

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

BEFORE SHRI NARENDER KUMAR CHOUDHRY, JUDICIAL MEMBER

AND

SHRI OMKARESHWAR CHIDARA, ACCOUNTANT MEMBER

**ITA No.1403/M/2008
Assessment Year: 2004-05**

M/s. Asia Today Limited, C/o. Zee Entertainment Enterprises Ltd., 135, Dr. Annie Besant Road, Worli, Mumbai – 400 018 PAN: AABCA0249F	Vs.	Asst. Director of Income Tax (International Taxation)-2(2), Scindia House, Bellard Estate, Mumbai - 400039
(Appellant)		(Respondent)

Present for:

Assessee by : Shri Niraj Sheth, Ld. A.R.
Revenue by : Shri Krishna Kumar, Ld. Sr. D.R.

Date of Hearing : 10.10.2025
Date of Pronouncement : 24.12.2025

O R D E R

Per : Narender Kumar Choudhry, Judicial Member:

This appeal has been preferred by the Assessee against the order dated 25.01.2007, impugned herein, passed by the Ld. Commissioner of Income Tax (Appeals) (in short Ld. Commissioner) u/s 250 of the Income Tax Act, 1961 (in short 'the Act') for the A.Y. 2004-05.

2. The relevant facts for adjudication of this appeal are as under:

The Assessee, being a foreign telecasting company incorporated in Mauritius and having tax residency certificate of Mauritius , during the AY under consideration was engaged in the production and acquiring rights of various television films including feature films, as a copy right owner/holder of various Hindi feature films produced and censored in India, as mentioned in Schedule 'C' annexed with the 'agreement of

license' executed on dated 07.04.2003 between Assessee {Licensor} and M/s. Usha Kiron Television {a propriety concern of Shri Ramoji Rao (HUF)} [licensee] for granting non-exclusive license and to give delivery of 100 (one hundred only) Hindi feature films – particulars of which are mentioned in the Schedule 'C' annexed to the said agreement, to the licensee for broadcasting through all channels of E-TV network, as per terms and conditions, set out in the license agreement and its Schedules 'A, B & C', on a consideration of Rs.1,00,00,000/- only.

2.1 The Assessee claimed the said amount of Rs.1,00,00,000/- being exempt, on the following reasons:

“ That such transaction is outside the definition/parameters of the definition of “royalty” as per Explanation-2 to section 9(1)(vi) of the Act That the Assessee being a foreign company is not liable to pay tax on the income from the transactions done outside India, as the Assessee had sold/given non-exclusive license of 100 cinematographic films from his library abroad and executed the agreement and delivered the films abroad, as transaction neither done in India nor money received in India and therefore the Assessee is not liable to tax in India. Further the Assessee has no Permanent Establishment (in short “PE”) in India and thus the income from license of films for use of telecast on television, is not taxable in India, as the income is not earned through PE situated in India nor the right in the films on which “royalty” is paid is connected with such PE. Even otherwise, if PE exists, then this income cannot be taxed as “royalty” “.

3. The AO though considered such claim of the Assessee with regard to the sale of rights/license of film rights given to M/s. Usha Kiron Television, India on a consideration of Rs.1,00,00,000/-, however, he ultimately held that the Assessee has a PE in India and its income from advertising and subscription has been taxed as business income. Further, as per definition of the term “royalty”, the use or the right to use the cinematographic film is specifically included as “royalty” and hence liable to be taxed, as the term “royalty” is defined in Article 12 of the India-Mauritius DTAA (in short “Treaty”). The AO ultimately treated the consideration amount of Rs.1,00,00,000/- received from licensing rights for broadcasting of Hindi Feature Films, given to M/s. Usha Kiron Television as “royalty” as per

Article 12(2) of the Treaty and taxed the same @ 15% by observing and holding as under:

“4. During the year under consideration, the assessee has also received an amount of Rs.100,00,000/- from sale of film rights from Usha Kiron Television, India. In the notes to the computation of income, the assessee has submitted that as per details/documents relating to its expenses vide its letter dated 22/12/2006 which were discussed and verified vis-à-vis the global audited accounts submitted earlier by the assessee. The assessee has submitted that the expenses under the India Mauritius Treaty are not subject to the limitations and provisions of the domestic laws unlike other similar tax treaties, However, the arguments of the assessee is hereby rejected. In any case, since profits and gains of the assessee has not been computed as per the provisions of the Income-tax Act, the profit/loss has to be computed as per Rule 10(i) of the Income-tax Rules in which the global profitability can only be taken as one of the factors.

3.5.3 The assessee submits that all its activities have been carried out outside India and has also done an FAR analysis to substantiate the same. However, as discussed in preceding paragraphs, it is evident that majority of functions are undertaken in India and further risks are also taken in India. Only some of the physical activities of the assessee are carried outside India such as uplinking of channels. Further, some entrepreneurial decisions and some strategic decisions on capital requirements etc. could have been carried outside India. In view of this, it is reasonable to estimate that at least 60 to 70% of the India specific profits are chargeable to tax in India.

3.5.4 In view of the above discussion and taking all the factors into consideration, and by applying Rule 10, the income of the assessee is estimated at 10% of the advertisement as well subscription revenue received by the assessee. During the year under consideration, the assessee has received total subscription and advertisement revenues amounting to 66,13,78,814 and 123,61,53,669 respectively, the taxable income on the said revenues worked out to Rs18,97,53,248/- i.e. 10% of Rs.189,75,32,483/-. The said amount is held as business income of the assessee and taxed accordingly.

Income from sale of film rights

4. During the year under consideration, the assessee has also received an amount of Rs.100,00,000/- from sale of film rights from Usha Kiron Television, India. In the notes to the computation of income, the assessee has submitted that as per Section 9(1)(vi) of the Income Tax Act, the term royalty excludes sale, exhibition or distribution of cinematographic films and hence the income is not liable to be taxed as per the Act. The assessee has further contended that without prejudice to the above, this is business income of the assessee and since the assessee does not have a PE in India, the income is not liable to be

taxed in India as per Article 5 read with Article 7 of the India-Mauritius Treaty.

4.1 The submissions made by the assessee has been considered, however, the same is not acceptable. In the earlier paragraphs of this order it has been held that the assessee has a PE in India and its income from advertisement and subscription revenue has been taxed as business income, Moreover the term 'royalty as defined in Article 12 of the India-Mauritius DTAA is as under:

"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 cinematographic films, and films or tapes for radio or television broadcasting), any patent, trademark, design or model, plan, secret formula or process or for the use of, or the right to use, industrial, commercial or scientific equipment, or for information concerning industrial, commercial or scientific experience."

4.2 In view of the above definition of the term 'royalty', the use or the right to use cinematographic films is specifically included as 'royalty and hence liable to be taxed under the said Treaty as such. It has already been held that, the assessee has a P.E. in India and its income from advertisement as well subscription revenues is held as taxable as business income. Hence, since the assessee is having a P.E., its income by way of sale of film rights is held as taxable by way of income from royalty and is taxed @ 15% under Article 12(2) of the India-Mauritius Treaty.

Penalty proceedings u/s. 271(1)(c) are initiated separately for furnishing inaccurate particulars. Since the assessee has also failed to get its books of accounts audited u/s. 44AB of the I.T. Act, penalty proceedings u/s. 271B is separately initiated.

Subject to the above remarks, the total income of the assessee is computed as under:

Business Income

*Income computed @ 10% of net revenue
(as discussed in para 3.5.4) Rs.18,97,53,248/-*

Income from Royalty

*From sale of film rights
(as discussed in para 4.2) Rs.1,00,00,000/-
Total Income Rs.19,97,53,248/-
Rounded off to Rs.19,97,53,250/-"
=====*

4. The Assessee, being aggrieved, challenged the decision of the AO for not allowing the deduction claimed to the tune of Rs.1,00,00,000/- being not liable to be taxed, before the Ld. Commissioner by filing first appeal inter alia challenging the other additions, however, could not get relief on this particular issue/aspect, as the Ld. Commissioner ultimately affirmed the decision of the AO in holding the said amount/receipt of Rs.1,00,00,000/- as "royalty", by holding "*that there is no infirmity in the order of the AO in holding the said receipt as "royalty"*". For completeness and ready reference, the observations, analyzations and conclusion drawn by the Ld. Commissioner, is reproduced herein below:

"6. Ground No. 8:

6.1 This ground is against the action of the AO in assessing income from sale of film rights of Rs.1,00,00,000 royalty income and taxing it under the treaty The appellant stated that the A.O failed to appreciate that the term Royalty as defined in Section 9 (6) (vi) specifically excludes sale of cinematographic films".

6.2 The appellant stated that the facts of the case are that the appellant has, on 76 April 2003, sold certain films out of its broadcasting library to an Indian Party-Usha Kiron Television India' for Rs.100 Lacs for the period of 2 years & Six months. The appellant filed the agreement of sale dated 75 April 2003 and claimed the said income as exempt as per the reasons given in the notes to Return of Income as it specifically excludes sale of films from the definition of Royalty u/s 9 (1) VI of the Act.

