IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "L", MUMBAI

Before Shri P.M.Jagtap, Accountant Member
and Shri Vijay Pal Rao, Judicial Member.

I.T.A. No. 2270/Mum/2011
Assessment Year : 2009-10.

Dy. Director of Income-tax, (International Taxation), 4(2), Mumbai.	**Vs.**	Nimbus communications Ltd. Nimbus Centre, Oberoi Complex, Andheri (West), Mumbai – 400 053. PAN AAACN 3947L
Appellant.		**Respondent**.

I.T.A. No. 1598/Mum/2011
Assessment Year : 2009-10.

Nimbus Communications Ltd., Mumbai.	Vs.	Dy. Director of Income-tax, (International Taxation), Range-4(2), Mumbai.
Appellant		**Respondent.**

Department by : Shri Narendra Kumar.
Assessee by : Shri K.Shivaram,
Shri ajay R. Singh.
Date of hearing : 31-10-2012
Date of pronouncement : 23-11-2012.

O R D E R

Per P.M. Jagtap, A.M. :

These two appeals, one filed by the assessee being ITA No. 1598/Mum/2011 and the other filed by the Revenue being ITA No.2270/Mum/2011 are cross appeals which are directed against the order of learned CIT(Appeals)-11, Mumbai dated 04-01-2011.

2. The assessee in the present case is a company which is engaged in the business of sports marketing and airtime marketing available on television programme. It is also engaged in the business of production, telecasting and marketing of television serials. It entered into an agreement with Nimbus Sports International Pte Ltd. (NSI), a company incorporated in Singapore, who had acquired all media rights throughout the world from Srilanka Cricket of the cricket series between Srilanka and India to be played in Srilanka. As per the said agreement dated 21-01-2009, the assessee company was granted by NSI a license for live terrestrial television rights of the cricket series between Srilanka and India to be played in Srilanka to be telecasted on Doordarshan (Prasar Bharti) for a fees of Rs.4 crores. The assessee company filed an application u/s 195(2) of the Act seeking a Nil deduction certificate in respect of the payment to be made to NSI as per the agreement dated 21-01-2009 on the ground that the payment to be made on account the broadcast of live match was not covered within the definition of royalty and the same, therefore, was not taxable in India in the hands of NSI. The stand of the assessee was that the broadcast of live signal does not entail the copy right to the broadcaster and the same is not in the nature of royalty.

3. The stand of the assessee was not found acceptable by the AO for the following reasons :

a) The matches are to be broadcasted in Indian Territory and the income to the applicant is to be by way of advertisement revenue and subscription revenue. The applicant would be paying taxes on this income. Without the receipt of signal on account of the matches to be played, none of this income would accrue to the applicant. Thus, this contention of the applicant that the income, if any, accruing to M/s Nimbus Sports International Pte Ltd. cannot be deemed to accrue or arise in India is not correct and the business connection of all receipts is in India and hence, all receipts to M/s Nimbus Sports International Pte Ltd. is deemed to accrue or arise in India.

b) The broadcast of live matches means capturing the image on cameras, and then editing the same before sending the signal for transmission and also arranging for replays to be provided during the match itself. Thus, payment for purpose of broadcast of live feed is in the nature of Royalty as per the provisions of Explanation 2 to Section 9(1)(vi) of the Income Tax Act, 1961.

c) The applicant has stated that the payments are solely to be taxed as per the provisions of the Income Tax Act, 1961 i.e. as per the provisions of Section 115A governing the taxability of Royalty.

4. For the reasons given above, the AO held that the entire amount of Rs.4 crores payable by the assessee to NSI was in the nature of the royalty and tax at the rate of 10% was deductible from the said payment. He also noted from clause No. 4.3 of the agreement dated 21-01-2009 that the amount payable by the assessee company to NSI was net of taxes and the tax liability was to be borne by the assessee company. He held that the amount payable by the assessee company to NSI thus was liable to be grossed up as per the provisions of section 195A of the Act and the assessee was liable to deduct tax at the rate of 11.80% at source from the payments to be made to NSI in terms of the agreement dated 21-01-2009.

