IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH "H" DELHI)

BEFORE SHRI A.D. JAIN AND SHRI A.K. GARODIA

ITA No. 1188(Del)06
Assessment year: 2000-01

BBC Worldwide Limited, C/o BSR & Co.Gurgaon. Haryana-122 002.	v.	Dy.Director of Income Tax, Cir. 1(1),Dte.of International Taxation, Drum Shape Bldg., New Delhi.
(Appellant)		(Respondent)

Appellant by: Shri Arvind Sonde, Advocate
Respondent by: S/Shri Ashwani Kumar Mahajan, CIT/DR
& Y.K. Kakkar, Sr. DR

ORDER

PER A.D. JAIN, J.M.

This is assessee's appeal for the assessment year 2000-01 against the ld. CIT(A)'s order dated 27.1.2006 confirming the AO's action in holding that the assessee had a business connection in India u/s 9 of the Income Tax Act and that M/s. BBC Worldwide (India)Pvt.Limited ("BWIPL", for short) was the assessee's permanent establishment in India.

2. The brief facts are that the assessee company was incorporated under the laws of England and Wales. It is a part of the BBC Group. During the year under consideration, it was operating as an international consumer

media company in the areas of television, publishing and program licensing etc. It also operated the BBC World News Channel ('the Channel', for short), which is a standard international Channel aired in the English language, operated by the assessee through a separate division, i.e., BBC World Division. The assessee had an indirect subsidiary in India, namely, BWIPL. The assessee appointed BWIPL as its authorized agent in India under an airtime sales agreement dated 15.9.2000, effective from 13.11.1998, for dollar denominated deals, to solicit orders for the sale of advertising airtime on the Channel at the rates and on the terms and conditions provided by the assessee and to pass on such orders to the assessee for acceptance and confirmation. The payment from the Indian advertisers for airtime sales and sponsorship was to be received directly by the assessee under this agreement, through EEFC account or specific RBI permission. In consideration for the services provided by BWIPL, it was to receive a 15% marketing commission of the advertisement revenues received by the assessee from Indian advertisers. A second airtime sales agreement dated 1.2.1999 was entered into between the assessee and BWIPL for rupee denominated deals for soliciting orders for Channel airtime sales, as under the first agreement (supra). The second agreement was executed so as to enable BWIPL to collect payments from Indian advertisers on sales

of airtime on behalf of the assessee and remit the same to the assessee, after deducting its commission at rate of 15%. While filing its return of income for the year under consideration, it declared an income of rupees nil, the assessee claimed that it would not be taxable in India on its airtime sales income, being business profits, in the absence of a permanent establishment in India. Later, the return of income was revised so as to disclose an income of Rs. 81,86,735/-, i.e., royalty income which had inadvertently not been shown in the original return. Other than the said royalty income, the assessee stated , it did not have any income chargeable to tax in India.

3. The AO observed that according to its own submissions, during the year, the primary activity of the assessee in India was that of sale of airtime for the Channel; that thus, it was clear that the assessee company was carrying out the activity of airtime sale in India; that the assessee had a clear and definite business connection in India inasmuch as there was a real and intimate relation between the business activities carried on outside India and the activity of soliciting, sourcing and collecting advertisement revenues from India; that the advertisement revenue received in India in respect of BBC World Channel was a business receipt in the hands of the assessee ; that BWIPL was acting as an agent of the assessee company and was rendering all services on behalf of the assessee company; that BWIPL , i.e.,

the Indian company prepared the rate-cards, collected the advertisements and advertisement revenue for onward remittance to the UK after deducting its commission; and that all these functions were undertaken by BWIPL in India on behalf of the assessee company and the advertisement revenues collected from India were remitted to the assessee company. The AO, therefore, held that the income of the assessee company from the advertisement revenues accrued or arose in India u/s 9(1) of the I.T. Act. It was held that BWIPL constituted a business connection of the assessee as well as a permanent establishment under Article 5(4)(a) and Article 5(4)(c) of the DTAA between India and the UK. The profits of the assessee were estimated at an ad-hoc rate of 20% of the total advertisement revenue attributed to India.