6.3 The A.O. examined the issue and did not agree with the appellant. The A.O. observed that definition of Royalty in Article 12 of Indo-Mauritius Treaty specifically includes 'the use or right to use Cinematographic Films" hence the income on sale of films is taxable under the treaty. He further observed that appellant is having PE hence income from sale of film rights is held to be taxable by way of income from Royalty.

6.4 The appellant stated that a Foreign Company is not liable to tax on the Income from the transactions done outside India. In this case the appellant has sold 100 Cinematographic films from his library abroad and executed the agreement/ delivered the films abroad hence transaction is neither done in India, nor money received in India hence it is not liable to tax in India and it is wrongly disclosed in the note to the Return of income as receipts from India for sale of films as it is not taxable under any of the provisions of the Act. In this respect the appellant relied on the Supreme Court judgement in the case of Ishikawajima Harima Heavy Ind. Ltd. 288 ITR 408 wherein the similar facts the Hon'ble Supreme Court held that for a Non-Resident to be taxed an income for services rendered.

6.5. The AR further stated that the appellant has a PE in India, the income from License of films for use of telecast on television is not taxable in India as the income is not earned through the PE situated in India nor the right, property in the films on which royalty is paid is connected with such PE. Further if PE exists then this income cannot be taxed as Royalty hence the taxing the income and as Royalty is arbitrary.

7. I have considered the facts of the case. The term Royalty as defined in Article 12(3) of the India Mauritius treaty is as under:

"1. Royalties arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.

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

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".

7.1 It is seen that the term "Royalty" is unambiguously defined above and the definition of Royalty in Article 12 of Indo Mauritius Treaty specifically includes payments of any kind received as a consideration for the use or right to use Cinematographic Films" hence the income on sale of films is taxable under the treaty.

7.2 In the present case the appellant is the licensor and is engaged in the production and acquiring rights of various television films including feature films and is copyright owner / holder (including broadcasting rights) of various Hindi feature films. The appellant has licensed to "UshaKiron Television" a proprietary concern of Shri Ramoji Rao (HUF) Hyderabad (India), the broadcasting rights of various films for Broadcast in the territory which includes India. The agreement of licensing is dated 7th April 2003. The period for which rights were assigned to M/s Usha Kiron Television is listed out in Schedule A of the said agreement and is two years and six months or period of expiry of rights whichever is earlier commencing from the date of delivery of the material of each film as mentioned in Schedule C of the said agreement. As per Clause 2 and Clause 12 of the said agreement the films were to be delivered in India, every month as per particulars shown in the schedule C of the said agreement, on a month to month basis. It is also mentioned in Clause 21 of the said agreement that this agreement is

subject to the jurisdiction of the courts of India at Hyderabad and Mumbai.

7.3 Thus in view of the above facts, it can be seen that the appellant had erroneously stated in its submissions that

"..... Foreign Company is not liable to tax on the Income from the transactions done outside India. In this case the appellant has sold 100 Cinematographic films from his library abroad and executed the agreement/ delivered the films abroad hence transaction is neither done in India, nor money received in India hence it is not liable to tax in India and it is wrongly disclosed in the note to the Return of Income as receipts from India for sale of films as it is not taxable under any of the provisions of the Act."

7.4 A perusal of the agreement shows that

- The agreement is executed in India*
- The broadcasting rights sold are of films which are meant for broadcast in India (Clause 2 r/w Schedule A and D)*
- That the films are delivered in India (Clause 12)*
- That the agreement itself is subject to the provisions of the Indian Arbitration & Conciliation Act 1996 (Clause 20) and the jurisdiction of Indian Courts (Clause 21)*

7.5 This being the case the payment received for the assignment of broadcasting rights falls squarely within the definition of 'Royalty' as per the Article 12(3) of the DTAA as per which "....such royalties may also be taxed in the Contracting State in which they arise". There is thus no infirmity in the order of the AO holding the said receipt as Royalty. Thus there is no merit in the argument of the appellant and the appeal of the appellant in respect of Ground No 8 is thus dismissed."

5. The Assessee, being aggrieved with the impugned order, challenged the decision of the Ld. Commissioner in upholding the decision of Ld. AO in treating the transaction qua sale/license for broadcasting of Hindi feature film, as "royalty income" taxable as per Article 12 of the Treaty, mainly on following grounds/reasons:

"That the Ld. CIT(A) erred in law and facts in upholding sale of film rights as royalty income of Rs. 1,00,00,000/- taxable as per Article of Indo-Mauritius treaty. The Reason given by him doing so is wrong and contrary to the facts of the case and against the provisions of law. Further the Ld. Commissioner failed to appreciate that the Assessee has no PE in India. Therefore, sale of film rights not taxable by way of income from "royalty."

5.1 The Ld. Counsel for the Assessee to buttress the grounds of appeal, has contended that the entire operation of the Assessee being a foreign telecasting company incorporated in Mauritius, is carried outside India only. The only activity the Assessee has carried out in India, was with regard to the canvassing and collection of advertisement revenue through its advertisement agents and granting broadcasting rights of 100 films to M/s. Usha Kiron Television for a period of two years and six months on a consideration of Rs.1,00,00,000/-, vide agreement dated 07.04.2003. The Assessee by filing its return of income on dated 31.10.2004 declared its income at Rs. "Nil" on the ground that the advertisement and subscription revenue were business profits, which cannot be taxed in India, as the Assessee did not have any business connection in India as per the Act, nor it had PE in India under the treaty and therefore the said income was not chargeable to tax in India.

5.2 The Ld. Counsel for the Assessee with regard to the sale of broadcasting film rights also claimed that said income was covered under the exclusionary clause in the definition of "royalty" under Explanation 2 to section 9(1)(vi) of the Act, which specifically excludes the sale of cinematographic films and therefore the Assessee has not offered the license fee/sale of broadcasting of film rights to tax in India.

5.3 The Ld. Counsel for the Assessee further submitted *"that the scheme of law knitted around the payments in the nature of "royalty" is governed by the provisions of section 9(1)(vi) of the Act, which defines the term "royalty" inter-alia to mean "all or any rights (including the granting of license) in respect of any copy right/literacy artistic or scientific work including films or video tapes for use in connection with television or tapes for use in connection with radio broadcasting, but not including consideration for the sale, distribution or exhibition of cinematographic films"*.

5.4 The Ld. Assessee's Counsel further claimed that the provision of section 9(1)(vi) of the Act shall come in play only when there is transfer of exclusive rights, such as right to modify, alter, change of the copy right. Broadcasting rights are distinguished from copy right, since broadcasting

rights entail telecasting the content, on an as-is basis and does not involve any right to copy, modify or alter the content, hence would fall outside the purview of the definition of "royalty".

5.5 The Ld. Assessee's Counsel further claimed that the Assessee has only given a non-exclusive license to broadcast the films to M/s. Usha Kiron Television, therefore such transaction falls outside the purview of definition of "royalty".

5.6 The Ld. Assessee's Counsel in support of aforementioned contentions/claim, also relied on various judgments, which we will consider, while giving findings on the issue(s) involved.

6. On the contrary, the Ld. D.R. has claimed that on perusal of the Agreement referred to above shows that the agreement was executed in India. The broadcasting rights sold, were of films, meant for broadcasting in India (clause 2 read with schedule A & D). The films were delivered in India (clause 12). Agreement itself is subject to the provisions of the Indian arbitration and Conciliation Act, 1996 (clause 20) and the jurisdiction of Indian Courts (clause 21).

6.1 The Ld. D.R. further claimed that in the Article 12 of the treaty, the term "royalty" is defined as under:

"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."

6.2 The Ld. D.R. further claimed that phrase "for the use" or "the right to use" has two different connotations, in so far as the phrase "for the use of" would simply mean a simple/plain usage and the phrase "the right to use" would mean a right to use, as well as to modify, change, add, delete, edit etc.

6.3 The Ld. D.R. further claimed that in the present case, the Assessee had transferred rights to use 100 Hindi feature films for a period of 30 months for broadcasting in the territory of India to M/s. Usha Kiron Television. The Assessee always had absolute ownership over the feature films but only for the contract period transferred the rights to use the cinematographic films to M/s. Usha Kiron Television for a limited period, thereby earning "royalty" income.

6.4 The Ld. D.R. further claimed that judicial decision cited by the Assessee in the case of CIT (IT-2) vs. MSM Satellite, Singapore PTE Ltd. is distinguishable from the fact of the present case, as the then Assessee in that case was operating TV channels for exhibition to various programs, entertainment and educational programmes or otherwise. The then Assessee had never owned such programs but only had right to air/telecast them through various cable operators. On the contrary, in the present case, the Assessee owned all 100 Hindi feature films and it gave to the Licensee, the right to use such films to broadcast in the latter's TV channels namely ETV for a period of 30 months. The Assessee retained the right with it, to telecast such feature films, on all channels of Doordarshan and ZEE network and Alpha network.

6.5 The Ld. D.R. further claimed that perusing the schedule 'C' of the agreement dated 07.04.2003, it is observed that some of the dates mentioned in column "licensee should telecast before the expiry date" goes beyond the period of two years and six months viz. 06 October 2093, 16 October 2093, 01 March 2094, 05 October 2095 and many other such dates and thus the Assessee has given perpetual rights to the Licensee.

