3)of the Income Tax Act, 1961 (hereinafter referred to as Act) dated 30/03/2004 by the ld. Asst. Director of Income Tax (International Taxation)-3(2), Mumbai (hereinafter referred to as ld. AO).

ITA No.3835/Mum/2007 A.Y.2002-03 (Assessee Appeal)

This appeal in ITA No.3835/Mum/2007 for A.Y.2002-03 arises out of the order by the ld. Commissioner of Income Tax (Appeals)-XXXIII, Mumbai in appeal No.CIT(A)XXXIII/Intl.Tax/IT/53-N/04-05 dated 14/03/2007 (ld. CIT(A) in short) against the order of assessment passed u/s.147 r.w.s.143(3)of the Income Tax Act, 1961 (hereinafter referred to as Act) dated 30/11/2005 by the ITO (International Taxation)-3(1), Mumbai (hereinafter referred to as ld. AO).

ITA No.3836/Mum/2007 A.Y.2003-04 (Assessee Appeal)

This appeal in ITA No.3836/Mum/2007 for A.Y.2003-04 arises out of the order by the ld. Commissioner of Income Tax (Appeals)-XXXIII,

Mumbai in appeal No.CIT(A)XXXIII/Intl.Tax/IT/179-N/05-06 dated 14/03/2007 (ld. CIT(A) in short) against the order of assessment passed u/s.143(3)of the Income Tax Act, 1961 (hereinafter referred to as Act) dated 30/11/2005 by the ld. Asst. Director of Income Tax (International Taxation)-3(1), Mumbai (hereinafter referred to as ld. AO).

ITA No.1662/Mum/2008 A.Y.2004-05 (Assessee Appeal)

This appeal in ITA No.1662/Mum/2008 for A.Y.2004-05 arises out of the order by the ld. Commissioner of Income Tax (Appeals)-XXXIII, Mumbai in appeal No.CIT(A)XXXIII/Intl.Tax/IT/53-N/04-05 dated 14/03/2007 (ld. CIT(A) in short) against the order of assessment passed u/s.143(3)of the Income Tax Act, 1961 (hereinafter referred to as Act) dated 18/12/2006 by the ld. Asst. Director of Income Tax (International Taxation)-3(2), Mumbai (hereinafter referred to as ld. AO).

1.1. At the outset, we would like to mention that all these files are reconstructed files in view of the original files not becoming traceable by the Registry. Pursuant to the order sheet noting in ITA No.8671/Mum/2004 dated 24/06/2020 wherein the Registry is directed by the Bench to comply with appeal papers in all respects pursuant to reconstruction and similarly for other A.Yrs. 2001-02, 2002-03, 2003-04 and 2004-05, these appeals are taken up for hearing based on the reconstructed appeal papers.

Let us take up Appeal in ITA No.8671/Mum/2004 (A.Y.2000-01)

2. The ground Nos. 1 to 3 raised by the assessee are with regard to taxability of advertisement revenue as business income.

3. We have heard the rival submissions and perused the materials available on record. We find that the assessee is a non-resident company, incorporated in the US. As per Article 4 of the India-US Double Taxation Avoidance Agreement ('India-US DTAA'), it is eligible for the benefits of the India-US Tax Treaty by virtue of being a resident of USA. It is primarily engaged in the media industry, and its business constitutes of broadcasting of its channels over various countries, including over Indian sub-continent. We find that the assessee executed an Advertisement Sales Representation Agreement dated 29 February 2000 with News Television (India) Limited ('NTIL'), now known as Star India Private Limited ('SIPL') as its representative for marketing and collection of advertisement revenue for which SIPL was remunerated commission at 15%. We find that the assessee had submitted during the course of assessment proceedings that the income from advertisement air time is business income and in the absence of a Permanent Establishment (PE) of the assessee in India, the same is not taxable. The ld. AO however, held that SIPL constitutes PE of the assessee by holding it as a dependant agent as per para 4(c) of the Article 5 of India-USA DTAA and taxed the advertisement revenue earned by the assessee as business income on a net basis. In this regard, it would be pertinent to reproduce the relevant extracts of Article 5(4) and Article 5(5) of India-USA DTAA which deals with agency PE:-

> *"4. Notwithstanding the provisions of paragraphs 1 and 2,* ***where a person-other than an agent of an independent status to whom paragraph 5 applies****-is acting in one of the States on behalf of an enterprise of the other State, that enterprise shall be deemed to have a permanent establishment in the first mentioned State, if (a) he has and habitually exercises in the first-mentioned State an authority to conclude contracts on behalf of the enterprise, unless his activities are limited to those mentioned in paragraph 3 which, if exercised through a fixed place of business, would now make that fixed place of business a permanent establishment under the provisions of that paragraph;*

(b) he has no such authority, but habitually maintains in the first-mentioned State a stock of goods or merchandise from which he regularly delivers goods or merchandise on behalf of the enterprise, and some additional activities conducted in that state on behalf of the enterprise have contributed to the sale of the goods or merchandise; or

(c) he habitually secures orders in the first mentioned state, wholly or almost wholly for 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, provided that such persons are acting in the ordinary course of their business. However, when the activities of such an agent are devoted wholly or almost wholly on behalf of that enterprise and the transactions between the agent and the enterprise are not made under arm's length conditions, he shall not be considered an agent of independent status within the meaning of this paragraph"

3.1. We find that SIPL had been remunerated by way of 15% commission from the assessee for the activities performed by it. It was submitted that the said commission of 15 percent is at arm's length as it is based on the industry standards for foreign telecasting companies. Circular No. 742 dated 2nd May 1996 issued by the CBDT which provides for computation of taxation of advertisement revenues by foreign telecasting companies, has also recognised the same. The Circular provides 15 percent advertising agency commission and 15 percent Indian agent's commission, which is in line with industry standards for media commission agents. In this regard, it would be pertinent to note that even the ld. AO had not disputed the fact that commission retained by SIPL is on arm’s length basis. From this, it could be safely concluded that SIPL had been remunerated at arm’s length price. It would be also relevant to note that transfer pricing provisions were not applicable for A.Y.2000-01 as the same were introduced in statute by Finance Act 2001 applicable from A.Y.2002-03 onwards. From A.Yrs 2002-03 onwards transfer pricing assessments were framed on the assessee u/s.92CA(3) of the Act wherein

the ld. TPO had confirmed the international transaction between SIPL and the assessee for commission income @15% and accepted the same to be at arm's length. This is evident from TPO orders passed u/s.92CA(3) of the Act for A.Yrs. 2002-03, 2003-04 and 2004-05 on 29/10/2010, 30/12/2005, 06/12/2006 respectively. We find that the assessee had pleaded before the ld. AO that once arm's length payment has been made, nothing further remain to be taxed in the hands of the non-resident even if there is existence of PE in India. The ld. AO however, did not agree to the contentions of the assessee and proceeded to place reliance on the second part of the Circular No.742 dated 02/05/1996 by adding 10% of net revenues and accordingly determined the income at Rs.20,35,202/- for A.Y.2000-01 which action was upheld by the ld. CIT(A).