4. Before the ld. CIT(A) , the assessee contended that the obligation of BWIPL towards the assessee , in pursuance of the agreement entered into between them, was to solicit orders for the sale of advertisement airtime/sponsorship on the BBC World Channel at the rates and on the terms and conditions as provided by the assessee, to pass on such orders to the assessee for acceptance and under the rupee agreement to collect advertisements/sponsorship revenues from the advertisers/advertising agencies and to remit the net proceeds to the assessee after deducting its

agreed commission; that under the agreement, the assessee reserved the right to reject any order passed on to it for acceptance by BWIPL, which was not authorized to create obligation of any kind, whether express or implied, in the name of or on behalf of the assessee; that in consideration, BWIPL was paid commission @ 15% on the airtime sales/sponsorship revenues generated by the assessee from India; that BWIPL was in fact merely canvassing for the orders for sale of airtime payment on the Channel for its principal; that the activities of BWIPL were of soliciting orders resulting in the Indian advertisers making offers for availing airtime; that however, the right to accept or reject the order lay solely with the assessee; that therefore, no business connection was constituted for the assessee in India; that since the assessee did not have any place for business in India, whether fixed or temporary, the conditions of Article 5(1) of the Treaty were not satisfied and there was no existence of any permanent establishment of the assessee in India; that Article 5(4)(a) of the Treaty was attracted when the agent had or was habitually exercising authority to negotiate and enter into contracts on behalf of the principal; that the agreement for sale of airtime provided that BWIPL shall not represent the assessee in any manner whatsoever whereby BWIPL would be conferred any authority to bind the assessee; that it was clear as per the agreement that any act of BWIPL which was beyond its

terms and conditions, would not be binding on the assessee; that as per the terms of the agreement, BWIPL had no authority to enter into contracts on behalf of the assessee; that BWIPL did not exercise such authority habitually or otherwise, since it was engaged in soliciting orders for sale of airtime on the BBC World Channel and was not engaged in entering into/signing of contracts on behalf of the assessee or in negotiating the contracts; that therefore, no permanent establishment was constituted for the assessee in India; that the contract for sale of airtime was entered into by the assessee with advertisers, invoices were raised by the assessee on the advertisers, the transmission report was issued by the assessee and the story-board approval was granted by the assessee, which all were apparent from the documentary material provided by BWIPL to the AO in response to the summons issued u/s 131(1) of the Act; that it was the assessee who had the right to approve or disapprove the advertisement to be aired or to amend the rate-card or regulate the transmission; that as such, Article 5(4)(a) of the Treaty was not attracted to the assessee's case; that Article 5(4)(c) of the Treaty was attracted when the agent habitually secured orders in India, wholly or almost wholly in principle; that in the assessee's case, the orders solicited by BWIPL were subject to rejection by the assessee; that therefore there was no assurance or guarantee to the prospective advertisers that BWIPL had

solicited from them; that the advertisement would be at the rates and on the terms and conditions as were accepted by the assessee; that as such, there arose no question of BWIPL obtaining any secured orders for the assessee; that there was no representation of any kind by BWIPL to the advertisers to the effect that it had the authority to accept the orders; that this being so, Article 5(4)(c) of the Treaty was also not attracted; that merely due to there being business transactions/dealings between the holding and the subsidiary company would not make a business connection or permanent establishment between the Indian company, i.e., BWIPL and the assessee; and that hence, there was no business connection in India u/s 9(1) of the Income Tax Act and the assessee did not have any permanent establishment in India under Article 5 of the Treaty.

5. The learned CIT(A), however, did not agree with the argument of the assessee and vide the impugned order, it was held that the assessee had a business connection/permanent establishment in India. Further, the learned CIT(A) estimated the profits of the assessee @ 10% of the total advertisement revenue allocable to India, placing reliance on CBDT Circular No. 742 dated 2.5.96.