5. Against the order passed by the AO u/s 195, an appeal was preferred by the assessee before the learned CIT(Appeals) and after considering the submissions made by the assessee and the material available on record, the learned CIT(Appeals) found that a similar issue involved in the case of Neo Sports Broadcast Pvt. Ltd. was decided by his predecessor vide order dated 29-09-2008 in favour of the assessee for the following reasons :

> "Section 13 and 14 of C.P. Act makes it clear that copyright can only subsist in a work. Therefore, if the feed is not considered to be a 'work' within the meaning of the Act, there can be no copyright protection for the same. Work is defined in Section 2(y) of the Act. Under this definition work is a literary, dramatic, musical or artistic work, a cinematograph film, and a sound recording. It is important to note that the definition is not an inclusive

> definition. A live feed has to be brought expressly into one of these categories. The feed clearly cannot be a literary, dramatic, musical or artistic work, as no element of originality goes into the same. As far as the definitions of cinematographic films and sound recording are concerned, the Act clearly contemplates that there should be a recording. In other words, there is a requirement under the Act that the sounds and images must be reduced to some tangible form whereupon the works would enjoy copyright protection. The live feed is not recorded on any medium. It is simply transmitted directly from the stadium to the coordination studio and thereon to the originating facility. In such a case, there cannot be any copyright in the live feed itself. This makes it clear that a live feed, where no work within the meaning of the CP Act is created, does not constitute a copyright, whereas the feed received in the form of a recording on a tape of disc etc. is covered by copyright. I, therefore, agree with the contention of the appellant that payments towards live telecast of events are not a royalty payment, hence, there was no requirement of deduction of tax u/s. 195."

Keeping in view the above decision of his predecessor in the case of Neo Sports Broadcast Pvt. Ltd. on a similar issue as well as the definition of the term "royalty" given in the Income-tax Act as well as in Article 12(3) of the Indo-Singapore DTAA, the learned CIT(Appeals) held that the amount payable by the assessee to NSI as per the agreement dated 21-01-2009 was not in the nature of royalty and the same not being taxable in India, the assessee was not required to deduct tax at source from the said amount.

6. As regards the other issue raised by the assessee in its appeal relating to the business connection of NSI in India, the learned CIT(Appeals), however, held that NSI had business connection in India for the following reasons given in paragraph No. 4.3 of his impugned order :

> " I have carefully gone through the order of the Assessing Officer and also the submissions as made by the Authorized Representative of the appellant company. However, I am inclined to agree with the views of the Assessing Officer. I find that the cricket matches were actually broadcasted in India and the appellant company was also able to sell airtime to various

Indian advertising agencies, commercials of which were to be telecasted along with the cricket matches. In case, the appellant company had not received the signals of the cricket matches from the NSI, it would have been difficult for the appellant company to sell the airtime to Indian advertisers. Further, the NSI has entered into a separate agreement with Srilanka Cricket SLC with a view to acquire all media rights throughout the world (including India) for broadcasting feed for cricket matches. Although, as per the agreement between the appellant company and NSI, it was responsibility of the NSI to make available broadcasting feed for cricket matches outside India i.e. in Srilanka for telecasting cricket matches on Neo Sports Channel. But unless these signals were becamed in India, the appellant company would not have been able to sell airtime. Therefore, I am of the view that the NSI has a business connection in India and this ground of appeal is dismissed."

6. Aggrieved by the order of the learned CIT(Appeals), both the assessee and Revenue have preferred their appeals before the Tribunal on the following ground :

Ground raised by the assessee:

" The learned CIT(A) erred in upholding the order passed by ld. DDIT, holding that NSI has business connection in India, hence income thereof is deemed to accrued or arise in India, without properly appreciating the facts of the case and law applicable thereto."

Ground raised by the Revenue:

"In the facts and circumstances of the case, the Ld. CIT(A) erred in holding that payment made by the assessee to NIMBUS SPORTS INTERNATIONAL PTE LTD. (SINGAPURE {NS} for the broadcast of live feed is different from that made for the purpose of broadcast of recorded feed, and hence is not in the nature of Royalty."