3.2. At the outset, we find that the commission remunerated at 15% was accepted to be at arm's length by the ld. TPO for A.Yrs.2002-03, 2003-04 and 2004-05 in the hands of SIPL. Though there was no transfer pricing assessment applicable in the statute for A.Y.2000-01, the CBDT Circular No.742 dated 02/05/1996 had provided for computation of taxation of advertisement revenues by foreign telecasting companies wherein a commission of 15% has been accepted and recognized to be at arm's length. On perusal of the order of the ld. AO and the ld. CIT(A), we find that the authorities had not disputed this fact that a commission retained by SIPL is at arm's length. So, once the arm's length payment is made, nothing further remains to be taxed in the hands of the non-resident. This principle has been upheld by various decisions of the Hon'ble High Court including the Hon'ble Jurisdictional High Courts and Tribunal as under:-

a. Decision of the Hon'ble Jurisdictional High Court in the case of Set Satellite (Singapore) PTE Limited vs. DDIT reported in 307 ITR 205 (Bom), wherein the Hon'ble High Court had observed that if the correct arm's length price is applied and paid, then nothing further would left to be taxed in the hands of foreign enterprises. The Hon'ble High Court was dealing with a foreign telecasting company, similarly to the assessee herein for the A.Y. 1999-2000 (i.e prior to the applicability of transfer pricing provisions as in the case of the assessee herein), wherein the Hon'ble High Court had relied on CBDT Circular No.742 to conclude that the commission paid to Indian agent is fair and reasonable for examining the arm's length basis. The relevant extract of the said decision is reproduced hereunder:-

> *" 10. .....From the order of the CIT, which has been accepted it is clear that the Appellant herein has paid to its PE on arm's length principle. It recorded a finding of fact that the Appellant had paid service fees at the rate of 15 per cent of gross ad revenue to its agent, SET India, for procuring advertisements during the period April 1998 to October, 1998. The fact that 15 per cent service fee is an arm's length remuneration is supported by Circular No. 742 which recognizes that the Indian agents of foreign telecasting companies generally retain 15 per cent of the ad revenues as service charges. Effective November Page 3 of 23 1998, a revised arrangement was entered into between the parties whereby the aforesaid amount was reduced to 12.5 per cent of net ad revenue (i.e., gross ad revenues less agency commission). Simultaneously, the Appellant also entered into an arrangement entitling SET India to enter into agreements, collect and retain all subscription revenues. Considering all these aspects and the fact that the agent has a good profitability record, it held that the Appellant has remunerated the agent on an arm's length basis." (emphasis applied)*

b. *Decision of Hon'ble Delhi High Court in the case of DIT vs. BBC Worldwide Ltd., reported 203 Taxmann 554 (Del)*, wherein the Hon'ble Delhi High Court by placing reliance on the decision of Hon'ble Bombay High Court in the case of Set Satellite Singapore Pte Ltd., supra upheld

that 15% commission to Indian agents as per Circular No.742 of CBDT is normally accepted commission rate payable to agents of foreign telecasting companies. The relevant extract is in para 16 of the said order which is not reproduced herein for the sake of brevity.

c. *Decision of the Hon'ble Jurisdictional High Court in the case of DIt vs B4U International Holdings Limited reported in 374 ITR 453 (Bom)* also expressed the similar view. The relevant extract is in para 12 of the said order which is not reproduced herein for the sake of brevity.

d. Decision of Mumbai Tribunal in the case of International Global Network BV reported in 84 Taxmann.com 188:-

In this case, the assessee before the Mumbai Tribunal had appointed an agent for marketing and advertising at the commission rate of 15% which is identical to the facts of the assessee herein before us. The Tribunal after placing reliance on the aforesaid decision of Hon'ble Jurisdictional High Court referred to supra upheld the principle that when the agent has been remunerated at arm's length price, no further attribution can be made in the hands of the foreign principal. The relevant operative portion of the judgement of this Tribunal reported in 84 taxmann.com 188 is reproduced hereunder:-

> *"6.4 We find that in the case of Set Satellite Singapore PTE Ltd.(supra) similar issues have been considered by the Hon'ble High Court. Facts of the case were that the Assessee, a resident of Singapore, was having business activities in India, that through its dependent agent, namely SET India (P.)Limited, it carried on marketing activities in India for advertisement slots by canvassing advertisements in India, that it claimed that it did not have any tax liability in India as it did not have a PE in india, that it was also argued that its dependent agent was remunerated on an arm' s length basis, that income from various activities had been assessed to tax in the hands of SET India, that there could not be further assessment of income in the hands of the Assessee on account of the said activities. Reliance was placed on Circular No. 23, dated 23/07/1969,*

issued by the CBDT. While filing revised return on 05/03/2001,it computed its taxable income as per the formula prescribed in the Circular No. 742 without prejudice to its contention that, it did not have any income which was taxable in India. The AO assessed the income of the Assessee which included income from marketing fees as also advertisement collected from India and further the subscription fees received from cable operators of its dependent agent.

.....

"6.4.1 We would also like to refer to the case of Dy. DIT (International Taxation) v. B4U International Holdings Ltd. [2012] 23 taxmann.com 372/137 ITD 346 (Mum.). In that matter the Tribunal has held as under:

"Coming to the alternate argument even if it is held that there is a PE of the Assessee in India, then we would hold that the rate of commission of 15% was accepted as ALP by the TPO for the AY 2003-04 to 2004-05, no further profit is attributable to the PE. This is the rate mentioned in the CBDT Circular No.742 of the order 1996. Similar rate is accepted by the Hon'ble Bombay High Court in the case of Set Satellite (Singapore) Pte. Ltd. (supra). Thus we have no agitation in upholding the contention of the Assessee that the payment was at arms' length. When the payment is at ALP there is no further need to attribute profit to the PE as held by the Hon'ble Supreme Court in the case of Morgan Stanley &Co.(supra).

" 6.4.2 We would also like to rely upon the matter of BBC Worldwide Ltd. (supra).In that matter also the Hon'ble Delhi High Court had referred to the case of Sat Satellite (Singapore) Pte. Ltd. (supra) ***and held that if correct ALP was applied and paid nothing further would be left to be taxed in the hands of the foreign enterprise. It also placed reliance on Circular No.742 and held that CBDT itself had considered 15% commission as normally accepted commission rate payable to the agents of telecasting companies.***

7. Considering the above discussion, we hold that the Assessee did not have a PE in India, that it was not carrying out any business activities in India and therefore no part of its revenue was attributable to India, that SIPL was an independent agent under Article 5(6)of the tax treaty between India and Holland, that the activities of the agent were carried out in its ordinary course of business, that the agent was not wholly and exclusively devoted to the Assessee, that payments made to SIPL were at arm's length, that provisions of Circular 742 were applicable for determining the tax liability of the Assessee. In short, the Assessee was not liable to pay tax in India in any of the AY.s. mentioned above. Effective ground of appeal is decided in favour of the Assessee." (emphasis applied)"

3.3. From the aforesaid decisions, we find lot of force in the alternative argument advanced by the ld. AR that even assuming that SIPL constitutes a PE of the assessee in India under Article 5(5) of India-USA

DTAA, considering the fact that SIPL had been remunerated at arm's length price by the assessee, no further profit could be attributed in the hands of the assessee. In fact, similar view has also been expressed by the Hon'ble Apex Court in the case of ADIT vs. E-Funds IT Solutions Inc. reported in 399 ITR 34(SC) even if such agent is treated as a dependent agent PE. The relevant extract of the said judgment of Hon'ble Apex Court is reproduced hereunder:-

22. ……..

"Shri Ganesh is correct in stating that as the arm's length principle has been satisfied in the present case, no further profits would be attributable even if there exists a PE in India. This was specifically held in Morgan Stanley (supra) as follows:

……..

36. Under the impugned ruling delivered by AAR, remuneration to MSAS was justified by a transfer pricing analysis and, therefore, no further income could be attributed to the PE (MSAS). In other words, 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 PE. The situation would be different if transfer pricing analysis does not adequately reflect the functions performed and the risks assumed by the enterprise. In such a situation, there would be a need to attribute profits to PE for those functions/risks that have not been considered. Therefore, in each case the data placed by the taxpayer has to be examined as to whether the transfer pricing analysis placed by the taxpayer is exhaustive of attribution of profits and that would depend on the functional and factual analysis to be undertaken in each case. Lastly, it may be added that taxing corporates on the basis of the concept of economic nexus is an important feature of attributable profits (profits attributable to PE).

3.4. Similar views were also expressed by the Hon'ble Apex Court in yet another decision in the case of Honda Motor Ltd., vs. ADIT 255 Taxman 72.