6. Challenging the order under appeal, the learned counsel for the assessee has canvassed that without prejudice to the contention that the

assessee has no business connection or permanent establishment in India, its Indian agent, i.e. BWIPL is remunerated on an arms length business which extinguishes any further tax liability on the assessee; that BWIPL has been remunerated on the basis of a fair transfer price and as such, nothing further remains to be taxed in India; that the department has itself, after examining the airtime sales agreement (supra), which were effective till November, 2002, accepted that the commission of 15% to BWIPL is a fair transfer price for the airtime sales activity which the taxing authorities have alleged to constitute a permanent establishment of the assessee in India; that the transfer pricing officer, in the transfer pricing order of BWIPL for assessment year 2002-03 (copy placed on record), accepted that the transaction was at arms length price; that the commission paid by the assessee to BWIPL constituted a fair transfer price, which gets supported by the decision of the Hon'ble Bombay High Court in "SET Satellite (Singapore) Pvt. Ltd. v. DDIT", 307 ITR 205 (Bom) for the assessment year 1999-00, i.e., the period before the enactment of the transfer pricing provisions in the I.T. Act; that therein, the CIT(A) had observed that SET Satellite (Singapore) Pvt.Ltd. (supra), the foreign company, had paid service fees @ 15% of the gross advertisement revenue to its agent, SET India; that the Hon'ble High court held this amount of commission to represent the

price computed on the arms length principle; that in "Galileo International Incorporation", 114 TTJ 289(Del), the Indian company made bookings on a computerized reservation system of the foreign assessee, which generated income for the foreign company; that it was held that the Indian company was a dependent agent permanent establishment of the foreign company; that the Tribunal held that only 15% of the revenue generated from the bookings made out of India was taxable in India and the same proportion had to be accepted while computing profit attributable to the permanent establishment; that the findings of the Tribunal were confirmed by the Hon'ble High Court in "DIT v. Galileo International Incorporation" (supra); that in CBDT circular No. 742 dated 2.5.96 (supra), it has been recognized that the advertising agent of the foreign telecasting companies in India usually retains service charges at rate of 15% or so of the gross amount; that this circular has been taken note of in "DIT v. Morgan Stanley and Company Inc." 292 ITR 416(SC), wherein the foreign company was held to have a permanent establishment in India on account of certain employees deputed to the Indian affiliate company; that the Hon'ble Supreme Court was considering the question as to whether the AAR was right in ruling that once the transfer pricing analysis had been undertaken there was no further need to attribute profits to a permanent establishment; that it was held that

where the transactions are held to be at arms length, the ruling is correct in principle provided that an associated enterprise (that also constitutes a P.E.) is remunerated on arms length basis taking into account all the risk-taking functions of the multinational enterprise and that in such a case, nothing further would be left to attribute to the P.E.; that even though the transfer pricing guide lines were not applicable to the assessee's case for the year under consideration, the ratio laid down in "Morgan Stanley" (supra) is fully applicable; that the Hon'ble Bombay High Court in the case of "SET Satellite" (supra) for the assessment year 1999-2000, was examining the issue of computing the "profit of the fictional permanent establishment"; that undisputedly, in that case, the assessee had a dependent agent in India in the form of SET India (P) Ltd. for canvassing advertisements in India; that taking note of "Morgan Stanley" (supra), it was held that if the correct arm's length price was applied and paid then nothing further would be left to be taxed in the hands of the foreign enterprise; that the facts in "SET Satellite" being similar to the facts in the case of the assessee and both cases pertaining to a period prior to the transfer pricing regime, said "SET Satellite" is squarely applicable; that without prejudice to these contentions, BBC World Division, which was running and operating the Channel business, is incurring losses; that in case a permanent establishment of the

assessee is found to exist in India, even then, no ad-hoc rate on turn over can be arbitrarily applied to determine profit/losses; that the ld. CIT(A) while passing the impugned order, wrongly placed reliance on CBDT Circular No 742 (supra); that CBDT Circular No. 742 was extended by Circular No. 765 dated 15.4.1998 and was operational for the year under consideration; that from this later Circular, it comes out that for it to be applicable, it has to be established that the assessee is a non-resident foreign telecasting company and it does not have a branch office or permanent establishment, or does not maintain country-wise accounts of its operations; that where any of the above conditions is not satisfied, the Circular does not apply; that as such, the Circular will not apply where the assessee has either a branch or a permanent establishment in India or it did not maintain country-wise accounts; that during the assessment proceedings, the assessee had submitted that its India accounts are unaudited and before the CIT(A) an audited copy of the Indian accounts of the assessee were submitted ; that before the AO, the assessee had filed its India accounts, allocating total revenue and expenses to India activity; that before the CIT(A), the assessee filed audited accounts containing allocation of revenue and expenses of India activities; that the CIT(A) remanded these accounts of the AO, the assessee having prepared its country accounts for the operations carried on by it; that CBDT

