

**IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCH "I", MUMBAI**

**BEFORE SHRI S. RIFAUR RAHMAN, HON'BLE ACCOUNTANT MEMBER AND  
SHRI RAHUL CHAUDHARY, HON'BLE JUDICIAL MEMBER**

**ITA NO. 948/MUM/2023 (A.Y: 2015-16)**

Fox International Channels (US) Inc {now known as TFCF International Channels (US). Inc} C/o. Star House Urmi Estate, 95 Ganpatrao Kadam Marg Lower Parel (W), Mumbai - 400013  <b>PAN: AAACF8387J</b>	v.	DCIT (Intl. Taxation)-4(1)(2) 16 <sup>th</sup> Floor, Air India Building Nariman Point Mumbai - 400021
<b>(Appellant)</b>		<b>(Respondent)</b>

<b>Assessee Represented by</b>	<b>:</b>	<b>Shri Porus Kaka &amp; Shri Divesh Chawla</b>
<b>Department Represented by</b>	<b>:</b>	<b>Shri Anil Sant</b>
<b>Date of Conclusion of Hearing</b>	<b>:</b>	<b>05.07.2023</b>
<b>Date of Pronouncement</b>	<b>:</b>	<b>25.08.2023</b>

**ORDER**

**PER S. RIFAUR RAHMAN (AM)**

1. This appeal is filed by the assessee against the final Assessment Order and directions of the Dispute Resolution Panel of Learned Commissioner of Income Tax (DRP-2), Mumbai -1 [hereinafter in short

"Ld. DRP"] dated 27.12.2022 for the A.Y.2015-16 passed u/s. 144C(5) of Income-tax Act, 1961 (in short "Act").

2. At the time of hearing, Ld. AR of the assessee submitted that assessee has raised several grounds of appeal, however, he submitted that relevant ground for adjudication would be Ground Nos. 6 and 7 and other grounds raised by the assessee are merely academic in nature.

3. The relevant grounds raised by the assessee are as under: -

*"Ground number 6*

*On the facts and in the circumstances of the case and in law, the Hon'ble DRP and the learned AO have erred in holding that the distribution revenues earned by the Appellant fall within the meaning of the term 'Royalty' under Article 12 of the India-USA Double Taxation Avoidance Agreement ("India-USA DTAA) and accordingly, such distribution revenues are taxable in India.*

*Ground number 7*

*On the facts and in the circumstances of the case and in law, the Hon'ble DRP and the learned AO have erred in holding that the distribution revenues earned by the Appellant fall within the meaning of the term 'Royalty' under Explanation 2 of Section 9(1)(vi) of the Act and accordingly, such distribution revenues are taxable in India."*

4. The relevant facts relating to the above grounds are; the case of the assessee was reopened u/s. 147 of Income-tax Act, 1961 (in short "Act") and notices u/s. 148 of the Act was issued on 31.03.2021 and served on the assessee along with the reasons for reopening by obtaining

proper approval u/s. 151 of the Act. Subsequently, notices u/s. 143(2) and 142(1) of the Act were issued and served on the assessee.

**5.** The assessee, Fox International Channels (US) Inc (in short 'FIC'), is a non-resident foreign company, incorporated in the US. It is primarily engaged in the media industry, and its business constitutes of broadcasting of its channels over various countries, including over the Indian sub-continent. FIC is eligible for the benefits of the India - USA Double Taxation Avoidance Agreement and has filed a copy of TRC to that effect which is placed on record. FIC primarily had two streams of revenues from India i.e. revenues from advertisement and revenues from distribution in India. **The issue before us is relating to distribution income.**

**6.** During the assessment proceedings, Assessing Officer observed that Assessee has entered into a distribution representation agreement with NGC Network (India) Private Limited (hereinafter "NGC India") appointing NGC India as FIC's exclusive agent for distribution of the Channels to media intermediaries' subscribers in India, Nepal, and Bhutan. With effect from 01.10.2009, NGC India, acted on behalf of the assessee, has entered into separate agreements with Star India Pvt. Ltd., [in short "SIPL"] for

the distribution of the Channels. By observing the various clauses in the agreement and in particular Clause (16) of the agreement Assessing Officer observed that SIPL will procure each authorized purchase platform to telecast each of the channel, however, with lot of restrictions. It shows that assessee retains the complete rights over the programs. Assessing Officer observed that assessee through NGC India has granted license to SIPL to distribute the channels. It can be seen that SIPL cannot modify or delete anything from the transmission of the channels and it has to ensure that channels are transmitted in their entirety. The assessee has also restricted SIPL and the intermediaries from modifying, replacing or copying any copyright, trademarks, trade names, logos and names. The assessee has also prohibited SIPL and its intermediaries from copying any programs included on the channels.