3.5. We find that the ld. DR had filed the following written submissions before us:-

> *"The above mentioned appeals were heard through Virtual Court today. The following is the gist of arguments made by me in these appeals.*
>
> *2. <u>Taxability of advertisement income-</u>*
> *This issue came up and was heard in this very case for AY 2007-08 and AY 2008-09 in ITA 7994/M/11 and ITA 7631/M/12 dated 16.12.2015. The MA 30/31/M/2016 was disposed vide order dated 23.11.2016 against which assessee filed a writ petition. The MA was restored by the HC and was finally disposed vide order dated 2.8.2017. The reasons for recall of the order are stated in detail. The Hon'ble HC did not express any views on merits of the earlier ITAT decision. I rely on the arguments of the DR and the views expressed by the ITAT in that order.*
>
> *As regards existence of the PE, Article 5(4) applies. The benefit of Art 5(5) is not available since the agent is not an independent agent. It is clearly controlled by the assessee. Further the agent habitually secures orders for the assessee and is therefore covered under Art 5(4) giving rise to deemed PE.*
>
> *As regards the attribution of income to PE, there is no TP audit as far as AY 2000-01 and AY 2001-02 are concerned. If the CBDT circular is relied upon by the assessee, it cannot be relied upon partially for treating the commission paid as arms length, ignoring the taxability of net advertisement income @ 10% prescribed by the same Circular.*
>
> *For AY 2002-03, as regards reopening of assessment, assessee never asked for the reasons for reopening, as elaborated in Para 7 of the CIT(A) order. The Ld AR has not pressed this ground.*
>
> *The case laws relied upon by the assessee were considered in the order of ITAT in AY 2007-08 and AY 2008-09. The decisions cited have proceeded on their own specific facts and such facts are distinguishable.*
>
> *i) Set Satellite Singapore –Bom HC*

Here the DTAA involved is with Singapore. CIT(A) had given some reliefs based on CBDT circular where as revenue was aggrieved only in respect of advertisement revenue income of one particular channel AXN. The HC noted that the findings of CIT(A) were not disputed by the revenue.

ii) E Funds IT Solution Inc –SC
This was a case of an Indian Sub providing auxiliary services – it was held that no part of main business was carried out through fixed place of business in India. Hence there was no PE.

iii) Delmas France – Bombay HC
Here before the ITAT, the DR requested for certain clauses of DTAA to be examined and to restore the matter to AO/DRP, which the ITAT did not allow.

3. <u>Distribution fees-Royalty</u>
Payment is made to assessee by Indian Sub for license to broadcast the channels of the assessee in India. This is a payment for the use of or right to use in connection with television broad casting. It is not necessary that all rights must be transferred for royalty to apply. Copyright is not defined in the DTAA and the definition of the term copyright is not to be construed in a limited restrictive sense. It encompasses rights of the nature which are protected and whose infringement attracts penal consequences.

The CIT(A) order narrates the meaning and context of the statutory provisions in respect of copy rights in several countries including that of USA. Under the Copyright Act 1957, even in section 14, reference is made to communication to public in respect of cinematographic films and sound recordings. The owner has copyright on such contents. Further section 37 of the same Act provides similar rights and protections to Broadcasting rights, which is a species of genus of Copyright.

Even the technical clarifications issued in respect of India US DTAA clearly refers to broadcasting (pages 25 and 26) as part of royalty. This clearly shows that license for broadcasting is covered under royalty.

In the recent decision of the Apex Court in PILCOM, which deals with location of the activity giving rise to income under section 5 and 9 of the IT Act, there is a reference to the case of Performing Rights Society Ltd. 106 ITR 11(SC). This was a case where the foreign entity Performing Rights Society Ltd. had granted to All India Radio the authority to broad cast its musical works for which license fees were payable. It is to be noted that the same was assessed as royalty, which has been upheld by the Apex Court.
It does not matter that the distribution rights obtained by the Indian Sub by paying license fees to the assessee, gives rise to business income. If the

payment received is covered by specific Article to the DTAA, the general article of business profits will not apply to such income (refer Article 7(6) of the DTAA).

The case laws relied upon by the assessee are distinguishable on facts.

i) MSM Satellite (Singapore) Pte Ltd. Bom HC
This case proceeds on the facts that subscription revenues received from a large number of customers- ultimately received by the Singapore Assessee was taxed as Royalty by the revenue. Here it is the license fees paid by Indian Sub to the US assessee which has been held as royalty. The country and DTAA is different.

ii) SET India Pvt. Ltd Bom HC
Here the HC states that the matter is settled by its decision in the case of Set Satellite (Singapore) Pte Ltd. 307 ITR 205. However in the decision referred to, discussed earlier in respect of advertisement income, the matter pertained to taxability of advertisement revenue and the attribution of income to PE and the CBDT Circulars and not the issue of royalty.

iii) Sony Pictures Network India ITAT Mumbai
Here the issue was TP adjustments related to royalty. On page 14 of this order it is stated that the Ld DR did not controvert that distribution fees is not royalty. This is strongly contested here with facts and the explanation of the DTAA with USA.

iv) Set India P Ltd. ITAT Mumbai
The case was of the Indian company who paid to a Singapore Company. The case proceeded on the decision of the CIT(A) that distribution rights are business right and not royalty which was accepted by the ITAT. In the present case the CIT(A) has extensively narrated the statutory provisions in several countries and I have argued with support of the Technical Explanation to India US DTAA and similar facts in the case of Performing Rights Society Ltd. to support the decisions of the AO and the CIT(A) on the facts of this case.

4. On section 234B, the proviso to section 209 was highlighted to note the distinction that no TDS is actually paid.

3.6. We find that each of the argument of the ld. DR which is also reproduced in the written submission hereinabove were met by the ld. AR at the time of hearing as under:-

a. *The ld. DR vehemently opposed the reliance placed by the ld. AR on Circular No.742 dated 02/05/1996 issued by CBDT by stating that the ld. AR had placed reliance only on the first part of the Circular and not on the second part of the said Circular*. We find that the said Circular No.742 dated 02/05/1996 issued by CBDT was issued in the form of guidelines for computation of Income Tax of foreign telecasting companies. We find that the second part of the said Circular states that in the absence of country-wise accounts and keeping in view the substantial capital cost, installation charges and running expenses etc., in the initial years of operation, it would be fair and reasonable if the taxable income is computed at 10% of the gross receipts (including the amount retained by the advertisement agent and the Indian agent of the non-resident foreign telecasting company as their commission / charges, made for the remittance abroad). The said Circular also states that the Assessing Officer shall accordingly compute the income in the case of foreign telecasting companies which are not having any branches or permanent establishment in India or are not maintaining country-wise accounts by adopting the presumptive profit rate of 10% of the gross receipts meant for remittance abroad or the income returned by such companies, whichever is higher and subject the same to tax at the prescribed rate. *We find that the ld. DR vehemently placed reliance on this portion of the said Circular No.742 and accordingly justified the action of the lower authorities in bringing to tax 10% of the gross receipts*.