Circular No. 742 (supra) cannot have any applicability in the assessee's case; that even otherwise, CBDT Circulars are not binding on the assessee, for which reason too, CBDT Circular No. 742 (supra) cannot be invoked for attributing profit/loss to the alleged permanent establishment in India over and above the fair value of profit attributed to the service rendered by BWIPL; and that as such, in no manner has any further tax liability for the assessee has accrued in the income for the year under consideration.

7. The learned DR, on the other hand, besides heavily relying on the impugned order has submitted that in the case of BWIPL, the transfer pricing order is that of a dependent agent; that as per the learned CIT(A), i.e., the observations made in para 3.6 of the impugned order, no India-specific accounts were not maintained by the assessee; that the assessee did have a permanent establishment in India and the averment that BWIPL was only soliciting orders, is only a façade; that BWIPL have only a whole subsidiary of the assessee and the sole advertisement concessionaire for the AIR Channel was dependent on the assessee for earning revenues in India; that as per FIPB approval, BWIPL were virtually carrying out all activities of sales promotion of airtime and sponsorship, identifying new clients, potential distributors, publishers, practices, providing advertising support services to Indian advertisers etc., it constituted a permanent establishment

of the assessee in India; that the employees of BWIPL were soliciting orders and negotiating with the advertisers on a regular basis; that the contracts for advertisement were between the assessee and the advertiser, the employees of BWIPL appended their signatures on behalf of the assessee; that the assessee had submitted different sets of figures of advertisement revenue procured in India through BWIPL and procured from Indian operators at different locations. The learned DR has thus averred that carrying no merit whatsoever, the appeal of the assessee be dismissed.

8. The Department has also filed written submissions. It has been contended that it is wrong to suggest that CBDT Circular No.742 dated 2.5.1996 has been wrongly applied, assessing the profits attributable to PE @ 10% of the gross profit; that the said circular is applicable where there is no branch office in India, where there is no permanent establishment in India or where the assessee is not maintaining country-wise accounts; that these three conditions are mutually exclusive and if any of them exists, the circular becomes applicable; that in the present case, the assessee was not maintaining country-wise accounts; that thus, even if the PE existed in India, the circular was applicable; that this being so, the said circular has been rightly applied by the learned CIT (Appeals) and he computed profits attributable to PE @ 10% of the gross profits; that it has been contended on

behalf of the assessee that the dependent agent had been remunerated @ 15% of gross receipts and that this rate is in line with the aforesaid CBDT circular; that it has been contended that 15% rate of commission has been held to be at arm's length price in the case of "Set Satellite Singapore Pte. Ltd." (supra); that it has also been submitted that since the dependent agent herein has been remunerated on arm's length basis, the assessment of the dependent agency PE gets extinguished; that reliance has been placed on the Transfer Pricing Officer's order in the case of BBC Worldwide (I) Pvt. Ltd., for assessment year 2002-03; that these conditions are not in consonance with the ratio of the decision in the case of "Morgan Stanley" (supra); that the assessment of the dependent agency PE gets extinguished only if both the conditions are satisfied, i.e., the dependent agent has been remunerated on arm's length basis and by FAR (functions performed, assets used and risks assumed) analysis, nothing more can be attributed to PE over and above the remuneration paid to dependent agent; that in the assessee's case, no FAR analysis has been got done by the assessee to prove that nothing more is required to be attributed to the PE; that no such case having been made out by the assessee during the assessment proceedings, no FAR analysis was got done at that stage also; that thus, there is no way to satisfy the conditions laid down in "Morgan Stanley" (supra); that from the TPO's