**7.** The Assessing Officer observed that Royalty can be said to be a compensation paid under the license granted by the owner to the other who wishes to make use of the license. In this case, the ownership remains with the licensor, i.e. assessee and from the terms of the agreement it can be seen that SIPL is allowed to distribute the Channels with so many restrictions as mentioned above. From the terms of the agreement it is clear that SIPL is allowed to distribute the Channels during

the contractual period and according to the terms laid down in the agreement. This shows that SIPL is not free to make use of the Channels as per their wish but strictly in accordance with the terms laid down by the assessee. Considering these facts, the assessee enjoys the rights of owners, whereas SIPL is paying compensation for the exploitation of the Channels.

**8.** Assessing Officer observed that the transaction with the SIPL is license fees payment and which is covered within the definition of royalty under the Act as well as under Article 12 of the U.S. Treaty, as being payments made for use of any copyright of a literary, artistic or scientific work, including cinematograph films or work on films, tape or other means of reproduction for use in connection with radio or television broadcasting. By relying on the Authority for Advance Rulings (AAR) and other Tribunal decisions he came to the conclusion that the distribution license will fall within the ambit of royalty and accordingly, the distribution receipt of ₹.43,73,44,337/- is treated as royalty income. Accordingly, he brought to tax 15% with applicable surcharge and education cess u/s. 115A of the Act.

**9.** Aggrieved with the above order, assessee preferred objection before Ld. DRP. After considering the detailed submissions before Ld. DRP,

Ld.DRP sustained the additions made by the Assessing Officer, however, they have directed the Assessing Officer to exclude the distribution revenue received from Srilanka and Bangladesh since the assessee has received this distribution revenue outside India. Accordingly, Ld. DRP partly allowed the objections raised by the assessee.

**10.** Aggrieved with the above directions and final Assessment Order, assessee is in appeal before us and raised the above said grounds of appeal.

**11.** At the time of hearing, Ld. AR of the assessee brought to our notice findings of the Tax Authorities and brought to our notice Page No. 1 of the Paper Book which is Channel License and AD Sales agreement entered by NGC India (on behalf of the assessee) with SIPL. He brought to our notice background, he also brought to our notice Specific Terms – I wherein the assessee entered Grant of Distribution Rights which is Clause (3) of the terms of agreement, for the sake of clarity it is reproduced below: -

3.	<b>Grant of Distribution Rights</b>	(a) In consideration of the License Fees payable by SIPL to NGC under this Agreement, and subject to this Section 3 and to SIPL's timely payment of all such License Fees and performance of all other obligations in this Agreement, NGC grants to SIPL a <u>non-transferable, exclusive license</u> to distribute and sublicense, and SIPL
----	-------------------------------------	--