We find that the second part of the Circular is the view of the CBDT. The same has been over ruled by various decisions of the Hon'ble High Courts and the Tribunal as stated supra.

b. We find that the ld. AR had argued that SIPL's commission income from assessee was less than 1% of its total commission income. The ld AR submitted that SIPL is not restricted from carrying on other business, including the business of being a representative to solicit advertisements for other television channels. During the year under consideration, SIPL was not only acting as an advertisement agent for the assessee but also acting as an advertisement agent for Satellite Television Asian Region Ltd., and ESPN Asia(s) Pvt. Ltd. Further SIPL is also engaged in other business such as producing / procuring of the content and supplying programmes and distribution rights of channels to cable operators in India. It was argued by the ld. AR that commission income from SIPL constitute less than 1% of the total commission income received by SIPL from other media companies, which fact is also noted by the ld. CIT(A) in para 3.7 in page 3 of his order. The ld. AR argued that if the commission income of the assessee company is compared to the entire business then the percentage will be even lower. Accordingly, SIPL as an agent is acting in the ordinary course of its business and by no stretch of imagination, the activities of SIPL could be considered to be 'wholly or almost wholly devoted to the assessee'. The ld. AR also placed reliance on the Co-ordinate Bench decision of Mumbai Tribunal in support of its contentions in the case of Varian India (P) Ltd., vs. ADIT reported in 142 ITD 692 wherein the Tribunal had noted that authorised foreign enterprises had engaged the assessee and the activities are not devoted wholly or almost wholly for any one enterprise. The relevant extract of the said decision is reproduced hereunder:-

"...As stated in several places in this order that the Assessee is providing services to various VGCs namely Varian Inc. U.S.A., Varian Australia, Varian Italy, Varian Switzerland and Varian Netherlands. It has not devoted only for one foreign enterprise. The learned Counsel had submitted a statement representing the approximate value of sales made by these foreign enterprise in the calendar year 2001 & 2002, which for the sake of ready reference is reproduced below:-

Supplying Entity (VGCs)	*Rate of Commission*		*Total Amount of Commission for 2001 & 2002*		*Total Amount of Sales (Approx.) for 2001 & 2002*	
	Calendar Year		*(Rupees)*	*(%)*	*(Rupees)*	*(%)*
	2001	*2002*				
Varian Australia	*33%*	*45%*	*47,16,563*	*8.69%*	*1, 4 1, 91, 798*	*7.70%*
Varian Inc., U.S. A (average rates)	*35%*	*29%*	*34,12,975*	*6.29%*	*1,03,47,529*	*5.61%*
Varian SPA, Italy	*15%*	*15%*	*58,07.471*	*10.70%*	*3,87,16.473*	*21.00%*
Varian Chrompak International Netherlands	*41%*	*41%*	*3.49.91,933*	*64.44%*	*8,53,46,178*	*46.28%*
Varian A G, Switzerland	*15%*	*15%*	*53,70,674*	*9.89%*	*3,58,04,493*	*19.42%*
Total			*5,42,99,616*	*100%*	*18,44,06,472*	*100%*

From the above, it is evident that the percentage of commission income and sales from the three VGCs are quite normal and with regard to Varian Inc. USA, the activities of the Assessee are between 5 to 7%. Hence, it cannot be said that the Assessee is devoted wholly or almost wholly on behalf of any one VGC.

We find that the ld. DR had argued that the above fact that SIPL commission income from assessee was less than 1% of total commission income derived by it, was not verified by the lower

authorities and the same needs to be sent back to the ld. AO for verification. In this regard, we find that the ld. AR rebutted the argument of the ld. DR by submitting that this fact along with all statistics were duly submitted before the ld. CIT(A) and the ld. CIT(A) also records this fact in his order and had not disputed the same. Once a particular submission was made and the same is not disputed by the lower authorities by bringing any contrary fact with evidences thereon, then the same needs to be accepted as such.

On the contrary, we find that the ld. DR was not able to provide any contrary evidences to prove that the fact of SIPL's commission from assessee was less than 1% of total income is incorrect. Hence, we hold that there is no need for this issue to go back to the file of the ld. AO and accordingly, the argument of the ld. DR in this regard is hereby rejected considering the fact that the issue involved is more than 20 years old as of now and hence the matter is not remanded back to the file of ld AO.

c. *The ld. DR vehemently argued that assessee had full control over the activity of SIPL and hence is a SIPL dependent agent PE of assessee in India. The ld. DR argued that control over the activities of the agent is a crucial point for the purpose of determining the independence of the agent under Article 5(5) of India-USA DTAA*. This was duly rebutted by the ld. AR by placing reliance on the decision of this Tribunal in the case of Varian India (P) Ltd., vs. ADIT reported in 142 ITD 692 supra and also on the decision of Authority of Advance Ruling in the case of Speciality Magazines (P) Ltd., reported in 274 ITR 310 (AAR) wherein criteria for satisfaction of the condition of "wholly or almost wholly dependent" was laid

down to meet anything less than 90% of income from that client. As the same is not satisfied in the instant case and also in addition that the conditions provided in Article 5(5) India-USA DTAA are satisfied, SIPL cannot be treated as dependent agent as per para 4. Thus, the allegation of existence of dependent agent PE by the ld. DR is hereby dismissed.

We further find that the ld. AR also pointed out that Article 5 of India USA DTAA for agency PE provides that para 4 of Article 5 shall apply only to those agents other than an independent agent. He argued that however, before examining whether an agent satisfied conditions laid down in para 4, it must be examined whether it satisfies the condition of independent agent laid down in para 5 of Article 5. He submitted that an agent is considered of having independent status if the activities are not devoted 'wholly or almost wholly' on behalf of foreign enterprises and the transactions between the agent and such enterprises are made at arm's length then it shall be regarded as an agent of independent status.

We hold that agent who satisfies the condition will be independent and would not constitute the PE in India even if he satisfies the conditions laid down in para 4. Accordingly, if SIPL is an agent of independent status and fulfils the conditions laid down in para 5, it will not constitute a PE for assessee in India. In this regard reliance was rightly placed on the Co-ordinate Bench decision of this Tribunal by the ld. AR in the case of Delmas France vs. ADIT reported in 49 SOT 719 (Mum) which affirm the above proposition. We find that this ruling was rendered in the context of Article 5(6)

of India France DTAA. Similar language exists in Article 5(5) of India USA DTAA and hence, said ruling would be made applicable to the facts of the assessee herein. We also find that the said decision of the Tribunal has been approved by the Hon'ble Jurisdictional High Court reported in 53 taxmann.com 294.

D. *Judicial precedents relied upon by the ld. AR on the decisions of the Hon'ble Jurisdictional High Court in the case of Set Satellite (Singapore) Pte Limited and other cases reproduced supra are considered and distinguished by this Tribunal in assessee's own case for A.Y.2007-08 and 2008-09 and hence High Court decisions relied upon need not be gone into*.

We find that the order passed by this Tribunal for A.Y.2007-08 and 2008-09 in assessee's own case has been recalled by this Tribunal in its entirety pursuant to the order of the Hon'ble High Court. It is trite law that once the order is recalled in its entirety, it is no order in the eyes of law. Hence, all the observations made in the said recalled order has got no relevance for the purpose of adjudication. At the most, it may only persuasive value and not any binding precedent. Hence, the argument made by the ld. DR in this regard is rejected.

3.7. In view of the aforesaid observations and respectfully following the judicial precedents relied upon hereinabove, we hold that assessee has paid arm's length commission to SIPL @15% which has been accepted to be at arm's length also by the lower authorities by not disputing the same and also by the ld. TPO for subsequent assessment years i.e. A.Yrs. 2002-03, 2003-04, 2004-05 in the orders passed u/s.92CA(3) of the Act and also considering the fact that the commission rate of 15% is fair and

reasonable in the light of the CBDT Circular No.742 dated 02/05/1996 and is accepted by the various Courts as mentioned above, no further attribution of profits should be done in the hands of the assessee as the agent has been remunerated on arm's length basis. Accordingly, the ground Nos. 1-3 raised by the assessee are allowed.

4. In the result appeal of the assessee for A.Y.2000-01 in ITA No.8671/Mum/2004 is allowed.

ITA No.3834/Mum/2007 (A.Y.2001-02) – Assessee Appeal

5. Assessee has raised the following grounds:-

"On the facts and circumstances of the case and in law, the learned CIT(A) erred in:

a) holding that the Appellant is taxable in India on the ground that it has a Permanent Establishment ("PE") in India in terms of Double Tax Avoidance Agreement ("DTAA") between India and USA.