6.6 The Ld DR at last submitted that on the aforesaid facts and circumstances and contentions raised, it can easily be construed that both the Authorities below have rightly treated the transaction involved as "royalty income".

7. The Assessee in rejoinder reiterated its claim as made before the authorities below and this Court. The Ld. Counsel for the Assessee in response to the question raised by the Ld. D.R. specific to the dates of expiry dates of the movies/films, has contended/clarified that the Assessee has right over such films over the period mentioned in Schedule-C, however, the Assessee had given broadcasting rights only for two years and six months to M/s. Usha Kiron Television. There appears to be typographical error in the headings of Schedule 'C'. It should be read as **"licensee should telecast before expiry date"**. Thus, there is no perpetual right in the films given to the licensee. In any event, assuming that the perpetual rights are given, the same would amount to sale of the films, which is specifically excluded from the definition of "royalty" in section 9(1)(vi) of the Act. Therefore, in that eventuality as well, the payment cannot be regarded as "royalty".

8. Heard the parties, perused the material available on record and given thoughtful consideration to the rival claims of the parties. Admittedly, the Assessee and M/s. Usha Kiron Television had entered into with an agreement of license dated 07.04.2003 for granting of licensing right for telecasting of 100 Hindi feature films, as mentioned in Schedule 'C' and on certain terms and conditions and tenure, as mentioned in schedule 'A' on a consideration of Rs.1,00,00,000/- in total payable in installments as mentioned in schedule 'B'. For brevity, ready reference and completeness, the relevant clauses for granting license for broadcasting of Hindi feature films, are reproduced herein below:

"(2) The licensor hereby grants and agrees to give delivery of 100 (one hundred only) Hindi feature films particulars of which are mentioned in the Schedule-C, annexed to this agreement, to the licensee on the basis of non-exclusive license for broadcasting the said films through all channels of E-TV Network. The licensor agrees to deliver the said film in India and the licensee hereby accepts and agrees to take delivery of the said films, on the terms contained in Schedules-B & C herein and annexed to this agreement. E-TV Network shall mean and include the present E-TV channels and also those channels that would become operational in course of time. Thus, the licensee shall be entitled to telecast the said films on all television channels of E-TV Network, present and, future within the said territory.

(3) The licensor shall be entitled to telecast or cause to telecast the said films on all channels of Doordarshan and on the channels of ZEE Network and ALPHA Network subject to the conditions contained herein. The licensor however shall not assign or transfer in any manner the satellite rights of the said films to any other third party, but there shall be no bar on the licensor assigning/licensing the said films to third parties located outside India, provided that the territory of such assignment/license shall not cover the territory of India.

(4) The period of license is 2(two) years and 6(six) months commencing from the respective dates of delivery of the said films to the licensee. The licensee shall be entitled to 3 (three) natural telecasts of each of the said films on all the channels of E-TV Network, viz., present and future channels, with 1 (one) repeat telecast for each natural telecast of the said films within 24 hours of the first telecast, on the same channel.

(5) The agreed and total consideration for grant of satellite rights in respect of 100 (One hundred only) Hindi feature films more particularly mentioned in Schedule-C annexed hereto shall be Rs.1,00,00,000/- (Rupees one crore only).

(6) The consideration in respect of each film delivered by the licensor to the licensee shall be payable in US Dollars. The licensor agrees to accept and the licensee agrees to pay consideration, as equivalent to the value of Indian Currency prevailing at the time of making payment by the licensee to the licensor. The said sum shall be payable by the licensee in accordance with the payment terms as provided in Schedule-B annexed hereto and against delivery of the said films. The payment shall be remitted to the bank account of the licensor, as mentioned below.

Banker Trust Company, New York
for credit to Account No.04-088-484 of
State Bank of India, Hong Kong
for further credit to Account No.04200-300013
of Asia Today Limited

SCHEDULE- A

(Annexed to the agreement of license dated 7-4-2003)

Date of agreement of assignment	7th April, 2003
Date of commencement of the rights in respected of each film	From the date of delivery of each film to the licensee by the licensor
Licensor	M/s. Asia Today Limited
Licensee	Ushakiron Television
Movies Title	As mentioned in Schedule C
Number of Movies	100 (one hundred only)
Language	Hindi
Total Consideration	Rs.1,00,00,000/- (Rupees one crore only) as per particulars shown in schedule -B.
Territories	India and the Foot prints of the

	satellite transponder hired by the licensee as per Schedule-D.
Rights granted	Non Exclusive satellite rights only
Period	2 (two) years and Six months or period of expiry of rights whichever is earlier Commencing from the date of delivery of the material of each film as mentioned in Schedule-C.
No. of Telecasts	3 (three), telecasts during the period of License with one natural repeat telecast for each of the original telecast within 24 hours of the first telecast on the present and future channels of E-TV Network.
Delivery of the films	As mentioned in schedule-B & C.
Payment of consideration	As mentioned in schedule-B.

WITNESS:*(1) for ASIA TODAY LIMITED**(1) Signature*

Name & Address

*(DEEPAK JAIN)**Director**Licensor**(2) Signature**(2) for USHAKIRON TELEVISION*

Name & Address

*(K BAPINEEDU CHOWDARY)**Attorney Licensee"*

9. "Royalties" as defined in Article 12(3) of the Treaty, is reproduced herein below:

"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."

10. The definition of "royalty" is also prescribed in the Explanation-2 to section 9(1)(vi) of the Act, 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- (i) the transfer of all or any rights (including the granting of a licence) in respect of a patent, invention, model, design, secret formula or process or trade mark or similar property; (ii) the imparting of any information concerning the working of, or the use of, a patent invention, model, design, secret formula or process or trade mark or similar property; (iii) the use of any patent, invention, model, design, secret formula or process or trade mark or similar property; (iv) the imparting of any information concerning technical, industrial, commercial or scientific knowledge, experience or skill; (iva) the use or right to use any industrial commercial or scientific equipment^{10a} but not including the amounts referred to in section 44BB;] (v) the transfer of all or any rights (including the granting of a licence) in respect of any copyright, literary, artistic or scientific work including films or video tapes for use in connection with television or tapes for use in connection with radio broadcasting, but not including consideration for the sale. distribution or exhibition of cinematographic films: or (vi) the rendering of any services in connection with the activities referred to in sub-clauses (1) to [(iv), (iva) and] (v)."

11. According to the agreement, the Assessee has licensed the non-exclusive distribution rights for broadcasting the Hindi feature films through all channels of ETV network for a period of two years and six months, commencing from the date of delivery of each film to the licensee M/s. Usha Kiron Television by the licensor (Assessee) in the territories of India. From the aforesaid clauses of the agreement, it has become clear that the Assessee has given non-exclusive satellite rights for broadcasting of 100 Hindi feature films, as detailed in Schedule 'C' annexed to the agreement for a period of two years and six months or period of expiry of rights, whichever is earlier commencing from the date of delivery of the material of each film, as mentioned in schedule 'C'.

12. We also deem it appropriate to address the specific objection raised by the Ld. D R. with regard to the tenure fixed i.e. 06.10.2093, 16.10.2093, 01.03.2094, 05.10.2095 etc. as mentioned in schedule 'C' of the agreement dated 07.04.2003. As we observed observe that in schedule 'A' the specific tenure is prescribed i.e. two years and six months or period of expiry of rights, whichever is earlier commencing from the date of delivery of the material of each film, as mentioned in schedule 'C',

which goes to show that the license for broadcasting of Hindi feature films to M/s. Usha Kiron Television as mentioned in schedule 'C' was given for a period of two years and six months only, commencing from the date of delivery of the material of each film as mentioned in schedule 'C' of the said agreement, but not later than the expiry date, as prescribed in schedule 'C'.

This fact is also clear from the specific finding of the Ld. Commissioner in para 7.2 at page no.22 of the impugned order, wherein the Ld. Commissioner has categorically held as under:

“That the agreement of licensing is dated 07.03.2003. The period for which rights were assigned to M/s. Usha Kiron Television is listed out in schedule 'A' of the said agreement and is of two years and six months or the period of expiry of rights, whichever is earlier and commencing from the date of delivery of the material of each film as mentioned in schedule 'C' of the said agreement”.

Therefore, the contention raised by the Ld. D.R that some of the dates mentioned in column “licensee should telecast before the expiry date, goes beyond the period of two years and six months, cannot be construed contrary in the aforesaid observation and analyzations made above.

13. Now coming to main controversy we observe that both the Authorities below treated the said transaction as “royalty income” whereas the Assessee has claimed that the said transaction falls outside of the purview of “royalty”. On the contrary, the Ld. DR has claimed the transaction as “royalty”. Thus, the following question emerge:

“Whether the license of broadcasting rights of films to M/s. Usha Kiron Television for a particular period, amounts to “royalty” and/or such transaction falls within the definition of “royalty” or not ?”