		<p>accepts the obligation to distribute and sublicense, the Channel, in standard definition for Pay Television on a linear encrypted basis for the duration of the Term via the Permitted Distribution Method in the Territory, to Authorized Platforms for distribution to Authorized Pay Subscribers, subject to the terms and conditions of this Agreement (<i>Distribution Rights</i>).</p> <p>(b) SIPL and NGC will discuss and mutually agree to a free window period for the Channel in the Territory or part thereof from time to time, Upon receipt of SIPL's proposal on the free window period, NGC will endeavour in good faith to either agree or disagree with such proposal within 30 (thirty) days.</p> <p>(c) The Parties acknowledge that NGC does not Currently have the free to air (FTA), video on demand (VoD), subscription video on demand (SVoD), paid video on demand (PVoD), Near video on demand (NVoD) and pay per view (PPV) rights ("Non-Linear Rights") in and to the content or Internet rights for distribution of the Channel, As and when any such Non-Linear Rights and/or Internet rights become available to NGC, it shall not, either itself or through a third party, exploit/grant the Non-Linear Rights or Internet rights in the Territory unless NGC has first offered the first right of refusal to SIPL to such Non-Linear Rights in and to the content or the Internet rights for the distribution of the Channel. NGC shall put forward a proposal, in writing, to SIPL of the terms of license of s Linear Rights and/or Internet rights ("Proposal") and SIPL shall have an, exclusive 30(Thirty) days period to negotiate, accept or reject such Proposal If after the exclusive period of negotiation, the Parties are not able to agree on the Proposal then NGC may exploit/grant such Non-Linear Rights or the Internet rights, as the case may be to a third party on terms no more favourable than as contained in the Proposal.</p> <p>(d)NGC shall not, whether directly or indirectly distribute or license the Channel to any Person in the Territory or in any other manner monetize the Channel in the Territory whether itself or through any Person, except and solely in the form of and for the purpose of conducting promotional and marketing activities.</p>
--	--	---

12. Further, he brought to our notice clause (16) of the above said agreement relating to Telecast Rights, this clause shows the various restrictions on SIPL, for the sake of clarity, it is reproduced below: -

16.	Telecast	<p>SIPL will procure each Authorized Platform to telecast the Channel in its entirety at all. times during the Term without interruption, alteration, addition, deletion or editing except as may be required by a relevant law in the Territory and only with NGC's prior written consent. SIPL shall not, and shall not allow any Authorized Platform or other person to, without NGC's prior written consent:</p> <p>(a) copy any of the programmes, data or content included on the Channel for the purpose of re-transmitting them later, or for any other reason, except as may be required by any relevant law or government authority within the Territory and provided that SIPL promptly notifies NGC before making or allowing any copy;</p> <p>(b) cut, edit, dub, voice-over, sub-title, reformat or otherwise change or make additions to any programmes, data or content included on the Channel except as may be required by a relevant law or government authority within the Territory,</p> <p>(c) exhibit or cause the Channel or the programmes therein via the Internet or any other local or area-wide computer network or wireless mobile network;</p> <p>(d) reformat the Channel so that it appears on less than the full screen of a television;</p> <p>(e) superimpose or otherwise add any third party or non-NGC advertising, promotions, programmes, data, content, copyright, trademarks, trade names, logos, names and/or likenesses on the Channel; or</p> <p>(f) use any copyright, trademarks, trade names, logos, names and/or likenesses, or any part of them, included in programmes on the Channel, or which NGC or licensors use for marketing purposes, except in connection with its receipt or promotion of the Channel.</p> <p>NGC reserves the right to, in its sole discretion, without any liability to SIPL or to any Authorized Platform or any other party to suspend Authorized Platform's rights to access the Channel at anytime if such suspension is necessary to comply with any Applicable Laws.</p>
-----	----------	---



**13.** With the above, Ld. AR of the assessee submitted that the assessee has granted only distribution rights and assessee has imposed restrictions on SIPL not to make any copies, it shows that all the rights are held by the assessee and only the SIPL and the intermediaries have right only on transmission. Therefore, the facts in this case are squarely covered in the decisions of the Hon'ble Bombay High Court which are referred in the case law Paper Book. In particular, Ld. AR of the assessee relied on the decisions in the case of CIT *vs.* MSM Satellite (Singapore) Pte. Ltd [2019] 106 taxmann.com 353 (Bombay) and ESS Distribution (Mauritius)SNC et Compagnie *vs.* DDIT (International Taxation) [2022] 145 taxmann.com 267 (Delhi – Trib). He submitted that these decisions squarely highlight that there is no definition of Copyright in the Copyright Act and also when the channels do not have a modification right and only to broadcast reproduction rights, it cannot be brought under the definition of Royalty.

**14.** On the other hand, Ld. DR relied on the findings of the Ld. DRP at Page No. 64 of the order.

**15.** Considered the rival submissions and material placed on record, we observe that in the similar facts on record, in the case of MSM Satellite (Singapore) Pte. Ltd., in ITA.No. 2870/Mum/2010 dated 28.08.2015 the

Coordinate Bench by relying on the Hon'ble High Court decision in assessee's own case in A.Y. 1999-2000 decided the issue in favour of the assessee. Further, in CIT v. MSM Satellite (Singapore) Pte. Ltd., [2019] 106 taxmann.com 353 (Bombay), the Hon'ble Bombay High Court held as under: -

*"9. We may notice that in case of SET India Private Limited, the Tribunal had addressed a similar question in its judgment dated 25th April, 2012 in Income Tax Appeal No.4372 of 2004. The Tribunal while confirming the decision of CIT (Appeals), in the said judgment held and observed as under:-*

*"6. Having heard both the sides, we observe that Id CIT (A) while examining the issue has stated that the Non-resident company has granted nonexclusive 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 broadcast 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 observe that Id. 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 Copy Right Act and not under section 14 thereof. We observe that Id 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 construed to be a grant of any license or transfer of any right in any copyright. Ld CIT(A) has stated that the assessee submitted before him that the cable operator only retransmits the television signals transmitted to it by a broadcaster without any editing, delays, interruptions, deletions or additions and therefore 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."*

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. Sub-section (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. Sub-section (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. Sub-section (2) of Section 37 provides that the broadcast reproduction right shall subsist until twenty five years from the beginning of the calender year next following the year in which the broadcast is made.*

12. *Section 9 of the Act pertains to income deemed to accrue or arise in India. Clause (vi) of Section 9(1) pertains to income by way of royalty. Relevant portion reads as under:-*

*"(vi) income by way of royalty payable by (a) the Government; or*

*(b) a person who is a resident, except where the royalty is payable in respect of any right, property or information used or services utilised for the purposes of a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India; or*

*(c) a person who is nonresident, where the royalty is payable in respect of any right, property or information used or services utilised for the purposes of a business or profession carried on by such person in India or for the purposes of making or earning any income from any source in India:"*

*Explanation 2 below sub-section (1) of Section 9 describes the term "royalty" for the purpose of said clause, relevant portion of*

*which reads as under:-*

*"Explanation 2.- For the purposes 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-"*

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 sub-section (1) of Section 9 of the Act, the question of applicability of clause (vi) of sub-section (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.*

14. *We may also notice that India Singapore Double Taxation Avoidance Agreement contains Article 12 pertaining to royalty and fees for technical service. Paragraph (3) of Article 12 defines the term "Royalty" as under:-*

*"The term "royalties" as used in this Article means payments of any kind received as a consideration for the use of, or the right to use:*

*(a) any copyright of a literary, artistic or scientific work, including cinematograph film or films or tapes used for 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, property or information;*

*(b) any industrial, commercial or scientific equipment, other than payments derived by an enterprise from activities described in paragraph 4(b) or 4 (c) of Article 8."*

15. *Even going by this definition, the payment in question cannot be categorized as royalty."*

**16.** Further, in the case of ESS Distribution (Mauritius) SNC et Compagnie v. DDIT (International Taxation) [2022] 145 taxmann.com 267 (Delhi – Trib), the Coordinate Bench of ITAT Delhi Bench held as under: -

*"9. We have considered rival submissions in the light of the decisions relied upon and perused the materials on record. The issue we are called upon to decide is, whether the subscription/distribution revenue received by the assessee from ESPN India towards grant of distribution right would amount to royalty as defined under Article 12 of Indian–Mauritius Tax Treaty. Undisputedly, the assessee is a tax resident of Mauritius and holding a valid Tax Residency Certificate (TRC). Therefore, the assessee is entitled to avail the benefit of India – Mauritius Tax Treaty. Before we proceed to deal with the issue, it is necessary to briefly describe the factual backdrop relating to the arrangement between the assessee and ESPN Star Sports, Singapore on one hand and between the assessee and ESPN India on the other. It is an admitted factual position that ESPN Star Sports, Singapore is the owner of ESPN and Star Sports channels. The ESPN Star Sports, Singapore has entered into an agreement with the assessee to appoint the assessee as a distributor to distribute and make available for sub-distribution ESPN network programming services in India, Pakistan, Bangladesh, Srilanka and Nepal via cable television system, satellite master antenna television systems and direct to home via satellite. The agreement between ESPN Star Sports, Singapore and assessee makes it clear that the assessee has not been conferred with any rights whatsoever with regard to copyright, title or any other proprietary or ownership interest in or to the ESPN service or any elements thereof. The agreement makes it explicit that all rights in the contents of ESPN service are expressly reserved by ESPN Star Sports, Singapore and the distributor shall not use, authorize or permit the use of ESPN service or any element thereof for any*

*purpose other than the purpose expressly specified in the agreement. The agreement also specifies that the assessee has to distribute the ESPN services in its entirety, without any alteration, editing, dubbing, scrolling or ticker tape, substitution or any other modification, addition, deletion or any other variation whatsoever. The agreement also provides that the names and marks of ESPN Star Sports and ESPN will remain exclusive properties of the ESPN, Inc and subject to agreement the distributor may be given nonexclusive license to use the names and marks on advertising and promotional material, notepapers, stationery and related materials. The assessee shall have the right to approve any of the distributors mentioning or using of such names or marks and publicity about the ESPN service, however, the distributors shall not publish or disseminate any material in violation of any restrictions imposed by ESS or ESPN Inc.*

*10. Thus, the terms of the agreement between the assessee and ESPN Star Sport, Singapore makes it clear that copyright over the programs of ESPN Star Sports are held by ESPN Star Sports, Singapore and not parted to the assessee. Similarly, on going through the agreement between the assessee and ESPN India it is observed that the assessee has only granted right to distribute ESPN and Star Sports channels in India to ESPN Indian. A reading of the agreement as a whole, as well as, certain specific clauses of the agreement would make it clear that the assessee has not transferred any right to use of any copyright to ESPN India, insofar as it relates to certain sports channels owned by ESPN Star Sports, Singapore. The agreement entered into with ESPN India clearly denotes that the assessee has merely granted distribution rights of ESPN service through sub-distributors/cable operators. The agreement also makes it clear that the distributor has to distribute the ESPN service provided by the assessee in its entirety, without any alteration, editing, dubbing, scrolling or ticker tape, substitution or any other modification, addition, deletion or any other variation whatsoever.*

*11. As discussed earlier, in assessment year 2003-04 the Assessing Officer held the distribution revenue received by the assessee as business receipts. However, in subsequent assessment years, the Assessing Officer treated it as royalty. While upholding the decision of the Assessing Officer in subsequent years and to bring the distribution revenue received by the assessee in the ambit of royalty, learned Commissioner (Appeals) has not only referred to Explanation 2(v) to section 9(1)(vi) of the Income Tax Act, but, has extensively referred to certain provisions of the Copyright Act. In this context, learned Commissioner (Appeals) has referred to definition of cinematograph film under section 2(f) of the Copyright Act, definition of broadcast under section 2(dd) of the Act, the meaning of copyright as provided under section 14 of the Copyright Act and section 13 of the Copyright Act, wherein, cinematograph films has*

*been enlisted as a form of work in which copyright subsists. Referring to all these provisions of the Copyright Act, learned Commissioner (Appeals), in sum and substance, has wanted to convey that by granting the distribution right to ESPN India the assessee has allowed broadcast of cinematograph films to communicate to the public. Thus, there is a transfer of copyright in terms of section 9(1)(vi) read with clause (v) to Explanation 2 there under, Article 12(3) of the India – Mauritius Tax Treaty and the relevant provisions of the Copyright Act, as referred to by him.*

12. *At this stage, it is necessary to look into the definition of royalty under Article 12(3) of the India–Mauritius DTAA, which reads as under:*

*"12(3) The term "royalties" as used in this Article means payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work (including cinematograph films, and films or tapes for radio or television broadcasting), any patent, trade mark, design or model, plan, secret formula or process or for the use of, or the right to use, industrial, commercial or scientific equipment, or for information concerning industrial, commercial or scientific experience."*

13 *A reading of the aforesaid Article would make it clear that the expression royalty means consideration received for the use of or right to use of any copyright of literary, artistic or scientific work (including cinematograph films and films or tapes for radio or television broadcasting, any patent trade-mark design, model plan, secret formula plan etc. Admittedly, the expression copyright has not been defined either under the Income Tax Act or under the India–Mauritius Tax Treaty. Therefore, we have to find the meaning of copyright in the Copyright Act. As discussed earlier, section 14 of the Copyright Act defines copyright as under:*

*"[14. Meaning of copyright.-- For the purposes of this Act, copyright means the exclusive right subject to the provisions of this Act, to do or authorise the doing of any 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 any 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 (i) 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 commercial rental or offer for sale or for commercial rental any copy of the computer programmer:*

*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--*

*the storing of it in any medium by electronic or other means; or*

*depiction in three-dimensions of a two-dimensional work; or*

*depiction in two-dimensions of a three-dimensional work;]*

*(d) in the case of a cinematograph film,--*

*4[(i) to make a copy of the film, including--*

*a photograph of any image forming part thereof; or*



*storing of it in any medium by electronic or other means;]*

*5[(ii) to sell or give on commercial rental or offer for sale or for such rental, any copy of the film.]*

*(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 6[including storing of it in any medium by electronic or other means];*

*7[(ii) to sell or give on commercial rental or offer for sale or for such rental, any copy of the sound recording;]*

*(iii) to communicate the sound recording to the public.*

*Explanation.--For the purposes of this section, a copy which has been sold once shall be deemed to be a copy already in circulation]."*

14. *Section 37 of the Copyright Act deals with broadcast, reproduction rights, which reads as under:*

**"37. Broadcast reproduction right.--** (1) *Every broadcasting organisation shall have a special right to be known as "broadcast reproduction right" in respect of its broadcasts.*

*The broadcast reproduction right shall subsist until twenty-five years from the beginning of the calendar year next following the year in which the broadcast is made.*

*During the continuance of a broadcast reproduction right in relation to any broadcast, any person who, without the licence of the owner of the right does any of the following acts of the broadcast or any substantial part thereof,--*

- a. re-broadcast the broadcast; or*
- b. causes the broadcast to be heard or seen by the public on payment of any charges; or*

- c. *makes any sound recording or visual recording of the broadcast; or*
- d. *makes any reproduction of such sound recording or visual recording where such initial recording was done without licence or, where it was licensed, for any purpose not envisaged by such licence; or*
- e. *3[(e) sells or given on commercial rental or offer for sale or for such rental, may such sound recording or visual recording referred to in clause (c) or clause (d).]”*

15. *It is further relevant to observe, the consequences for infringement of copyright and broadcast reproduction right have been dealt with differently under the Copyright Act. Thus, on a conjoint reading of section 14 and 37 of the Copyright Act, a holistic view can be taken that broadcast reproduction right is distinct and separate from Copyright Act. In case of DDIT Vs. SET India Pvt. Ltd (supra), the Coordinate Bench, while dealing with aforesaid aspect, has held as under:*

*"16. Having heard both the sides, we observe that Id CIT(A) while examining the issue has stated that 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 broadcast 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 observe that Id 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 Copy Right Act and not under section 14 thereof. We observe that Id 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 construed to be a grant of any license or transfer of any right in any copyright. Ld CIT(A) has stated that the assessee submitted before him that the*

*cable operator only retransmits the television signals transmitted 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."*

16. *Similar to the case of DDIT Vs. Set India Pvt. Ltd. (supra), referred to above, in assessee's case also there is no transfer of any right to use of any copyright and there is specific restriction imposed upon ESPN India that it has to provide the ESPN services through sub-distributors without any editing, interruption, deletions, additions etc. It is relevant to observe, in case of Set Satellite (Singapore) Pte Ltd. Vs. DDIT (supra), the Hon'ble Bombay High Court while dealing with the issue, whether identical nature of distribution rights granted to an entity in India is in the nature of royalty, has held that consideration received is in respect of a commercial transaction, hence, distinct and different from copyright as defined under Copyright Act. In case of NGC Network Asia LLC Vs. DCIT (supra), the issue involved was whether revenue received by the non-resident company from NGC India from distribution right granted in respect of telecast/broadcast of certain channels in India through cable operators would be in the nature of royalty. While dealing with the issue, the Tribunal, after taking note of the difference between the meaning of copyright and broadcast reproduction right under the Copyright Act has held that the right granted to the Indian entity is a commercial right and not copyright. Identical view has been expressed by the Coordinate Bench in a catena of decisions cited before us, including, in the case of Turner Broadcasting System Asia Pacific Inc. Vs. DDIT (supra). In case of CIT Vs. MSM Satellite (Singapore) Pte. Ltd. (supra), the Hon'ble Bombay High Court has held as under:*

*"10. In our opinion, the Tribunal has not committed any error. As noted, the assessee would received 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. "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. Sub-section (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. Sub-section (I ) 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. Sub-section (2) of Section 37 provides that the broadcast reproduction right shall subsist until twenty-five years from the beginning of the calender year next following the year in which the broadcast is made. 1*

*12. Section 9 of the Act pertains to income deemed to accrue or arise in India. Clause (vi) of Section 9(1) pertains to income by way of royalty. Relevant portion reads as under:—*

*(vi) income by way of royalty payable by —*

- a. the Government; or*
- b. a person who is a resident, except where the royalty is payable in respect of any right, property or information used or services utilised for the purposes of a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India; or*

- c. *a person who is non-resident, where the royalty is payable in respect of any right, property or information used or services utilised for the purposes of a business or profession carried on by such person in India or for the purposes of making or earning any income from any source in India:*

*Explanation 2 below sub-section (1) of Section 9 describes the term "royalty" for the purpose of said clause, relevant portion of which reads as under:—*

*Explanation 2.- For the purposes 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'*

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 sub-section (1) of Section 9 of the Act, the question of applicability of clause (vi) of sub-section (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.*

14. *We may also notice that India Singapore Double Taxation Avoidance Agreement contains Article 12 pertaining to royalty and fees for technical service. Paragraph (3) of Article 12 defines the term "Royalty" as under—*

*'The term "royalties" as used in this Article means payments of any kind received as a consideration for the use of, or the right to use:*

- a. any copyright of a literary, artistic or scientific work, including cinematograph film or films or tapes used for 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, property or information;*
- b. any industrial, commercial or scientific equipment, other than payments derived by an enterprise from activities described in Paragraph 4(b) or 4 (c of Article 8'*

*15. Even going by this definition, the payment in question cannot be categorized as royalty."*

*17. Though, learned Commissioner (Appeals) has extensively referred to the definitions of copyright, communication to public, broadcast under the Copyright Act, however, he has completely ignored the broadcast reproduction right as provided under section 37 of the Act. Thus, in our view, the ratio laid down in the decisions referred hereinabove clearly clinches the issue in favour of the assessee, as, what the assessee has granted to ESPN India through the distribution agreement is broadcast reproduction right, as defined under section 37 of the Copyright Act and not any Copyright. In any case of the matter, the Assessing Officer himself in assessment year 2003-04 has observed that the copyright over all the contents of ESPN channels remains with ESPN Star Sports, Singapore and has not been transferred to the assessee. Therefore, when the assessee itself does not have ownership over the copyright, it could not have transferred such right to any other party. Thus, respectfully following the ratio laid down in the judicial precedents cited before us, we hold that the subscription/distribution revenue received by the assessee is not in the nature of royalty either under section 9(1)(vi) of the Act nor under Article 12(3) of the Tax Treaty. In view of the aforesaid, this issue is decided in favour of the assessee."*

**17.** Respectfully following the above said decisions, we are also of the view that the Broadcasting Reproduction Right is different from the copyright as mention in the Copyright Act. Therefore, respectfully following the above said decisions of Hon'ble Bombay High Court and decision of the ITAT Delhi Bench, we are inclined to allow the grounds raised by the assessee. Accordingly, appeal filed by the assessee is partly allowed and other grounds raised by the assessee are kept open at this stage considering the fact that adjudication of these grounds will lead to academic purpose.

**18.** In the result, appeal filed by the assessee is partly allowed.

Order pronounced in the open court on 25<sup>th</sup> August, 2023.

**Sd/-**  
**(RAHUL CHAUDHARY)**  
**JUDICIAL MEMBER**

Mumbai / Dated 25/08/2023  
Giridhar, Sr.PS

**Sd/-**  
**(S. RIFAUR RAHMAN)**  
**ACCOUNTANT MEMBER**

**Copy of the Order forwarded to:**

1. The Appellant
  2. The Respondent.
  3. CIT
  4. DR, ITAT, Mumbai
  5. Guard file.
- //True Copy//

BY ORDER

(Asstt. Registrar)  
**ITAT, Mum**