(b) assuming without admitting that the Appellant has a PE in India, the learned CIT(A) erred in holding that entire advertisement revenues collected by the alleged PE are taxable in India disregarding the fact that several key operations like content procurement up-linking and amplification in satellite are admittedly carried outside India and therefore, income attributable to those operations can not be taxed in India as per clear mandate of clause (a) of Explanation 1 to section

(c) *assuming without admitting that the Appellant has a PE in India and income attributable to operations carried out by the PE in India is taxable, the learned CIT(A) erred in holding that income of the PE, in excess of marketing and collection commission paid to Indian agent on the basis of Arm's Length Pricing ("ALP") is further taxable in India.*

2. On the facts and circumstances of the case and in law, the learned CIT(A) erred in:

(a) *holding that distribution revenues earned by the Appellant outside India are taxable in India.*

(b) *holding that distribution revenues earned by the Appellant outside India are taxable as royalty both under ITA and Article 12 of DTAA between India & USA.*

(c) *not holding that distribution revenues are attributable to broadcast reproduction right granted to NGC India and broadcast reproduction right is not included in the definition of 'copyright[1] under Income-tax Act, Copyright Act or the DTAA.*

3. Assuming without admitting that Broadcast reproduction right is included in copyright under Copyright Act, the learned C1T(A) erred in holding income from grant of this right as royalty ignoring specific exclusionary provisions of clause (v) of Explanation 2 to section 9(l)(vi) of Income-tax Act which mandate taxation of income from distribution or exhibition of cinematograph films as business income despite existence of copyright in films as per Copyright Act.

4. On the facts and circumstances of the case and in law, the learned CIT(A) erred in upholding levy of interest under 234 B ignoring the binding precedent from Special Bench of IT AT in the case of Motorola Inc (95 TTD 269) to the effect that a non-resident, whose entire income is subject to Tax Deducted at Source (TDS) under section 195 is not liable for payment of advance tax and consequently not liable to interest under section 234 B.

5. On the facts and circumstances of the case and in law, the learned CIT(A) erred in upholding levy of interest under Section 234D of the Income Tax Act, 1961.

Appellant craves leave to add, alter, amend or delete one or more grounds of appeal so as die Honourable Bench to decide this appeal according to law."

6. We find that the ground No.1 raised by the assessee for A.Y.2001-02 is exactly identical to that raised in A.Y.2000-01 and the decision rendered thereon would apply with equal force for this assessment year also except with variance in figures.

7. The ground Nos.2 & 3 raised by the assessee are challenging the action of the lower authorities in holding that the distribution revenues earned by the assessee falls within the meaning of "Royalty" under Article 12 of India USA DTAA and accordingly, such distribution revenues are taxable in India.

7.1. We have heard rival submissions and perused the materials available on record. We find that assessee vide agreement dated 21/02/2001 had granted rights to distribute the channels in India to NGC Network (India) Pvt. Ltd., (NGC India). The assessee does not have any control over the activities undertaken by NGC India upon grant of distribution rights, nor does it undertake any activity in India as regards the distribution rights granted. In this regard, the relevant extracts of the distribution agreement that are pertinent are reproduced hereunder for the sake of convenience:-

"2. <u>RIGHTS GRANTED</u>
2.1 NGC ASIA hereby grants NGC INDIA and NGC INDIA hereby accepts upon the terms and conditions set out in this Agreement, the right to, during the Contractual Period, distribute the channel (s) through any means to Intermediaries, in the Territory except where the channel (s) may be transmitted on a Ku-band frequency.
2.2 ……..
2.3 NGC INDIA shall not and shall ensure that the Intermediaries do not:
(a) in the transmission of the channel (s), effect or permit and any delay or modification thereof and/ or deletion therefrom. NGC INDIA shall also ensure that the Channel(s) are transmitted in their entirety;
(b) use, modify or replace any copyright, trade marks, trade names, logos, names and/ or likeness, or any part of them, included in any of the channel (s) or any of the contents thereof, or which NGC INDIA uses for marketing purposes, provided that this restriction on use shall not apply to NGC INDIA in so far as NGC INDIA uses the same for marketing purposes in accordance with and subject to Clause 6;
(c) cut, edit, club voice-over, subtitle or otherwise in any manner change or alter any of the channel (s) or any of the content thereof, including but not limited to programmes, advertisements, interstitials and promotions, except as may be required by any applicable law. Provided that in the event there is such a requirement under the applicable law, NGC INDIA shall forthwith inform NGC ASIA of all details regarding such mandate changes or alterations;

(d) copy any of the programmes included on the channel (s) for the purpose of retransmitting them later, or for any other reason, except as may be required by any applicable law; Page 12 of 23

(e) do any act which might tend to indicate that (i) any television programme(s) advertisement, interstitial or promotions from a television services other than the channel (s) forms part of or is associated with the channel (s), or (ii) any

programme, advertisement or interstitial which is included in the channel (s) does not form part of the channel (s).

(f) use any person, object or event appearing in any Channel(s) in a defamatory manner or in such a manner as to constitute an endorsement of any person, entity, product or service; and
(g) allow or procure any other person or entity to do any of the acts listed in paragraphs (a) to (f) above.

7.2. In consideration of the transfer, lump sum payment of USD 1,00,000/- was made by NGC India to the assessee. We find that the assessee had granted to NGC India for a lump sum consideration, the distribution right to distribute the channel broadcasted by the assessee. NGC India inturn is allowed to independently enter into a contract with the media intermediaries / subscribers (i.e. cable operators) for distribution of channel in India. The fact that there are no copyrights in the channel or content that is transferred is clearly spelt out by para 2.3(b) of the agreement which provides that NGC India shall not and shall ensure that the intermediates do not modify or replace any copyrights trademarks, trade names, logos, names or likewise or any contents. Further it provides that NGC India or Intermediaries cannot modify or alter or delete anything in the content of the channel and that it has to ensure that the channel is transmitted in its entirety. In fact, it is an obligation for NGC India to distribute the channel on an 'as is' basis, without making any amendment to channel. Further, it provides that NGC India or intermediaries cannot cut, edit, dub, voice-over, subtitle or otherwise change or alter any of the channel(s) or any of the content thereof, as required by any applicable law, without informing the assessee of all the details regarding the mandated changes or alterations. It also provides explicitly that NGC India or intermediaries cannot copy any of the programmes included on the channel for the purpose of re-transmitting them later or for any other reason. Therefore, it is clear that

no copyrights are granted nor any rights to copy any programme not only to NGC India but also to any further intermediaries.

7.3. We find that the assessee had granted NGC India the limited right to use the trade name, trademarks, service marks and logos ('the Channel marks') solely to enable it to market and distribute the channel in accordance with the distribution agreement. NGC India does not have the rights to exploit these service marks, in any manner.

7.4. We find that the ld. AO had held in his assessment order that the consideration received by the assessee from NGC India for grant of distribution rights of the channels is in the nature of "Royalty" under the provisions of the Act and accordingly, the receipts are liable to tax in the hands of the assessee which was upheld by the ld. CIT(A).

7.5. In this regard, the provisions of Explanation 2 to Section 9(1)(vi) of the Act would be relevant and the same is reproduced hereunder:-

> *For the purpose of this clause, 'Royalty means consideration (including any lump sum consideration but excluding any consideration which would be the income of the recipient chargeable under the head "Capital gains") for-*
>
> *(i) the transfer of all or any rights (including the granting of a license) in respect of a patent, invention, model, design, secret formula or process or trade mark or similar property;*
>
> *(ii) the imparting of any information concerning the working of, or the use of, a patent, invention, model, design, secret formula or process or trade mark or similar property;*
>
> *(iii) the use of any patent, invention, model, design, secret formula or process or trade mark or similar property;*
>
> *(iv) the imparting of any information concerning technical, industrial, commercial or scientific knowledge, experience or skill;*

(iva) the use or right to use any industrial, commercial or scientific equipment but not including the amounts referred to in section 44BB;

(v) the transfer of all or any rights (including the granting of a licence) in respect of any copyright, literary, artistic or scientific work including films or video tapes for use in connection with television or tapes for use in connection with radio broadcasting, but not including consideration for the sale, distribution or exhibition of cinematographic films; or

(vi) the rendering of any services in connection with the activities referred to in sub-clauses (i) to (iv), (iva) and (v).