7. We have heard the arguments of both the sides and also perused the relevant material on record. The learned counsel for the assessee has submitted that the solitary issue involved in the appeal of the Revenue is squarely covered in favour of the assessee by the decision of the Tribunal in the case of ADIT, International Taxation vs. Neo Sports Broadcast Pvt. Ltd. rendered vide order dated 9th Nov.,

2011 passed in ITA No.99/Mum/2009. A copy of the said order is placed on record before us and perusal of the same shows that similar issues have been decided by the Tribunal in favour of the assessee. As regards the nature of payment for live broadcasting of matches, the Tribunal has discussed the issue in the light of the relevant facts in paragraph No. 13 which reads as under :

> " Adverting to the facts of the instant case it is noticed that the dispute has arisen on the consideration for live broadcasting of matches, which has been categorized by the DDIT as synonymous with the granting of copyright in such work. The learned Departmental Representative has accentuated on the point that the live telecasting itself involves the transfer of copyright. In support of this contention he referred to para 6.4 of the impugned order as per which the assessee itself submitted that for live telecasting, images of the matches have to be captures which are transferred to control room by different cameras. The director then chooses the best image out of those received from different angles to be telecasted so that viewers can enjoy the same from the best possible angles. We are unable to appreciate as to how this procedure of live telecasting results into transfer of copyright cricket match. The relevant criteria is not capturing of different images and sending them to the control room, but telecasting the final image. It is only when a particular image is finally chosen out of different options available before the director which is telecasted that gives birth to a 'work' as per section 2(y) of the Copyright Act,1957 capable of copyright. In our considered opinion the live telecast of a match or any other event cannot be considered as transfer of copyright in such match. It is only when the live telecast of a match is done that the question of creation of copyright in such match arises. The second or later telecasting of the such event shall be considered as use of the 'work' and consideration for the broadcasting of such recorded matches shall be considered as payment for the use of copyright in such event. It is for this reason and rightly so that the assessee volunteered to include the consideration for the license of the recorded broadcast as royalty while making application u/s 195(2) of the Act."

8. The Tribunal then referred to a book titled "Law of Copyright and Industrial Designs" by P. Narayanan wherein it was stated in paragraph No. 17.02 that a cinematograph film depicting live events like sporting events, horse race, etc.

cannot infringe any copyright because there is no copyright in live events. The Tribunal held that there is thus no copyrights in the live events and depicting the same cannot infringe any copyright. The Tribunal also referred to the proposed Direct Tax Code Bill wherein "live coverage of any event" is proposed to be included in the definition of "royalty' and held that if "live coverage" had been a part of copyright of any work as was sought to be contended on behalf of the Revenue, then there was no need to classify live coverage as a separate item. It was held by the Tribunal that the definition of royalty under the Income-tax Act, 1961 thus does not include any consideration for live coverage of any event which is now sought to be included in the definition of royalty by the Direct Tax Code, 2010. The Tribunal, therefore, held that any consideration for live broadcasting cannot be considered as royalty for the transfer of copyright so as to fall within the domine of Explanation 2 to section 9(1)(vi). Respectfully following the said decision of the coordinate bench of this Tribunal rendered in the case of Neo Sports Broadcast Pvt. Ltd (supra), we uphold the impugned order of the learned CIT(Appeals) holding that the amount paid by the assessee for live coverage of cricket matches to NSI is not taxable in the hands of NSI and the assessee was not required to deduct tax at source from the said amount. The appeal of the Revenue is accordingly dismissed.