14. We observe that the jurisdictional High Court in the case of CIT (IT) Vs. MSM Satellite (Singapore) PTE Ltd. (2019) 106 taxmann.com (Bom.)

has also dealt with the identical issue, wherein the broadcasting rights of the channels, were given by the Assessee but not any right to use or exploit any copy right. The Hon'ble High Court ultimately held that the broadcasting service charges, cannot be categorized as "royalty" by observing and holding as under:

"2. This appeal is filed by the revenue to challenge the judgment of Income Tax Appellate Tribunal. Following questions are presented for our consideration: -

'a. Whether on the facts and circumstances of the case and in law, the tribunal is correct in deciding the issue in favour of the assessee relating to the addition of income as per rule 10A on account of "Advertisement Revenue" and "Distribution revenue" ignoring the fact that the assessee has a PE in India?

b. Whether on the facts and circumstances of the case and in law, the ITAT is correct in not treating M/s Multi Screen Media Pvt. Ltd. (MSM India as Permanent establishment of the assessee in terms of Article 5 of Double Taxation Avoidance Agreement between India and Singapore?

c. Whether on the facts and circumstances of the case and in law, the ITAT erred in not appreciating that the assessing officer has correctly assessed as distribution receipt as 'Royalty Income'?

6. So far as question (c) is concerned, we notice that the Tribunal in the impugned judgment has also made a reference to the earlier assessment proceedings of this assessee. It appears that in the earlier occasion the Commissioner (Appeals) had held that the payment of distribution charges, cannot be termed as payment for copyright, but can at best be a business income. We notice that on earlier occasions the Tribunal had considered a similar issue which was framed as under :-

'Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in not appreciating that the Assessing Officer has correctly treated the distribution receipt as 'Royalty Income'?

The Tribunal had dealt with this issue, by making an extensive reference to the order of CIT (Appeals). Relevant portion of this judgment of the Tribunal dated 28th August, 2015 reads as under:-

"7. Regarding distribution revenue also, the Ld. CIT (A), though discussed the issue in detail that it is not "royalty", decided the issue in favour of the assessee, following the past history of the assessee from assessment year 1999-2000 to 2004-05, wherein this

issue was decided in favour of the assessee. The relevant observation and finding of the CIT (A) is as under:

11. After considering the rival contention and above facts, we find that, so far as the issue relating to addition on account of 'advertisement revenue' and 'distribution revenue' the same stands decided in favour of the assessee by the Tribunal, which has been affirmed by the Hon'ble High court in AY 1999-2000 and also in subsequent years. As regards the issue of 'distribution receipts' treated as royalty income, we find that this has been treated as business income and such a finding or conclusion now have attained finality, as pointed out by the Ld. Senior Counsel. Thus finding of the CIT (A) on both the issues are affirmed and ground no.1 & 2 are dismissed."

7. From the documents supplied to us, we could not gather any judgment of the High Court in case of this assessee or of any other assessee, dealing with such an issue. We have therefore applied our mind independently and heard learned counsel for the parties on this question.

8. Broadly stated, the facts are that the Assessee-MSM Satellite (Singapore) Private Limited is a Singapore based company and operates T.V. Channels for exhibition of various programmes; entertainment, educational or otherwise. SET India Private Limited through layers of multi system operators and cable operators collects subscription charges to enable individual customers to view the channels and the programmes telecast on such channels. The revenue so collected from large number of customers would eventually reach the assessee after adjustment of intermediary charges paid to the different agencies. The revenue contends that these payments made to the assessee are in the nature of royalty for use of copyright. The assessee contends that the same is a business income and under no circumstances can be categorized as royalty payment.

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 Dy. CIT v. Set India (P.) Ltd. [IT Appeal No. 4372 (Mum.) of 2004, dated 25-4-2012]. 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 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. CTT(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. In fact, 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 calendar 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 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 stress 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 work 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 Articles.'

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

15. We further observe that co-ordinate Bench of the Tribunal in the case of ADIT Vs. Warner Brother Picture INC (2012) 17 taxmann.com 171 has also dealt with the identical issue, as involved in the instant case qua right/license for broadcasting of films and ultimately held the amount received by the Assessee qua transfer of rights of films or video tapes for use in connection with television or tapes for radio broadcasting and/or distribution rights/exhibition of cinematographic films, cannot be considered as "royalty" within the meaning of the Act or under the DTAA entered into between the India and USA, by observing and holding as under:

"6) On the above contentions of the assessee the learned CIT (A) passed detailed order inter alia holding that the amount is not taxable, in following Paragraphs, as under:

"3.14 In this regard it first becomes imperative to analyse the definition of Royalty in the Explanation 2 to Section 9(1)(vi) of the Income Tax Act 1961. The relevant portion of the said section is extract below:

Section 9

(1) The following incomes shall be deemed to accrue or arise in India: -

(i)..... (v)

(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 service utilized 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 a non-resident where the royalty is payable in respect of any right, property or information used or service utilized 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 – For the purpose of this clause, “royalty” means consideration (including any lump sum consideration but excluding any consideration which would be the income of the recipient chargeable under the head “Capital gains”) for-

(i) The transfer of all or any rights including the granting of a license) in respect of a patent, invention, model, design, secret formula or process or trade mark or similar property:

(ii) The imparting of any information concerning the working of, or the use of a patent, invention, model, design, secret formula or process or trade mark or similar property;

(iii) The use of any patent, invention, model, design, secret formula or process or trade mark or similar property;

(iv) The importing of any information concerning technical, industrial, commercial or scientific knowledge, experience or skill; (iv a) The use or right to use any industrial, commercial or scientific equipment but not including the amounts referred to in section 14BB;

(v) The transfer of all or any rights (including the granting of a license) in respect of any copyright, literary, artistic or scientific work including films or video tapes for use in connection with television or tapes for use in connection with radio broadcasting, but no including consideration for the sale, distribution or exhibition of cinematographic films: or

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

3.15 A simple analysis of the said definition in clause (v) of the said Explanation would reveal that the consideration for the sale, distribution or exhibition of cinematographic films is kept outside the purview of the definition of royalty unless royalty arises on the transfer of all or any rights (including the granting of license) in respect of any copyright, literary, artistic or scientific work including films or video tapes for use in connection with the television or tapes for use in connection with radio broadcasting.

.....

3.17 I have carefully considered the submissions of the learned Counsel. I have also gone through the Agreement. A perusal of the assessment order shows that it is not the case of the Assessing Officer that the said Royalty has arisen on account of transfer of rights of films or video tapes for use in connection with television or tapes for use in connection with radio broadcasting. In fact, the Assessing Officer has accepted that as per the agreement dated February 01, 2005 executed by the assessee with Warner Bros Pictures (India) Pvt. Ltd (WBPIPL), the assessee has licensed the India distribution rights in respect of its films to WBPIPL, in consideration for the payment of the agreed license fees. This being the fact of the case, it transpires that such consideration for the sale, distribution or exhibition of cinematographic films cannot be taxed as Royalty on account of specific exclusion given in Explanation 2(v) of section 9(1)(vi) per the Income Tax Act 1961.

3.18 The next question for consideration is if the royalty received by the assessee is not covered by the definition of royalty either under the Act or the DTAA whether the same is not liable to tax or it is covered by the general clause (i) of section 9(1). In this regard the learned Counsel reiterated the following submissions which have been referred to earlier in this order:

(A) When there is a special provision dealing with a specific type of income such a provision would exclude the general provision.

(B) Appellant does not have business connection in India. Hence the appellant has no business income in India.

(C) Even if it is held that the royalty is income arising from business connection in India, the same is not taxable as the appellant does not have a PE in India.

(D) The royalty received by the appellant is not taxable in India as the appellant does not carry out any business activity in India.

(E) Since the royalty is paid at arm's length the income of the appellant is not taxable in India.

3.19 Regarding the submission at (A) the learned Counsel invited my attention to Paragraphs 9 & 10 of the written submission dated October 31, 2008 filed before the Assessing Officer and argued that when there is a special provision dealing with a specific type of income, here royalty, such a provision would exclude the general provision dealing with the income accruing or arising out of any business connection in India. In this regard he relied on the following decisions:

(1) Metro Satellite Ltd Vs. Income Tax Officer Companies Circle-ix Ahd. 121 ITR 311 (Guj)

(2) CIT v. Cape Vulcan Inc. 167 ITR, 884 (Mad)

(3) United Commercial Bank Ltd Vs. CIT West Bengal 32 ITR, 688 (SC)

(4) *CIT Bombay City – III Vs. Smt. T.P. Sidhwa* 133 ITR, 840 (BOM)

3.20 I have carefully considered the submissions of the learned Counsel but do not find force in the same. Once it is held that the royalty is not covered by its definition under the Act, the next question to be considered is whether the said income is taxable under any other provision of the Act. As royalty is not specifically exempted under any provision of the Act I hold that the same is covered by the general provision of clause (i) of section 9(1). This argument of the learned Counsel, is therefore, rejected.

.....

3.27. I have carefully considered the submissions of the learned Counsel. I have also gone through the Agreement. On the basis of the facts mentioned above I am of the opinion that the License (WBPIPL) does not constitute a PE of the appellant. This is also not disputed by the Assessing Officer as he has himself assessed the income of the appellant as royalty. The Assessing Officer has not invoked the provisions of Paragraph 6 of Article 12 of the DTAA which provides that if the beneficial owner of the royalty carries on business through a permanent establishment and the royalty is attributable to such PE, it will be taxed under Article 7 as business profits. Since the appellant does not have a PE in India, the royalty received by the appellant is not taxable in India. Since the income of the appellant (royalty) is held not taxable in India, other arguments of the appellant in this behalf are not adjudicated upon.

.....

3.30 In this regard the legal position is that if royalty received by the appellant is not taxable under the Act, then there is no need to refer to the provision of the DTAA. There is overwhelming judicial precedence on the issue that if an income is not taxable under the domestic law, the same cannot be taxed under the DTAA as the DTAA does not create a charging provision to assessee an income which is not otherwise chargeable to tax under the domestic law. The Apex Court has, in no uncertain terms held in the case of *P.V.A.L. Kulandagan Chettiar* 267 ITR 654 (SC) that

“The provisions of such agreement cannot fasten a tax liability where the liability is not imposed by a local Act. Where tax liability is imposed by the Act, the agreement may be resorted to either for reducing the tax liability or altogether avoiding the tax liability” (Emphasis supplied).

3.31 However, the Assessing Officer has held that the definition in the India USA treaty makes the royalty received by the appellant as taxable in India. Assuming this to be the case, the matter still does not end here. The law on this issue is that

where a matter is governed by the provisions of the Act and also by a DTAA, the provisions of the DTAA should prevail unless the statutory provision is more beneficial to the assessee. In this regard the reliance placed by the appellant on the Circular No. 333 dated 02/04/1982 137 ITR (St) of CBDT and the two case laws of CIT v V.R.S.R.M. Firm 208 ITR, 400 (Mad) and Advance Ruling P.No.13 of 1995 228 ITR 487 (AAR) is perfectly in order. So by the application of the said legal principles we will arrive at the same conclusion viz. that consideration for the sale, distribution or exhibition of cinematographic films not being taxable as 'royalty' under the Income Tax Act cannot be brought to tax as per the DTAA when such consideration has been kept out of the purview of the said DTAA.

3.32 Hence in view of the above facts and circumstances of the case discussed above and respectfully following the legal position applicable to the appellant's case, it is held that the royalty amount of `3,88,02,093/- received by the appellant from WBPIPL is not taxable as Royalty either under the Indian Income Tax Act or the DTAA. Having held so the other submissions of the appellant pertaining to arm's length payments, and service rendered outside India need not require any discussion".

7) Learned Departmental Representative referring to various findings of the CIT (A) submitted that the CIT (A) erred in not considering the provisions of section 5 of the ACT and Article 7 of Treaty while deleting the above as he has held that there is a business connection and accordingly the income is taxable under the Indian Income Tax Act Sec. 9(1)(i) r.w.s Section 5 (2).

8) However, the learned Counsel submitted that by virtue of exclusion under section 9(1)(vi) from the definition of royalty by Explanation 2 of the said provisions and by virtue of Article 12(3) which also excludes the sale, distribution and distribution of cinematograph films from the definition of royalty, income is not taxable either under the Indian Income Tax Act or under the DTAA. He then referred to the findings of the Hon'ble I.T.A.T in the case of Asia Vision Home Entertainment (P) Ltd vs. ACIT 41 DTR (Mumbai) (Trib) 492) wherein on similar payment paid under license agreement for exhibition of the programmes for rental and sale through distribution, it was held that the said amount fall outside the purview of the royalty within the meaning of Section 9(1)(vi) and therefore, no TDS is required to be made from such payment and consequently no disallowance under section 40(a)(i) was called for. Similar view was also held in the case of ACIT vs. Manish Dutta in 2011 – TMI-204199-Income Tax Appellate Tribunal Mumbai in ITA No.4017/Mum/2010 dated 17.6.2011 wherein the ITAT held that in view of the specific provision of Explanation 2, clause (v) of section 9(1)(vi) of the Act consideration for exhibition of cinematographic films are excluded from the purview of the definition of royalty. It was fairly submitted that the assessee has no rights for broadcasting on Radio and TV and therefore, the principles established in the above decisions would apply to the facts of the case. He then referred to the order of the CIT (A) to submit that on the facts, there is no dispute with reference to

the issue that the amounts are not taxable under section 9(2)(vi) and Article 12(3) of the DTAA. He submitted that the assessee has objection with reference to the findings of the CIT (A) that the provisions of section 9(1)(i) which are general provisions would apply which the assessee was objecting to in the cross appeal. He referred to the decision of the Hon'ble Gujarat High Court in the case of Meteor Satellite Ltd vs. Income Tax Officer, 121 ITR 311 (Guj.) to submit that Clause (vi) of section 9(1) deals with a specific type of income, namely, income by way of royalty, whereas cl.(i) of section 9(1) is a more general provision which deals with all incomes accruing or arising, whether directly or indirectly, through or from, any business connection in India. Income by way of royalty is a species or one of the categories of a larger class mentioned in clause (i) of section 9(1) and, hence, the specific instance having been provided by clause (vi), one has to look at that clause (vi) and not to the more general provision of clause (i) of section 9(1). Similarly, income by way of fees for technical assistance, which is covered by clause (vii). Principle of excluding the general clause has to be applied in this case and once the case falls under clause (vi) and is exempted from the operation of clause (vi) by virtue of the proviso, then we cannot refer to clause (i) which is a general clause.

8.1 Ld. Counsel also relied on the decision of the Hon'ble Madras High Court in the case of CIT vs. Copes Vulcan Inc. 167 ITR 884 (Mad) wherein with reference to the proviso to section 9(1)(vii) similar view was held and because of application of section 9(1)(vii) receipt was excluded by the proviso, the said payment cannot be automatically fall within the section 9(1)(i) of the I.T. Act. It was the submission that when there is a special provision dealing with special type of incomes accruing or arising out of any business connection, it is not possible to apply the general principles in section 9(1)(i). It was submitted that in view of the proviso and principles established, the amount on royalty received by the assessee Non-Resident Company is not taxable and therefore, the order of the CIT (A) to that extent is to be upheld.

9) **We have considered the rival contentions and examined the facts on record. There is no dispute with reference to the fact that the assessee has entered into agreement with Warner Brothers Pictures India (P) Ltd outside India and the amounts were also received outside India. There is also no dispute with reference to the fact that the definition of royalty under section 9(1)(vi) Explanation 2 to (v) excludes the payment received with reference to sale, distribution and exhibition of cinematographic films. There is also no dispute with reference to the provisions of DTAA entered into by India with USA, notified on 20th December, 1990, that the term royalty used in the Article 12 does not include payment of any gain received as consideration for the use of any copyright or literary, artistic or scientific work including cinematographic films or work on films, tape or other means of production for use in connection with Radio or T.V. broadcasting. In view of this specific provisions, the amount received by the assessee cannot be considered as royalty as was done by the Assessing Officer while invoking the Article 12(2) of the DTAA for taxing the amounts. To that extent the findings of**

the CIT (A) are correct and there is no need to deviate from such findings. In view of this the amount received by the assessee cannot be considered as royalty within the meaning of Indian Income Tax Act or under the DTAA.

10) The issue can be examined in another dimension whether the amount is taxable under the Indian Income Tax Act in India if not as royalty, but as business income. The CIT (A) finding is that assessee has a business connection in India. However, he considered that there is no PE to the assessee, the fact of which was also accepted by the Assessing Officer as he has invoked only Article 12(2) and not considered the amounts business income as per PE proviso. It was the contention of the learned Departmental Representative that the assessee having business connection, the findings of which was given by the CIT (A), the amount cannot be excluded without examining 'PE proviso' provisions of the DTAA. In this regard the learned Counsel's submission that under the Income Tax Act as well as under the provisions of DTAA the transaction between the assessee and Indian Company to whom license was granted by virtue of the agreement cannot be considered as Agency PE as the Indian assessee is not exclusively dealing with the assessee and referred to the receipts from another company 20th Century Fox to submit that the assessee is also dealing with the other Non Resident Companies, so assessee cannot be considered as Agency PE within the definition of Permanent Establishment.

11) We have examined this aspect also. As rightly held by the CIT (A) even if income arises to the Non-Resident due to the business connection in India, the income accruing or arising out of such business connection can only be taxed to the extent of the activities attributed to permanent establishment. In this case, the assessee does not have any permanent establishment in India. Since the Indian company who obtained the rights is acting independently, Agency PE provisions are not applicable to the assessee company. The assessee relied on the decision of *Ishikawajima-Harima Heavy Industries Ltd vs. Director of Income Tax 2007-(158)-TAXMAN 0259-SC* that incomes arising to a Non-Resident cannot be taxed as business income in India, without a PE. As the assessee does not have any permanent establishment in India, the incomes arising outside Indian Territories cannot be brought to tax. Therefore, there is no need to differ from the findings of the CIT (A) and accordingly the Revenue Appeal is dismissed.

12) In the cross objection, the assessee is contesting about the findings of the CIT (A) that the general principles of section 9(1)(i) will apply in the absence of inclusion under section 9(1)(vi) and relied on the two decisions of the Gujarat and Madras High Courts referred (supra). Even though the cross objection was raised on findings of CIT(A), in view of the observations given above, we are of the opinion that the issue is only academic and does not require any specific adjudication.

13) In the result, Revenue's appeal as well as the Cross Objection filed by the assessee are dismissed."

16. We further observe that in the case of ESS Distribution (Mauritius) SNC ET Compagnie **Vs.** DDIT (145 taxmann.com 267) the co-ordinate Bench of the Tribunal also dealt with an issue and the treaty as involved in this case, wherein the entity being resident of Mauritius distributed sports related television broadcasting rights through network of Indian cable operators and earned revenue from subscription and therefore the co-ordinate Bench of the Tribunal has held that the then Assessee was merely granted broadcasting right through distribution agreement but not any copy right and therefore such subscription/distribution revenue received by the Assessee, would not be in the nature of "royalty", either u/s 9(1)(vi) of the Act or under article 12(3) of the DTAA.

17. We further observe that the Hon'ble High Court of Delhi in the case of CIT Vs. ESPN Star Sports, Mauritius SNC ET Compagnie Ltd. (2024) 160 taxmann.com 389 affirmed the aforesaid Tribunal's decision in the case of ESS Distribution (Mauritius) SNC ET Compagnie Vs. DDIT, {supra}, by observing and holding as under:

"1. The Commissioner of Income-tax impugns the decision rendered by the Income-tax Appellate Tribunal dated 21 November 2022 in ITA 382/2023 for Assessment Year [AY 2003-2004], ITA 381/2023 [AY 2004-2005], ITA 380/2023 [AY 2009-2010], ITA 344/2023 [AY 2011-2012], ITA 336/2023 [AY 2012-2013], ITA 773/2023 (AY 2014-2015) and ITA 333/2023 [AY 2014-2015]. The following questions are proposed for our consideration: -

"2.1 Whether on the facts and in the circumstances of the case and in law, the Ld. ITAT is correct in holding that assessee did not have a dependent agent PE (DAPE) in India by observing that the transaction between the assessee and ESPN India is limited to conferring of right to distribute the channels of ESPN Star Sport in India through cable operators in an independent manner when it has been brought out that the assessee had complete control over sale of agent, bore commercial risk on behalf of the agent thereby not appreciating the principle of substance over form?"

2.2. Whether on the facts and in the circumstances of the case and in law, the Ld. ITAT is correct in holding that the assessee did not have a fixed place PE in India by observing that there was nothing to suggest that the assessee had any control over the business/premises of ESPN India when it has been clearly brought out that the assessee and ESPN India has common

management and identical functions and for all practical purposes the distinction between the two was insignificant?

2.3 Whether on the facts and in the circumstances of the case and in law, the Ld. ITAT is correct in holding that assessee has no business connection in India and is not taxable in terms of section 9(1) of the Income-tax Act when the assessee had complete control over sale of the agent and bore commercial risk on behalf of the agent?

2.4 Whether on the facts and in the circumstances of the case and in law, the Ld. ITAT is correct in holding that if the purported PE is remuneration on arm's length as subsidiary company, no further attribution of profit be made on foreign company, when the functions performed by the subsidiary company are much more what has been reported before TPO Analysis?

2.5 Whether on the facts and in the circumstances of the case and in law, the Ld. ITAT is correct in holding that no further attribution of profit be made on foreign company when the TP analysis did not adequately reflect the FAR borne by the Indian enterprise, for additional functions/risk performed by it as DAPE?"

2. The appeals emanate from agreements entered into between ESS Distribution (Mauritius) S.N.C. ET Compagnie³, ESPN Star Sports and ESPN Software India Private Limited. ESS Distribution (Mauritius) holds a valid Tax Residency Certificate and claims benefits in terms of the provisions contained in the India -Mauritius Double Taxation Avoidance Agreement. The subject matter of the agreements executed by it with ESPN Star Sports and ESPN India pertain to distribution of Star Sports and ESPN channels in India. Both ESPN Star Sports and ESPN India are designated as Distributors under the two agreements.

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8. While dealing with the issue of royalty, the ITAT has on a detailed review of the contract terms and the facts as placed before it recorded the following conclusions: -

"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 (vw);*

(b) *in the case of a computer programme:*

(i) *to do any of the acts specified in clause (a);*

2[(ii) *to sell or give on commercial rental or offer for sale or for commercial rental any copy of the computer programme:*

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,-*

3[(1) *to reproduce the work in any material form including--*

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

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

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

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

4[(1) to make a copy of the film, including—

(A) a photograph of any image forming part thereof, or

(B) storing of it in any medium by electronic or other means.)

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

(ii) to communicate the film to the public

(e) in the case of a sound recording.

(1) to make any other sound recording embodying it 6f including storing of it in any medium by electronic or other means);

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 v. 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 Nonresident 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 in 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)(w) of the Income-tax Acts well as Article 12 of the Treaty. Accordingly, the payment is not in the nature of Royalty but in the nature of business income."

9. In order to appreciate the arguments which were addressed before us, we deem it apposite to briefly notice the following salient clauses as they appear in the agreement between ESPN Star Sports and ESS Distribution (Mauritius):-

"1(a) ESS hereby appoints Distributor as distributor to distribute and, or make available for distribution (subject to ESS's prior written approval, not to be unreasonably withheld or delayed) the international ESPN network programming service (the "ESPN Service") throughout the Area effective April 1, 2002 through March 31, 2003(the "Term") and Distributor hereby, accepts such appointment. The Term shall automatically renew for successive periods of one year each unless ESS gives written notice to Distributor of its intent not to renew at least forty-five days prior to the scheduled expiration of the original or then applicable renewal Term.

(b) Distributor acknowledges and agrees that the above appointment is limited and qualified to the extent of solely making the ESPN Service available in the Area to approved sub distributors in strict accordance With the terms and conditions herein. Distributor further agrees that nothing in this Agreement shall provide Distributor with any rights whatsoever to the ESPN Service, nor convey, confer, grant, assign or otherwise provide Distributor with copyright, title or any other proprietary or ownership interest in or to the ESPN Service or any elements thereof. All rights in the content of the ESPN Service are expressly reserved by ESS. Distributor shall not use, authorize or permit the use of the ESPN Service, or any element thereof, for any purpose other than the purpose expressly specified under this Agreement. Notwithstanding anything contained in this Agreement, if the Distributor becomes aware of any Service, the Distributor shall inform ESS of such infringement. ESS may require Distributor to take, either by itself or through a person authorized by it, all reasonable steps to end such infringement, including initiating appropriate legal action on behalf of ESS.

(c) Distributor agrees and undertakes to distribute the ESPN Service provided by ESS in its entirety, without any alteration, editing, dubbing, scrolling or ticket tape,

substitution or any other modification, addition, deletion or any other variation whatsoever.

(2) Neither Distributor nor ESS shall have, or shall hold itself out as having, the right or authority to bind the other or to assume, create or incur any liability or any obligation of any kind, express or implied, against or in the name of or on behalf of the other.

3(a) Distributor shall comply with all laws, rules and regulations, and & shall obtain all necessary licenses and permits.

(b) Distributor acknowledges that the names and marks of ESPN STAR Sports and ESPN (and the names of certain programs which appear in the ESPN Service) are the exclusive property of ESPN, Inc., ESS and its program suppliers and that Distributor has not acquired and will not acquire any proprietary rights therein by reason of this Agreement. Subject thereto and to the terms of this Agreement, ESS grants to the Distributor a non-exclusive license to use the said names and marks on advertising and promotional material, notepapers, stationery and related materials used by the Distributor for its business activities under the Agreement. ESS shall have the right to approve any of Distributor mentioning or using of such names or marks and publicity about ESS or the programming included in the ESPN Service. Distributor shall not publish or disseminate any material which violates any restrictions imposed by ESS or ESPN, Inc. program suppliers and disclosed to Distributor by ESS. Distributor shall be entitled to allow sub-distributors appointed by it to distribute the ESPN Service to use the names and marks of ESPN STAR Sports and ESPN to the extent permitted hereunder. Upon ESS's request, Distributor shall promptly discontinue, and shall procure all sub-distributors to promptly discontinue, use of any material or material containing any of the names and marks of ESPN STAR Sports and ESPN.

4(a) In consideration of the appointment of the Distributor to distribute the ESPN Service in the Area, Distributor shall pay ESS (subject to deduction, if required, of all applicable taxes), the aggregate of the following amounts:

(1) a minimum guaranteed amount of USD 9,500,000 (United States Dollars Nine Million Five Hundred Thousand only) per annum; and

(ii) an amount which is equal to 88% of the excess of the total gross revenues of the Distributor per annum over

and above USD 9,500,000. For this purpose gross revenues shall mean the amount due to the Distributor from distributing the ESPN Service in the Area as reduced by any taxes that are withheld in the Area.

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7(c) ESS will indemnify Distributor from and against any and all claims, damages, liabilities, costs and expenses arising out of the distribution, pursuant to this Agreement, of the ESPN Service to the extent that such claims, damages, liabilities, costs and expenses are: (i) based upon alleged libel slander, defamation or invasion of the right of privacy (as such concepts are limited and defined by New York and United States federal law), or violation or infringement of copyright or literary or dramatic rights or the requirements of applicable laws within the Area arising out of the content of the ESPN Service (other than music performing or music synchronization rights); and (ii) based upon the distribution of the ESPN Service as furnished by ESS without alterations, modifications, variations, additions or deletions by Distributor. It is hereby agreed and declared that ESS makes no representation or warranty as to whether or not the ESPN Service or any of its content requires any governmental consent or approval within the Area to distribute.

(e) Except as herein provided to the contrary, neither Distributor nor ESS shall have any rights against the other party hereto for claims by third persons or for the non-operation of facilities or the non-furnishing of the ESPN Service if such non operation or non-furnishing is due to failure of equipment, action or claims by any third person, labour dispute or any cause beyond such party's reasonable control."

10. A similar agreement came to be executed between ESS Distribution (Mauritius) and ESPN India. That agreement incorporates the following salient clauses: -

"1(a) ESS Distribution hereby appoints Distributor as distributor to distribute and, or make available for distribution (subject to ESS Distribution's prior written approval, not to be unreasonably withheld or delayed) the international ESPN network programming service (the "ESPN Service") throughout the Area effective April 1, 2002 through March 31, 2003 (the "Term") and Distributor hereby, accepts such appointment. The Term shall automatically renew for successive periods of one year each unless ESS Distribution gives written notice to Distributor of its intent not to renew at least thirty days prior to the Scheduled expiration of the original or then applicable renewal Term.

(b) Distributor acknowledges and agrees that the above appointment is limited and qualified to the extent of solely making ESPN Service available in the Area to approved sub-distributors in strict accordance with the terms and conditions herein. The terms of appointment of each sub-distributor shall provide that if this Agreement is terminated, then at ESS Distribution's election, (i) the arrangement with such sub-distributor may

be terminated; or (ii) the rights and obligations of distributor under the arrangement with such sub-distributor may, automatically, be assigned to ESS Distribution. Distributor further agrees that nothing in this agreement shall provide Distributor with any rights whatsoever to the ESPN Service, nor convey, confer, grant, assign or otherwise provide Distributor with copyright, title or any other proprietary or ownership interest in or to the ESPN Service or any elements thereof. Distributor shall not use, authorize or permit the use of the ESPN Service or any element thereof, for any purpose other than the purpose expressly specified under this Agreement. Notwithstanding anything contained in this Agreement, if the Distributor becomes aware of any infringement or threatened infringement in the Area of any intellectual property in the ESPN Service, the Distributor shall inform ESS Distribution of such infringement. ESS Distribution may require Distributor to take, either by itself or through a person authorised by it, all reasonable steps to end such infringement including initiating appropriate legal action on behalf of ESS Distribution.

(c) Distributor agrees and undertakes to distribute the ESPN Service provided by ESS Distribution in its entirety, without any alteration, editing, dubbing, scrolling or ticker tape, substitution or any other modification, addition, deletion or any other variation whatsoever.

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2. Neither Distributor nor ESS Distribution shall have, or shall hold itself out as having, the right or authority to bind the other or to assume, create or incur any liability or any obligation of any kind, express or implied, against or in the name of or on behalf of the other.

3(a) Distributor shall comply with all laws, rules and regulations, and shall obtain all necessary licenses and permits.

(b) Distributor acknowledges that the names and marks of ESPN STAR Sports and ESPN (and the names of certain programs which appear in the ESPN Service) are the exclusive property of ESPN, Inc., ESPN STAR Sports and their program suppliers and that Distributor has not acquired and will not acquire any proprietary rights therein by reason of this Agreement. Subject thereto and to the terms of this Agreement, ESS Distribution grants to the Distributor a non-exclusive license to use the said names and marks on advertising and promotional material, notepapers, stationery and related materials used by the Distributors for its business activities under the Agreement. ESS Distribution shall have the right to approve any of Distributor mentioning or using of such names or marks and publicity about ESPN STAR Sports or the programming included in the ESPN Service. Distributor shall not publish or disseminate any material which violates any restrictions imposed by ESPN STAR Sports or ESPN, Inc. program suppliers and disclosed to Distributor by ESS Distribution. Upon ESS's request, Distributor shall promptly discontinue the use of any material or material containing any of the names and marks of ESPN STAR Sports and ESPN."

11. Pursuant to the rights conferred, ESPN India entered into distribution agreements with various affiliates in India. One of the Service Contracts so executed and which forms part of our record contains the following stipulations pertaining to the license:-

"B. THE SERVICE

The Licensor is offering two services viz. ESPN Network Programming Service ("ESPN Service") and Star Sports International Programming Service ("STAR Sports Service"). The Services are available in two packages to the Affiliate namely, a Bouquet, In which both ESPN Service' as well as Star Sports Service will be provided ("Bouquet") and Alacarte under which package the Affiliate can choose to take either ESPN Service or Star Sports Service. The rates for both these packages have been fully communicated to and understood by the Affiliate. The Affiliate has indicated his choice by ticking the relevant box.

VI. GENERAL TERMS AND CONDITIONS

1. NON EXCLUSIVE RIGHT

The Licensor grants to the affiliate the non-exclusive right to distribute the Service in the area for reception by subscribers of the Distribution System(s) (referred to in Article II) whether directly, or through its sub operators and sub affiliates/cable operators of the Affiliate listed at Annexure I, collectively referred to as the Affiliate's Subscribers. For purposes of this Agreement, sub-operators', 'sub affiliates/cable operators' shall mean and include and person or entity that receives the service from the affiliate or from a person permitted by the affiliate to provide the service and who re-transmits the same for reception by subscribers. The licensor may terminate this Agreement, at any lime, without liability, upon prior written notice to the affiliate, if he believes in good faith and reasonable judgment that it is threatened by or may be subject to legal, governmental or other adverse action under applicable treaties, tariffs, laws, Rules, regulations or orders, that may restrict the right of the licensor to provide the Service or any part thereof to the Affiliate, or limit the licensor's right or authorization to offer the service. The Licensor may deactivate/disconnect the Service hereunder provided and/or terminate this Agreement at any time without liability, by prior written notice to the Affiliate. If the Licensor exercises its discretion to discontinue the Service in the area. For purposes of this Agreement, subscriber shall include any person or entity that receives the Service for exclusive viewership at a location within the area from the affiliate, or from sub-operators, sub-affiliate/cable operators of the Affiliate and does not further transmit the Service to any other person.

2. OBLIGATIONS OF THE AFFILIATE

The Affiliate shall at its own cost and expense cause the service to be received only from the designated satellite(s) and shall ensure distribution Systems on a separate, dedicated channel(s) (the 'Channel(s)') for reception by all its Subscribers. The Affiliate shall be responsible, at its sole cost and expenses for obtaining all licenses and permits necessary for the foregoing. The Affiliate shall use its best efforts to maintain a high quality of signal transmission for the service and shall take all other necessary steps to ensure that (i) the service is received only by subscribers who pay the full applicable subscription fees for such Service and (ii) no location for which the applicable, subscription fees is not paid shall be capable of viewing the service. The Affiliate further agrees and undertakes that it shall cause continuous distribution of the service to all

its Subscribers during Its telecast without blacking it out or interfering with it in any manner whatsoever.

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4. REPRESENTATIONS AND WARRANTIES OF THE LICENSOR

The Licensor represents and warrants the Affiliate that it has the requisite power and authority to enter into this Agreement and to fully perform its obligations hereunder. It is clarified that licensor's authority to Licence the Service is derived from agreements granted to the Licensor by ESPN Star Sports ('ESS') for the ESPN Service and for the Star Sports Service (the ESS Agreements"). Affiliate expressly acknowledges and agrees that upon termination of either of the ESS Agreements by ESPN Star Sports, this agreement shall stand terminated as concerns the service for which the ESS Agreement(s) has been terminated.

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15.3 No Agency

Neither Affiliate nor Licensor shall be or hold itself out as the agent of the other under this Agreement. No Sub-operators/Subscribers shall be deemed to have any privity of contract or direct contractual or other relationship with Licensor by virtue of this Agreement or by Licensor's delivery of the Service of the Affiliate."

12. We also deem it apposite to notice Articles 5 and 12 as contained in the India - Mauritius DTAA and which are reproduced hereinbelow: -

"Article 5 — Permanent establishment

1. *For the purposes of this Convention, the term "permanent establishment" means a fixed place of business through which the business of the enterprise is wholly or partly carried on.*
2. *The term "permanent establishment" shall include—*
 - (a) *a place of management;*
 - (b) *a branch;*
 - (c) *an office;*
 - (d) *a factory;*
 - (e) *a workshop;*
 - (f) *a warehouse, in relation to a person providing storage facilities for others;*
 - (g) *a mine, an oil or gas well, a quarry or any other place of extraction of natural resources;*
 - (h) *a firm, plantation or other place where agricultural, forestry, plantation or related activities are carried on;*
 - (i) *a building site or construction or assembly project or supervisory activities in connection therewith, where such site, project or supervisory activity continues for a period of more than nine months.*
 - (j) *the furnishing of services, including consultancy services, by an enterprise through employees or other personnel engaged by the enterprise for such purpose, but only where activities of that nature*

continue (for the same or connected project) for a period or periods aggregating more than 90 days within any 12-months period.]

3. Notwithstanding the preceding provisions of this article, the term "permanent establishment" shall be deemed not to include:

- (a) the use of facilities solely for the purpose of storage or display of merchandise belonging to the enterprise;*
- (b) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage or display;*
- (c) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise;*
- (d) the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise or for collecting information for the enterprise;*
- (e) the maintenance of a fixed place of business solely—*
 - (i) for the purpose of advertising,*
 - (ii) for the supply of information,*
 - (iii) for scientific research, or*
 - (iv) for similar activities,**which have a preparatory or auxiliary character for the enterprise.*

4. Notwithstanding the provisions of paragraphs (1) and (2) of this article, a person acting in a Contracting State for or on behalf of an enterprise of the other Contracting State [other than an agent of an independent status to whom the provisions of paragraph (5) apply] shall be deemed to be a permanent establishment of that enterprise in the first-mentioned State if:

- (i) he has and habitually exercises in that first-mentioned State, an authority to conclude contracts in the name of the enterprise, unless his activities are limited to the purchase of goods or merchandise for the enterprise; or*
- (ii) he habitually maintains in that first-mentioned State a stock of goods or merchandise belonging to the enterprise from which he regularly fulfils orders on behalf of the enterprise.*

5. An enterprise of a Contracting State shall not be deemed to have a permanent establishment in the other Contracting State merely because it carries on business in that other State through a broker, general commission agent or any other agent of an independent status, where such persons are acting in the ordinary course of their business. However, when the activities of such an agent are devoted exclusively or almost exclusively on behalf of that enterprise, he will not be considered an agent of an independent status within the meaning of this paragraph.

6. The fact that a company, which is a resident of a Contracting State controls or is controlled by a company which is a resident of the other Contracting State, or which carries on business in that other Contracting State (whether through a permanent establishment or otherwise) shall not, of itself, constitute either company a permanent establishment of the other.

1	<i>Royalties arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.</i>
2	<i>However, such royalties may also be taxed in the Contracting State in which they arise, and according to the law of that State, but the tax so charged shall not exceed 15 per cent of the gross amount of the royalties.</i>
3	<i>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.</i>
4	<i>The provisions of paragraphs (1) and (2) shall not apply if the recipient of the royalties, being a resident of a Contracting State carries on business in the other Contracting State in which the royalties arise, through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the right or property in respect of which the royalties are paid is effectively connected with such permanent establishment or fixed base. In such a case, the provisions of article 7 or article 14, as the case may be, shall apply.</i>
5	<i>Royalties shall be deemed to arise in a Contracting State when the payer is that Contracting State itself, a political sub-division, a local authority or a resident of that State, where, however, the person paying the royalties whether he is a resident of a Contracting State, or not, has in a Contracting State a permanent establishment in connection with which the liability to pay the royalties was incurred, and such royalties are borne by such permanent establishment, then such royalties shall be deemed to arise in the Contracting State in which the permanent establishment is situated.</i>
6	<i>Where, by reason of a special relationship between the payer and the recipient or between both of them and some other person, the amount of royalties paid, having regard to the use, right or information for which they are paid, exceeds the amount which would have been agreed upon by the payer and the recipient in the absence of such relationship, the provisions of this article shall apply only to the last-mentioned amount. In that case, the excess part of the payments shall remain taxable according to the laws of each Contracting State, due regard being had to the other provisions of this Convention."</i>

13. Taking up the issue of royalty first, it is manifest from a reading of Article 12(3) that payments would fall within its ambit provided they represent "consideration for the use of, or the right to use, any copyright of literary, artistic or scientific

work.....". As is evident from a reading of the agreement conditions extracted hereinabove, there was no transfer of copyright. The agreement that ESS Distribution (Mauritius) came to execute conferred no right with respect to copyright upon the Indian entities. This aspect, in any case, is liable to be answered in favour of the assessee bearing in mind the decision of the Supreme Court in Engineering Analysis Centre of Excellence (P). Ltd. v. CIT [2021] 432 ITR 471/[2022] 3 SCC 321 and which had clearly held and recognized the distinction between a broadcasting right and a copyright as flowing from Sections 14 and 37 of the Copyright Act, 1957. This quite apart from the undisputed fact that insofar as the present respondent is concerned, even the question of broadcasting rights does not arise since it was in no manner connected therewith."

18. From the aforesaid judgments, analyzations and relevant provisions of the Treaty and the Act, it has become clear that sub-clause-v of explanation 2 to section 9(1)(vi) of the Act has carved out an exception with regard to consideration for sale, distribution or exhibition of cinematographic films from the purview of the definition or consideration as "royalty". In simple meaning, consideration received for sale, distribution or exhibition of cinematographic films, will not fall within the meaning and domain of "royalty" as enshrined in the explanation-2 to clause-vi of section 9(1) of the Act and therefore shall not be subjected to taxation as "royalty" as has wrongly been subjected to by the AO and the Ld. Commissioner. We further observe that vide Finance Act, 2020 w.e.f. 01.04.2021, the consideration for sale, distribution or exhibition of cinematographic films has been omitted from the explanation-2 (clause-v) which means exception carved out for exclusion of consideration for sale, distribution or exhibition of cinematographic films has been removed and therefore w.e.f. 01.04.2021 the consideration for such sale, distribution and exhibition of cinematographic films would fall under the domain of "royalty". As the language of the provisions of clause-v of the explanation-2 of section 9(1)(vi) of the Act is very much clear and therefore no interpretation is needed. We further observe that in the instant case, the Assessee being a non-resident company has granted non-exclusive broadcasting rights to licensee without any right to use, modification, rectification, exploitation, copyright etc. The Hon'ble Co-

ordinate Bench of the Tribunal in the case of ADIT (International Taxation) Vs. Warner Brother Pictures INC (supra) has also made it clear that in simple analysis of the definition in clause v of the explanation-2 of section 9(1){vi} of the Act, would reveal that the consideration for the sale, distribution or exhibition of cinematographic films is kept outside the purview of the definition of "royalty" **unless** "royalty" arises on the transfer of all or any rights (including the granting of license) in respect of any copyright, literary, artistic or scientific work, including films or video tapes for use in connection with the television or tapes for use in connection with the radio broadcasting.

Further, the definition of "royalty" as enshrined in Article 12, para-3 also talks about any copyright of a literary, artistic or scientific work including cinematographic film or films or tapes used for radio or television broadcasting, which goes to show that assigning a right of copyright of a cinematographic film is mandatory for considering the transaction as "royalty" but not otherwise. Even otherwise, Article 12(3) of the Treaty mandates that the payments would fall within its ambit provided they represent "consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work Admittedly, in the instant case, no such right of copyright was transferred by the Assessee to the Licensee, as it appears from the agreement under consideration. Therefore, the amount of Rs.1,00,00,000/- received by the Assessee for granting a license for cinematographic rights for broadcasting of Hindi feature films, even as per provisions of Article 12(3) of the Treaty, cannot be categorized as "royalty". We further reiterate that judgment of the Jurisdictional High Court in the case of CIT-3 Vs. MSM Satellite (Singapore) Pte. Ltd. (supra) is loud and clear, on the aforesaid aspect. Further the Hon'ble High Court of Delhi in the case of CIT Vs. ESPN Star Sports Mauritius case (supra) has not only dealt with the distribution rights to the Indian entities for broadcasting of programme through cable operators but also dealt with the identical Treaty, as involved in the instant case and ultimately held as under: -

"The payments would fall within the ambit of Article 12(3) of the treaty, provided the payment represent the consideration for use of or the right to use any copyright of literary, artistic or scientific work and without transferring the copyright the payment would not fall within the ambit of Article 12(3) of the treaty".

19. Coming to the instant case again, we observe that the Assessee had granted non-exclusive broadcasting rights of feature films to licensee, without any right of editing, modification, rectification, delays, interruptions, deletions, additions, copyright etc. and therefore the payment made by licensee for broadcasting rights cannot be categorized as "royalty" income for the use of any copyright. It is also a fact that the Assessee has also not parted with any of the copyrights for which the payment can be considered as a "royalty" payment. From the agreement, it is nowhere appearing that the Assessee has granted any other right qua modification, correction and/or assigning further any right of copyright of the feature films, to any third party and therefore consideration amount of Rs.1,00,00,000/- received on account of license granted for broadcasting of films to the licensee i.e. M/s. Usha Kiron Television for the period of two years and six months, in any sense cannot be termed as "royalty" within the parameters of "royalty" as defined in Explanation-2 to section 9(1)(vi) of the Act and/or under Article 12(3) of the Treaty and/or does not fall within the definition of "**royalty**". Thus, the **question posed is answered with 'negative'**.

20. Thus, the decision of the AO in taxing the amount of Rs.1,00,00,000/- and affirmation of the same by the Ld. Commissioner through impugned order, is liable to be set aside and hence the addition made by AO and affirmed by the Ld. commissioner is deleted by setting the orders passed by the Authorities below.

21. As we have has set aside the decisions of the authorities below in treating the transaction qua broadcasting rights of films, as '**royalty**', thus, are inclined not to delve into other issues raised by the Assessee, as the adjudication of the same, would prove futile exercise.

22. In the result, **Assessee's appeal is allowed.**

Order is pronounced on 24.12.2025 as per Rule 34(5) of the
Income Tax (Appellate Tribunal Rules) 1963.

Sd/-
(OMKARESHWAR CHIDARA)
ACCOUNTANT MEMBER

Sd/-
(NARENDER KUMAR CHOUDHRY)
JUDICIAL MEMBER

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.