7.6. The ld. AR submitted that the payments received by NGC India are not towards the transfer of any rights in respect of the copy right in respect of literary, artistic or scientific work. The term 'copyright' is not defined under the Act. Accordingly, the definition of copyright provided under the Copyright Act, 1957 needs to be considered. The ld. AR submitted that Section 14 of the Copyright Act clearly defines copyright as under:-

"copyright means the exclusive right to do or authorise the doing of the following acts in respect of a work or any substantial part thereof, namely:
(a) in the case of a literary, dramatic or musical work, not being a computer programme,
(i) to reproduce the work in any material form including the storing of it in any medium by electronic means;
(ii) to issue copies of the work to the public not being copies already in circulation;
(iii) to perform the work in public, or communicate it to the public;
(iv) to make any cinematograph film or sound recording in respect of the work;
(v) to make any translation of the work;
(vi) to make an adaptation of the work;
(vii) to do, in relation to a translation or an adaptation of the work, any of the acts specified in relation to the work in sub-clauses (1) to (vi);

(b) in the case of a computer programme,
(i) to do any of the acts specified in clause (a);
(ii) to sell or give on hire, or offer for sale or hire any copy of the computer programme, regardless of whether such copy has been sold or given on hire on earlier occasions;

Provided that such commercial rental does not apply in respect of computer programmes where the programme itself is not the essential object of the rental ;

(c) in the case of an artistic work,

(i) to reproduce the work in any material form including depiction in three dimensions of a two dimensional work or in two dimensions of a three dimensional work;
(ii) to communicate the work to the public;
(iii) to issue copies of the work to the public not being copies already in circulation;
(iv) to include the work in any cinematograph film;
(v) to make any adaptation of the work;
(vi) to do in relation to an adaptation of the work any of the acts specified in relation to the work in sub-clauses (i) to (iv);

(d) in the case of a cinematograph film,

(i) to make a copy of the film, including a photograph of any image forming part thereof;
(ii) to sell or give on hire, or offer for sale or hire, any copy of the film, regardless of whether such copy has been sold or given on hire on earlier occasions;
(iii) to communicate the film to the public;

(e) in the case of a sound recording,

(i) to make any other sound recording embodying it;
(ii) to sell or give on hire, or offer for sale or hire, any copy of the sound recording regardless of whether such copy has been sold or given on hire on earlier occasions
(iii) to communicate the sound recording to the public."

7.7. The ld. AR argued that from the aforesaid definition, right granted to NGC India, in respect of which it makes payments to the assessee cannot be classified under any of the above. It is merely a right to distribute the channel and it does not grant NGC India any right in respect of any work, telecasting of the channel. The ld. AR also argued that there is no doubt that NGC India does obtain distribution right from the assessee, but such a right is not in the nature of a copyright. In fact, Section 37 of the Copyright Act separately deals with 'Broadcast Reproduction Right' of a broadcasting organization. Section 37 of the Copyright Act provides as under:

'any person who without the license of the owner of the right does any of the following acts of the broadcaster, namely:

- *re-broadcasts the broadcast; or*

- *causes the broadcast to be heard or seen by the public on payment of any charges; or*
- *makes any sound recording or visual recording of the broadcast; or*
- *makes any reproduction of such sound recording or visual recording where suchinitial recording was done without license or where it was licensed, for any purpose not envisaged by such license; or*

** sells or hires to the public, or offers for such sale or hire any such sound recording or visual recording referred to in clause (c) or clause (d),*

shall, subject to the provisions of Section 39, be deemed to have infringed broadcast reproduction right.'

7.8. Section 2(dd) of the Copyright Act defines 'Broadcast' to mean - 'communication to the public by means of wireless diffusion, whether in any one or more signals, sounds or visual images or by wire and includes re-broadcast'.

7.9. Section 39A of the Copyright Act provides that only certain specific sections of the Copyright Act such as Section 18, 19, 30, 53, 58, 64, 65 and 66 will apply to the Broadcast Re-production Rights and not other provisions that apply to copyright. Hence, based on the combined reading of Section 37 and 39A with Section 2(dd) of the copy right Act, it could be safely concluded that the consideration paid by NGC India for Broad Cast reproduction rights causing the Broad Cast to be heard or seen by the subscribers on payment of any charges / fees from the subscribers. However, such a right is not copyright as defined under the law and hence, not covered by the definition of 'Royalty' under the Income Tax Act.

7.10. We also find that the ld. AR further submitted that the Copyrights Act provides for different rights against infringement in the case of

copyrights and broadcasting rights under Section 51 and Section 37(3) of the Copyrights Act.

7.11. We find that the ld. DR vehemently relied on the technical explanation of the convention and protocol between the USA and India, to argue that the definition of royalty includes television Broad Casting in India. The relevant extract of the technical explanation as relied upon by the learned DR is reproduced below:-

> *"The royalty definition in subparagraph (a) of paragraph 3 of the Convention differs from the comparable provision in the US Model in two respects. First, the Convention's royalty definition includes payments received in connection with the use or right to use cinematographic films or films or tapes used for radio or television broadcasting. Such payments are excluded from the royalty definition in the US Model. Second, the Convention's royalty definition does not include "other like right or property" at the end of its listing of the types of rights for which a use payment is considered to be a royalty." (emphasis applied)*

7.12. Per contra, the ld. AR submitted that the reliance on technical explanation in the context of use or right to use of cinematographic films or films or tapes used for radio or television broadcasting, is erroneous. The provision is applicable only in case of channel owner who acquires rights for any cinematographic films or tapes that used for the radio or broadcasting. However, in the present case, the assessee has granted distribution rights of 'Channel' to NGC India and not the rights of any 'cinematographic films' or 'tapes'. As mentioned earlier, NGC India cannot copy any of the programmes included on the channel for the purpose of re-transmitting it later or it cannot modify or delete or cut or edit or otherwise, anything in the course of the distribution to the cable operators. In fact, it has to ensure that the channel is transmitted in its entirety.

7.13. We find lot of force in the rebuttal offered by the ld. AR as admittedly NGC India is not entitled as per the agreement to copy any of the programmes included in the channel for the purpose of re-transmitting the same at a later point of time by making any alterations thereon. Thus, we hold that the reliance placed by the ld. DR on the above technical explanation is misplaced and is hereby rejected. Moreover, we also find that the above technical explanation was issued by the tax authorities of United States of America and the same is not the official protocol or clarification which has been mutually agreed upon between the two countries. Hence, in any case, the said technical explanation would not bind this Tribunal.

7.14. We find that the ld. DR placed reliance on the decision of the Hon'ble Supreme Court in the case of Pilcom vs. CIT reported in 116 taxmann.com 394 dated 29/04/2020. The said Hon'ble Supreme Court decision referred to the decision of yet another Hon'ble Supreme Court decision in the case of Performing Rights Society ltd., vs CIT reported in 106 ITR 11. The ld. DR argued that since the broadcast of the channel is conducted in India, the receipts generated therefrom are taxable in India. We find that the decision relied upon by the Hon'ble Apex Court in the case of Pilcom vs. CIT referred to supra was rendered in the context of applicability of provisions relating to deduction of tax at source (TDS) on a particular transaction and not on the taxability of income of non-resident in India. Hence, reliance placed on the said decision by the ld. DR is completely misplaced herein. We also find that the decision of the Hon'ble Apex Court in the case of Performing Rights Society ltd., referred to supra is actually in favour of the assessee as in the said case, the broadcast of the music was conducted by All India Radio from its stations

in India, and hence, the source of income was held to be in India. However, in the present case of the assessee before us herein, we find that the telecast of the channel happens from outside India. All the other core activities such as procurement/aggregation of the content, editing, uplinking, etc. are conducted by the assessee from outside India. Hence, the source of income for the assessee, even based on the principle laid down in Performing Arts Society cannot be considered to be in India. Further, it is also a settled position that merely because the footprint of the satellite is in India and/or advertisers are in India, the source of income cannot be considered to be in India. Reliance in this regard is placed on the decision of the Hon'ble Delhi High Court in the case of Asia Satellite Tele Communications Ltd., vs. DIT reported in 332 ITR 340 (Del). Moreover, we find that the decision in the case of Performing Rights Society ltd., was relating to the existence of "business connection" of the non-resident in India, whereas in the present case, the issue before us is whether the distribution rights could be taxed as "Royalty" or not. The issue in dispute is not related to the aspect of examining the existence of business connection or source of income of the assessee in India.