order in BBC Worldwide (I) Pvt. Ltd. (supra), it is evident that the FAR analysis got done in that case resulted in additional income of Rs.3.60 crores; that this shows that payments made to the dependent agent did not meet the test of transfer pricing analysis; that it is evident that assessee did not furnish any information about status of appeal filed, if any, in the case of BBC Worldwide (I) Pvt. Ltd.; that if such an exercise had been carried out in the present case, the payment made to the dependent agent would have revealed its character as to its arm's length price status; that the assessee has wrongly equated the assessment of the Indian Agent with the assessment of the dependent agency PE; that the Indian agent and the dependent agency PE are two separately assessable entities; that the Indian agent is assessable with reference to incomes received by it from the foreign enterprise and any other income which it might have earned; that this assessment will be in status of resident and as per the domestic tax law; that the foreign enterprise is taxable in India as a dependent agency PE with reference to profits which are attributable to Indian PE; that this assessment would be in the status of non-resident and as per the article 7 of Indo-UK Treaty, whereunder, assessable income is to be on FAR analysis; that pertinently, the commission paid by the foreign enterprise to the Indian agent is income qua the assessment of the Indian agent; that on the other

hand, this is expenditure in the assessment of the dependent agency PE; that this dual assessment status of the Indian agent has been clarified in the decision of the Mumbai Bench of the Tribunal in the case of "Set Satellite Singapore Pte. Ltd." (106 ITD 175 (Mum.); that it is thus obvious that income assessable in the hands of the foreign enterprise as a dependent agency PE is different from the income assessable in the hands of the Indian agent; that in "Morgan Stanley" (supra), it has been observed that if the Indian agent is remunerated on arm's length price basis, there can be a situation that same amount is taxable in the hands of both, the Indian agent and the dependent agency PE and the same amount will be allowable as expenditure in the assessment of the dependent agency PE; that the assessable income in the hands of the dependent agency PE becomes nil; that thus the assessment of the dependent agency PE gets extinguished; that however, in "Morgan Stanley" (supra), it has also been observed that there can be a situation that where after FAR analysis, some additional income needs to be attributable to the PE of the foreign enterprise and in that situation, the assessment of the dependent agency would not get extinguished; that undisputedly, in the present case, the assessee is not maintaining India specific accounts, as rightly observed by the learned CIT (Appeals); that it was also so stated before the Assessing Officer during the

assessment proceedings, as noted by the learned CIT (Appeals) too, that the question arising is as to how to compute profits attributable to the dependent agency PE in India in such a situation; that the assessee has given different sets of figures of receipts and expenditure on different occasions before the Assessing Officer and the CIT (Appeals), as is available from their respective orders; that the assessee wants to claim the expenses relatable to airing over the Indian sub-continent, but does not want to include the corresponding revenue relatable to the same; that evidently, the assessee itself is not sure about the figure of revenue attributable to the Indian operations; that the alleged audited statement furnished by the assessee is not at all relevant or significant in view of the comments made by auditors themselves therein; that it was in these circumstances, that the assessing authorities were left with no option other than to resort to estimation of profits attributable to the PE in India, as per rule 10(i) of the Income Tax Rules, 1962; that as such, the learned CIT (Appeals) has correctly assessed the profits attributable to the foreign enterprise PE in India @ 10% of gross revenue receipts from India; and that in this view of the matter, the assessee's appeal be dismissed.

9. We have heard the parties and have perused the material on record. The facts are not in dispute. The question is as to whether the learned CIT

(Appeals) has correctly assessed the assessee's profits attributable to the foreign enterprises PE in India @ 10% of the gross revenue receipts from India.

10. The assessee's case is that during the year under consideration, the assessee company, a part of the BBC Group, operated as an International Consumer Media Company in the areas of TV, publishing and program licencing , etc. It also operated the BBC World Channel ('the Channel') through a separate division, i.e., the BBC World Division. It had as its subsidiary in India, BWIPL. It appointed BWIPL as its authorized agent in India. This was under an airtime sales agreement dated 15.9.2000, effective from 13.11.1998. This agreement was for dollar denominated deals and was entered into to solicit orders for the sale of advertising airtime on the Channel. The rates and terms and conditions to govern such sale were provided by the assessee. The payment from the Indian advertisers for airtime sales and sponsorship was to be received directly by the assessee. This was to be through EEFC account or on specific RBI permission. For the services provided by BWIPL, it was to receive consideration of 15% marketing commission of the advertisement revenues received by the assessee from Indian advertisers. On 1.2.1999, the assessee and BWIPL executed another airtime sales agreement. This was for rupee denominated

deals concerning soliciting orders for Channel airtime sales, as was the case under the aforementioned earlier agreement. This second agreement was executed so as to enable BWIPL to collect payment from Indian advertisers for sale of airtime on behalf of the assessee and to remit the same to the assessee. BWIPL was to be paid, again, commission @ 15%.

11. In the return of income filed for the year under consideration, the assessee showed income at rupees nil. It was claimed that the assessee would not be taxable in India on its income concerning airtime sales. The basis for such claim was that the airtime income sales was business profits of the assessee, since the assessee did not have a permanent establishment in India. Later on, the return was revised, disclosing an income of Rs.81,86,735/- representing certain royalty income which, as per the assessee remained from being shown in the original return of income. The assessee claimed not to have any other income chargeable to tax in India. In the Notes to the return filed, the assessee contended that no income accrued or arose to the assessee from any business connection in India, either under the Indian Income Tax Act or under the Treaty between India and UK; that even if BWIPL was considered to be a business connection/permanent establishment of the assessee in India, the commission paid to it constituted adequate compensation for its activities in India; that it was subject to tax in

India and no further income of the assessee was liable to tax in India; that even otherwise, the sale of airtime in India having resulted in a net loss to the assessee, even if it were to be held that the assessee had a permanent establishment in India, there could be no taxable income; that the airtime sales activity of the assessee was a part of the activity of the BBC World Division which ran the Channel; that the BBC World Division having incurred losses worldwide during the year, there would be a loss even if any income or loss on a proportionate basis were to be held to be attributable to the assessee's Indian operations; and as such, the assessee would legally be entitled for carry forward of such loss for setting it off against future attributable profit. The assessee placed reliance on CBDT Circular No. 23 of 1969, according to which, if the agent's commission fully represents the value of profit attributable to its service, it should prima facie extinguish the assessment. An allocation statement was filed before the AO. This was regarding revenues and expenses attributable to India footprint. It showed a loss in the event a business connection/permanent establishment was found to exist.

12. By virtue of the assessment order dated 31.3.2003, the AO, rejecting the assessee's contention, held that BWIPL constituted the assessee's business connection as well as a permanent establishment under Articles

5(4)(a) and 5(4)(c) of the Indo-UK Treaty. The profits of the assessee were estimated at a rate of 20% of the total advertisement revenue attributable to India.

13. Before the ld. CIT(A), the assessee, inter alia, filed audited accounts of the revenues and expenses allocable to India footprint. However, vide order dated 27.1.2006, i.e., the impugned order, the ld. CIT(A) confirmed the assessment order. Placing reliance on CBDT Circular No. 742 datead 2.5.1996, the ld. CIT(A) further estimated the assessee's profits at the rate of 10% of the total advertisement revenues allocable to India.

14. Before us, however, the issue of business connection or permanent establishment was not addressed. The learned counsel for the assessee has, rather, stressed and dilated upon the assessee's stand that BWIPL has been remunerated on the basis of a fair transfer price, due to which, nothing further remains to be taxed in India. It has been argued that having examined the two aforementioned airtime sales agreements, the department has itself accepted that commission of 15% paid to BWIPL is a fair Transfer Price. Reference concerning this has been made to the Transfer Pricing Order for assessment year 2002-03 in the case of BWIPL. A copy thereof has been placed on record. In that order, the TPO accepted that the transaction was at arms length price. It was held that the CUP method

selected by BWIPL for determining the arms length price of the commission income earned by it, was acceptable; that this was due to the fact that BWIPL had compared the rate of commission charged by it from BBCW with that charged by an uncontrolled party for similar services; that even otherwise, it was found that the rate of commission in the assessee's trade was fairly uniform and almost everyone was charging the same rate of commission in the sale of airtime on TV Channels and FM Channels; and that it was therefore, that the arm's length price determined by BWIPL was not being disturbed. The learned counsel for the assessee has also sought to place reliance on the decision of the Hon'ble Bombay High Court in the case of "SET Satellite (Singapore)Pvt. Ltd. v. DDIT", 307 ITR 205(Bom). In that case, commission of 15% of gross advertisement revenue paid by SET Singapore, the foreign company, to its agent, SET India, which agent was held to constitute SET Singapore's dependent agent permanent establishment, was held to represent price computed at arms length. The Hon'ble High Court held, inter alia, that it was clear from reading Article 7(1) of the Treaty, that the profits of an enterprise of the Contracting State shall be taxable only in that State, unless the enterprise carries on business in the other Contracting State through a permanent establishment constituted therein; that the profits of the enterprise may be taxed in the other State, but

only so much of them, as are directly or indirectly attributable to that permanent establishment; that the expression used while determining the profits attributable to the permanent establishment, in Article 7(2) of the Treaty, is "estimated on a reasonable basis"; that the Treaty did not refer to arm's length payment; that it was Section 92 of the I.T. Act which contained the principles concerning income from international transactions on an arms length price; that these principles had been clarified by the Finance Act, 2001 and the Finance Act, 2002; that it was clear from the CIT(A)'s order, that SET Singapore had made payment to its permanent establishment on the arm's length principle; that a finding of fact had been recorded to the effect that SET Singapore had paid service fees @ 15% of the gross advertisement revenue to its agent SET India, for procuring advertisements during the year from April, 1998 to October, 1998; that CBDT Circular No. 742 recognized that the Indian agents of foreign telecasting companies generally retain 15% of the advertisement revenues of the service charges; that therefore, the said Circular also supported the stand that the payment of 15% service fee was payment at arms length; that the said amount of 15% had been reduced to 12.5% of the net advertisement revenue by virtue of a revised agreement entered into between the parties; and that simultaneously SET Singapore had also, vide an agreement,

entitled SET India to enter into agreements to collect and retain all subscription revenue.

15. "Galileo International Incorporation", 114 TTJ 289 of the Delhi Bench of the Tribunal has also been relied on behalf of the assessee. Therein, the Indian company made booking on a computerized reservation system for the foreign assessee. This generated income for the foreign company. It was held that the Indian company was a dependent agent permanent establishment of the foreign company. Concerning attribution of profits for the permanent establishment, it was observed that only 15% of the revenue generated from the bookings made within India was taxable in India and it was this proportion which was to be adopted for computing profit attributable to the permanent establishment. The Hon'ble Delhi High Court confirmed the findings recorded by the Tribunal in "DIT v. Galileo International Incorporation" 224 CTR 251(Del), which has further been relied on.

16. Reliance has also been placed on CBDT Circular No. 742 (supra), which was relied on by the Hon'ble Bombay High Court in the case of "SET Satellite"(supra). Further, it has been contended that the commission paid by the assessee to BWIPL @ 15% being the value of profit attributable to the services rendered by BWIPL, further income from advertisement

revenues ought not to be taxed in India. CBDT Circular No. 23 of 1969 has been relied on in this regard. As per this circular, where a non resident's sales to Indian customers are secured through the services of an agent in India, the assessment in India of the income arising out of the transaction will be limited to the amount of profit which is attributable to the agent's services, provided that non-resident's business activities in India are wholly channeled through its agent, the contracts to sell are made outside India and sales are made on a principle-to-principle basis. As per this circular, in the assessment of the amount of profits, allowance will be made for the expenses incurred, including the agent's commission, in making the sales and if the agent's commission fully represents the value of the profit attributable to his service, it should prima facie extinguish the assessment.

17. CBDT Circular No. 23 of 1969 (supra) is eloquently clear, providing that if the value of the profit attributable to the services rendered by the agent is fully represented by the commission paid, it should, prima facie extinguish the assessment. "DIT v. Morgan Stanley and Company Inc."(supra), as stated, has taken into consideration CBDT Circular No. 23 of 1969(supra). In that case, since certain employees had been deputed by the foreign company to the Indian affiliate company, the foreign company was held to have a permanent establishment in India. The AAR held that

once the Transfer Pricing Analysis was undertaken, there was no further requirement to attribute profits to a permanent establishment. Adjudicating on the issue as to whether the action of the AAR in holding so was correct or not, the Hon'ble Supreme Court held, inter alia, that where the transaction was held to be at arms length, the ruling of the AAR was correct in principle, provided that an associated enterprise, which also constituted a permanent establishment, was remunerated on arm's length basis, taking into account all the risks–taking functions of multinational enterprises and that in such a case, nothing further would be left to attribute to the permanent establishment.

18. As contended , for the year under consideration, Transfer Pricing guide lines were not applicable. That being so, reliance on behalf of the assessee on "SET Satellite" (supra) cannot at all be said to be misplaced. Therein also, the assessment year being 1999-2000, the Transfer Pricing guide lines were not applicable, as they became applicable from the next year. Pertinently, the Hon'ble Bombay High Court, in the case of "SET Satellite" (supra), has held that if the correct arms length price is applied and paid, nothing further would be left to be taxed in the hands of the foreign enterprice. "Morgan Stanley" (supra) as well as CBDT Circular No. 23 (supra) were taken into consideration. The facts in the present case are

found to be at parity with those present in "SET Satellite"(supra), to the extent noticed above. Both the cases concern years before the onset of the Transfer Pricing regime. As such, we hold that "SET Satellite"(supra) has rightly been relied on on behalf of the assessee and that it is directly applicable to the assessee's case.

19. Apropos the department's contention that the assessee has furnished different mutuals intrinsically irreconcilable statements before the authorities below, copies of these documents have been placed in the paper book filed by the assessee. These documents are :-

1. Consolidated annual audited accounts showing the losses suffered by the Channel;
2. The computation of loss as per Rule 10 (ii) of the I.T. Rules, 1962; and
3. Allocation statements of income and expenses of India Footprint.

20. As pointed out, it is seen that all these statements reflect a loss. It was the foreign exchange rate and India Footprint which gave rise to difference in the figures submitted before the taxing authorities.

21. So far as regards the department's assertion that CBDT Circular No. 742(supra) has wrongly been relied on, it is seen that CBDT Circular No. 765 dated 15.4.1998 extended Circular No. 742 (supra). As per CBDT

Circular No. 742, it was needed to be established, for the applicability of the Circular, that the assessee or a non-resident foreign telecasting company and that it did not have a branch office or a permanent establishment or did not maintain countrywise accounts of its operations. The Circular would not apply in the event of any of the said conditions being not satisfied. All the conditions are not to be cumulatively satisfied so as to apply the Circular. In the assessee's case, the assessee had filed before the AO its country accounts for India, wherein the total revenues and expenses of the assessee were allocated to its India activity. A copy thereof has been placed before us. Before the CIT(A), the assessee also filed its audited accounts containing allocation of revenues and expenses to its India activity. A copy thereof has also been furnished before us. The learned CIT(A) remanded these to the AO. Therefore, evidently, CBDT Circular No. 742 (supra) does not apply.

22. Apropos reliance on the TPO's order in "BWIPL" (supra), it does not make a difference if the order of the TPO in that case was that of a dependent agent. The TPO had accepted that the transaction was at arms length price. It was observed that almost everyone in the assessee's line of business was charging the same rate of commission on the sale of airtime on TV Channels or FM Channels.

23. Further, the department has not been able to establish its assertion that the stand that BWIPL was merely soliciting orders for the assessee, was a mere facade. It has rather been shown to be otherwise, as discussed hereinabove.

24. "SET Satellite" (supra) and "Morgan Stanley" (supra), as deliberated upon in the preceding paragraphs are directly applicable in favour of the assessee and the department has not been able to successfully canvass as to why they should not be followed.

25. In view of the above, the case made out by the assessee is found to be justified. Its grievance is thus accepted.

26. In the result, the appeal filed by the assessee is allowed, as indicated.

Order pronounced in the open court on 15.01.2010.

(A.K. Garodia)
Accountant Member

(A.D. Jain)
Judicial Member

Dated: 15.01.2010
*RM
copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

True copy

Deputy Registrar