9. As regards the appeal of the assessee, it is observed that the solitary issue involved therein is also squarely covered by the decision of the Tribunal in the case of Neo Sports Broadcast Pvt. Ltd (supra) wherein a similar issue regarding business connection in India has been decided by the Tribunal in favour of the assessee for the following reasons given in paragraph No. 26 to 29 :

"26. We are unable to approve this point of view of the authorities below for the reason that Nimbus has provided license for the live broadcast of certain matches to the assessee for a definite consideration. The rights in such broadcast vest with Nimbus. After the live broadcast by the assessee, Nimbus will continue to hold right over such broadcast. The mere act of allowing the assessee by Nimbus to live broadcast the matches for a defined consideration, in our considered opinion, would not constitute a business connection in India. In order to constitute a business connection of a non-resident in India, it is necessary that some sort of business activity must be done by the non-resident in the taxable territory of India. Clause (a) of *Explanation 1* to section 9(1)(i) provides that in the case of business of which all the operations are not carried out in India, the income of the business deemed under this clause to accrue or arise in India shall be only such part of the income as is reasonably attributable to the operations carried out in India. From the above provision it becomes manifest that the non-resident must carry out certain operations in India so as to fall within the ambit of section 9(1)(i).

27. The relevant criteria is the carrying on of business operations in India by the non-resident and not the earning of income by any resident from the use of any product acquired from the non-resident. Where the non-resident only allows some resident to exploit certain right vested in it on commercial basis, it cannot be said that the non-resident has carried out any business activity in India. The act of the assessee earning revenues from India cannot lead to a business connection of Nimbus in India as the transaction between assessee and Nimbus is confined to receiving broadcasting right for a consideration. Whether the assessee earns income or suffers losses from the exploitation of such broadcasting is not the concern of Nimbus. Such transaction of the assessee with Nimbus on principal to principal basis cannot be considered as a ground for holding that Nimbus has a business connection in India and hence the income shall accrue to Nimbus through this business connection in India.

28. In the case of *CIT Vs. R.D.Agarwal & Co. & Anr. [(1965) 56 ITR 20 (SC)]*the Hon'ble Supreme Court has held that the expression "business connection" undoubtedly mean some thing more than "business". A business connection has been held to be involving a relation between the business carried on by a nonresident yielding profits or gains and some activity in the

taxable territories which provides directly or indirectly to the earning of those profits or gains. A stray or isolated transaction has been held to be not constituting a business connection. In this case the assessee procured orders in taxable territories for non-resident for which he was not duly authorized and contracted for the sale of goods. The orders were accepted by the non-resident. Price was received and delivery was given outside India. No operation such as procuring of material or manufacture of finished goods took place within India. The Hon'ble Supreme Court held that there was no business connection of the non-resident.

29. From this judgment it can be easily deduced that what is relevant is the business connection of the non-resident by carrying out some operations in India. Mere sale of goods by a non-resident in India on principal to principal basis does not establish any business connection of non-resident with India. If we presume for a moment without agreeing that contention advanced on behalf of the Revenue in this regard merits acceptance, even then no income will be deemed to accrue or arise to the non-resident in India by reason of application of Explanation 1 (a) to section 9(1)(i), which provides that only such part of the income as is reasonably attributable to the operations carried out in India shall be deemed to accrue or arise in India under this clause. As by selling the goods in India, the non-resident cannot be said to have carried out any business in India, there cannot be any issue of the applicability of section 9(1)(i). In the same manner, when a non-resident allows any resident to commercially exploit its asset for a consideration, the business connection in terms of section 9(1)(i) will be lacking. Thus it is clear that both the authorities below were not justified in holding that Nimbus has a business connection in India."

As the issue involved in the present case as well as all the material facts relevant thereto are similar to that of the case of Neo Sports Broadcast Pvt. Ltd. (supra), we respectfully follow the decision of the coordinate bench in the said case and decide this issue in favour of the assessee.

10. In the result, the appeal of the Revenue is dismissed whereas the appeal of the assessee is allowed.

Order pronounced on this 23rd day of Nov., 2012.

Sd/-	Sd/-
(Vijay Pal Rao)	(P.M. Jagtap)
Judicial Member	Accountant Member

Mumbai,
Dated: 23rd Nov., 2012.

Copy to :

1. Appellant
2. Respondent
3. C.I.T.
4. CIT(A)
5. DR, L-Bench.

(True copy)

By Order

Asstt. Registrar,

ITAT, Mumbai Benches, Mumbai.

Wakode