7.15. We find that the ld. AR had placed reliance on the decision of the Hon'ble Jurisdictional High Court in the case of MSM Satellite (Singapore) Pte Ltd., in ITA No.103/2017 with ITA No. 207/2017 dated 23/04/2019 wherein it has been held that the distribution rights granted by the Assessee to SET India Private Limited (an Indian group company) are not in the nature of 'Royalty' under the Act and the India- Singapore Tax Treaty (similar to the India- USA Tax Treaty). It is submitted that the facts of this case are similar to that of the assessee, wherein, the assessee has also granted distribution rights to the Indian company (NGC India). The Court held, the payments were not copyrights but were

broadcast reproduction rights that cannot be royalty under the Act or treaty. The relevant operative portion of the said decision of the Hon'ble Jurisdictional High Court is reproduced hereunder:-

> *"10. In our opinion, the Tribunal has not committed any error. As noted, the Assessee would receive a part of subscription charges paid by a large number of customers through different agencies. The said subscription charges would enable the customers to view channels operated by such Assessee. The Assessee was thus not parting with any of the copyrights for which payment can be considered as royalty payment. Term "copyright" has been defined in Section 14 of the copy right Act, 1957. A glance at the said provision would show that the copyright means exclusive right, subject to the provisions of this Act, to do or authorise the doing of any of the following acts specified in the said provision in respect of a work or any substantial part thereof. Term "work" is defined under Section 2(y) of the Copyright Act, 1957, as to mean any of the works namely a literary, dramatic, musical or artistic work or a cinematograph film and a sound recording. Subsection (1) of Section 14 of the Copyright Act, 1957 lists several Acts in respect of a work in relation to which exclusive right would be termed as copyright. In the present case, the Assessee had not created any literary, dramatic, musical or artistic work or cinematograph film and/or a sound recording.*
>
> *11. Infact, Section 37 of Copyright Act, 1957 separately defines broadcast reproduction right. Subsection (1) of Section 37 of the said Act provides that every broadcasting organisation shall have special rights to be known as "broadcast reproduction right" in respect of its broadcasts. Subsection (2) of Section 37 provides that the broadcast reproduction right shall subsist until twentyfive years from the beginning of the calender year next following the year in which the broadcast is made.*
> *12…..*
> *13. In our opinion, these provisions would in no manner change the position. Only if the payment in the present case by way of a royalty as explained in explanation (2) below subsection (1) of Section 9 of the Act, the question of applicability of clause (vi) of subsection (1) of Section 9 would arise. Learned counsel for the revenue placed considerable tress on clause (v) of explanation (2) by virtue of which the transfer of the rights in respect of copyright of a literary, artistic or scientific wok including cinematograph film or films or tape used for radio or television broadcasting etc. would come within the fold of royalty for the purpose of Section 9(1) of the Act. We do not see how the payment in the present case could be covered within the said expressions. As noted, this is not a case where payment of any copyright in literary, artistic or scientific work was being made." (emphasis applied)*

7.16. We find that the ld. DR also argued that the facts in the case of MSM Satellite (Singapore) Pte Ltd., referred to supra relied upon by the

assessee are different from that of the facts of the assessee as in the case before us, the non-resident company received distribution revenue from various cable operators. We find the facts of the case of the assessee before us and the facts of the case before the Hon'ble Bombay High Court are identical as distribution receipts in the said case are collected by the Indian subsidiary Set India Private Limited through layers of cable operators which fact is mentioned in para 8 of the said decision and Set India Pvt. Ltd., paid distribution fees to MSM Satellite (Singapore) Pte Ltd.,, which is similar to the present case before us, wherein such distribution receipts are collected by Indian subsidiary NGC India through various cable operators. NGC India makes onward payments for assessee for grant of distribution rights by the assessee.

7.17. We also find that the Co-ordinate Bench of this Tribunal in the case of Sony Pictures Network India Pvt. Ltd. vs. DCIT in ITA No. 971/M/2016 had also held that distribution fees for the channel cannot be termed as "Royalty". The relevant observations of the said decision is reproduced hereunder:-

> *"22. We have considered the rival submissions of the parties and have gone through the orders of the lower authorities. The first issue for our consideration is whether the 'distribution fee' is in the nature of 'Royalty' or not. Before us the ld. AR for the Assessee vehemently submitted that the TPO wrongly characterized the channel distribution fee as Royalty. It was further explained that the Assessee acts as a intermediary between the broadcaster and the ultimate customers who uses the channels. Thus, distribution fee paid by the Assessee cannot be termed as Royalty. This fact in not controverted by ld. DR for the revenue nor any contrary facts were brought on record by the lower authorities. The ld. DRP in Assessee's MSM Satellite (Singapore) Pte Ltd in its order dated 19.12.2014 for AY 2010-11 by following the order of Tribunal for AY 2005-06 & 2006-07 dated 28.08.2015 held that distribution revenue is not Royalty income. The Hon'ble Bombay High Court in CIT Vs SET India Pvt Ltd (ITA No. 1347 of 2013) held that the distribution fee paid is not in the nature of royalty. Similar view was affirmed by Hon'ble Bombay High Court in CIT Vs MSM Satellite (Singapore) Pte Ltd (ITA No. 103 of 2017). Considering the decision of the Hon'ble Jurisdictional High*

Court and respectfully following the same, we are of the view that the payment of distribution fee cannot be termed as 'Royalty'. Since, we have held that distribution fee cannot be termed as 'Royalty' thus; discussion on the royalty agreement selected for comparability has become academic.

7.18. We further find that the Co-ordinate Bench of this Tribunal in the case of DDIT (IT) vs. SET India Pvt. Ltd., in ITA No.4372/Mum/2004 had held that the payment towards the right to distribution of channels is not in the nature of copy right. The relevant extract of the said decision is reproduced hereunder:-

"6. Having heard both the sides, we observed that ld CIT(A) while examining the issue has stated the Non-resident company has granted non-exclusive distribution rights of the channels to the Assessee and has not given any right to use or exploit any copyright. The Assessee is no way concerned whether the programs broadcasted by the Non-resident company are copyrighted or not. The said distribution is purely a commercial right, which is distinct from the right to use copyright. We observed that ld CIT(A) has considered the provisions of Section 14 and Section 37 of the Copyright Act, 1957. It is observed that Section 37 of the Copyright Act deals with Broadcast Reproduction Rights (BRR) and same is covered under Section 37 of the Copyright Act and not under Section 14 thereof. We observe that ld CIT(A) has also considered Clause 6.3 of the distribution agreement entered into between assessee company and Non-resident company, which states that the right granted to the Assessee under the agreement is not and shall not be constructed to be a grant of any license or transfer of any right in any copyright. Ld CIT(A) has started that the Assessee submitted to it by a broadcaster without any editing, delays, interruptions, deletions, or additions and, therefore the payment made by the Assessee to the Non-resident company is not for use of any copyright and consequently cannot be characterized as Royalty. Ld CIT(A) has held that Broadcasting Reproduction Right is not covered under the definition of Royalty under section 9(1)(vi) of the Income tax Act as well as Article 12 of the Treaty. Accordingly, the payment is not in the nature of Royalty but in the nature of business income…

7.19. Further the Hon'ble Bombay High Court in the case of Set Satellite (Singapore) PTE Limited vs. DDIT reported in 307 ITR 205 had noted that the distribution rights are in the nature of commercial rights and hence they are distinct and different from copy right. The relevant extract of the said decision of the Hon'ble High Court is reproduced hereunder:-

"The distribution rights it was held were a commercial right which was distinct and different from a copyright and consequently there was no question of payment of royalty as has been held by the Assessing Officer and the income belonged to SET India which could not be subject to tax in the hands of the Appellant."

7.20. We find the term "Royalty" is defined under para 3 of India-USA DTAA as under:-

(a) payments of any kind received as a consideration for the use of, or the right to use, any copyright or 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.

7.21. From the aforesaid definition of royalty as per India-USA DTAA, in para 3(a), payment received by an enterprise can be construed as royalty only if, they are for the use or right to use of any copy right of a literary, artistic or scientific work. We had already held that no right in respect of any copy right is given to NGC India and infact this is specifically set out in Clause 2.3 (a),(b),(c),(d),(e) and (g) of the agreement. We also find that the term 'copy right' is not defined in the treaty. That is why we had to resort to the definition of copy right given under the Copy Right Act, 1957.

7.22. We also find the alternative argument advanced by the ld. AR to be fair and reasonable that even if it is contended that the channel has copy right, what NGC India is paying for is a right to use the copy righted article (i.e. if the channel could be considered to be so) by

virtue of being permitted to distribute the channel. Accordingly, since NGC India does not acquire any right in the underlying copy right (i.e. right to modify / reproduce channel / content). Hence any contention that NGC India is making a payment for copy right would be erroneous.

7.23. In view of the aforesaid observations and respectfully following the various judicial precedents relied upon hereinabove that are relevant for adjudication of the issue in dispute before us, we hold that the distribution rights granted by the assessee to NGC India is only a commercial right / Broad Cast reproduction right and not copyright and consequently consideration received by the assessee for the same cannot be treated as royalty or fees for included services under Article 12 of India-USA DTAA. Accordingly, the ground Nos. 2 & 3 raised by the assessee for A.Y.2001-02 are allowed.

8. The ground No.4 raised by the assessee is with regard to charging of interest u/s.234B of the Act. We find that assessee is a non-resident whose entire income is subject to deduction of tax at source u/s.195 of the Act. Accordingly, the assessee had pleaded that it is not liable to pay advance tax and consequently not liable to pay any interest u/s.234B of the Act which was not appreciated by the ld. AO and the ld. CIT(A). We find that the issue in dispute is squarely addressed by the decision of the Hon'ble Jurisdictional High Court in the case of DCIT vs. NGC Network Asia LLC reported in 313 ITR 187 (Bom) wherein the Hon'ble Court had held that when the duty is cast on the payer to deduct and pay the tax at source and on payer's failure to do so, interest u/s.234B of the Act cannot be imposed on the payee assessee. Moreover, we also find that the proviso to Section 209(1) of

the Act, which has been heavily relied upon by the ld. DR at the time of hearing was inserted in the statute only w.e.f. A.Y.2013-14 onwards and the same is not applicable for the year under consideration. Accordingly, we hold that no interest u/s.234B of the Act could be charged in the hands of the assessee as the entire income is subject to deduction of tax at source. Accordingly, the ground No.4 raised by the assessee is allowed.

9. The ground No.5 raised by the assessee is with regard to chargeability of interest u/s.234D of the Act, which is consequential in nature and does not require any specific adjudication.

10. In the result, appeal of the assessee for A.Y.2001-02 in ITA No.3834/Mum/2007 is allowed.

ITA No.3835/Mum/2007 (A.Y.2002-03) Assessee Appeal

11. The ground No.1 raised by the assessee for A.Y.2002-03 was challenging the validity of reopening of assessment was stated to be not pressed by the ld. AR at the time of hearing. Accordingly, the ground No.1 is dismissed as not pressed.

12. The ground No.2 raised by the assessee for A.Y.2002-03 is similar to the ground No.1-3 raised by the assessee for A.Y.2000-01 and the decision rendered thereon would apply with equal force for this assessment year also except with variance in figures. In fact, the assessee is in much better position during assessment year 2002-03 in view of the fact the transfer pricing provisions are indeed applicable from A.Y.2002-03 onwards and transfer pricing order u/s.92CA(3) of

the Act was passed by the ld. TPO for A.Y.2002-03 on 29/10/2010 in the hands of the SIPL wherein the ld. TPO had confirmed that the international transaction between SIPL and assessee for commission income is at arm's length price. Hence, once the agent i.e. SIPL has been remunerated at arm's length price by the assessee which is also confirmed and accepted by the ld. TPO, no further profits could be attributed in the hands of the foreign principal. Accordingly, ground No.2 raised by the assessee is allowed.

13. The ground Nos. 3 & 4 raised by the assessee for A.Y. 2002-03 are similar to ground Nos. 2-3 raised by the assessee for A.Y.2001-02 and the decision rendered thereon would apply with equal force for this assessment year also except with variance in figures.

14. In the result, appeal of the assessee for A.Y.2002-03 in ITA No.3835/Mum/2007 is partly allowed.

ITA No.3836/Mum/2007 (A.Y.2003-04) Assessee Appeal

15. The ground No.1 raised by the assessee is exactly identical to ground No.2 raised by the assessee for A.Y.2002-03 and the decision rendered by us thereon would apply with equal force for A.Y.2003-04 also except with variance in figures.

16. Ground Nos.2 & 3 raised by the assessee for A.Y.2003-04 are exactly identical to ground Nos.3 & 4 raised by the assessee for A.Y.2002-03 and the decision rendered thereon would apply with equal force for this assessment year also except with variance in figures.

17. The ground No.4 raised by the assessee is identical to ground No.4 raised by the assessee for A.Y.2001-02 and the decision rendered thereon would apply with equal force for this assessment year also except with variance in figures.

18. The ground No.5 raised by the assessee is identical to ground No.5 raised by the assessee for A.Y.2001-02 and the decision rendered thereon would apply with equal force for this assessment year also except with variance in figures.

19. In the result, appeal of the assessee for A.Y.2003-04 in ITA No.3836/Mum/2007 is allowed.

ITA No.1662/Mum/2008 (A.Y.2004-05) Assessee Appeal

20. The ground No.1 raised by the assessee is exactly identical to ground No.2 raised by the assessee for A.Y.2002-03 and the decision rendered by us thereon would apply with equal force for A.Y.2004-05 also except with variance in figures.

21. Ground Nos.2 & 3 raised by the assessee for A.Y.2004-05 are exactly identical to ground Nos.3 & 4 raised by the assessee for A.Y.2002-03 and the decision rendered thereon would apply with equal force for this assessment year also except with variance in figures.

22. Ground Nos. 4 & 5 raised by the assessee for A.Y.2004-05 are identical to ground No.5 raised for A.Y.2003-04 and the decision rendered thereon would apply with equal force for this assessment year also except with variance in figures.

23. In the result, appeal of the assessee for A.Y.2004-05 is allowed.

TO SUM UP:

ITA No.	A.Y.	Appeal by	Result
8671/Mum/2004	2000-01	Assessee	Allowed
3834/Mum/2007	2001-02	Assessee	Allowed
3835/Mum/2007	2002-03	Assessee	Partly Allowed
3836/Mum/2007	2003-04	Assessee	Allowed
1662/Mum/2008	2004-05	Assessee	Allowed

Order pronounced on 30/12/2020 by way of proper mentioning in the notice board.

Sd/-
(RAM LAL NEGI)
JUDICIAL MEMBER

Sd/-
(M.BALAGANESH)
ACCOUNTANT MEMBER

Mumbai; Dated 30/12/2020
KARUNA, *sr.ps*

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai