

आयकर अपीलीय अधिकरण, 'ए' न्यायपीठ, चेन्नई  
**IN THE INCOME TAX APPELLATE TRIBUNAL**  
'A' BENCH, CHENNAI

श्री महावीर सिंह, उपाध्यक्ष एवं डॉ एम एल मीना, लेखा सदस्य के समक्ष  
**BEFORE SHRI MAHAVIR SINGH, VICE PRESIDENT AND**  
**Dr. M.L. MEENA, ACCOUNTANT MEMBER**

आयकर अपील सं./ITA Nos.: **1070, 1071, 1072 & 1073/CHNY/2018**  
निर्धारण वर्ष /Assessment Years: 2010-11, 2011-12, 2012-13 & 2013-14

**M/s. ESPN Digital Media (India)**  
**Pvt. Ltd.,**  
Unit No.A2, A Wing, 3<sup>rd</sup> Floor,  
Divyasree Chambers,  
'O'Shaughnessy Road, Langford  
Town, Bengaluru – 560 025.

**The DCIT,**  
v. International Taxation 1(1),  
Chennai.

**PAN: AABCC 2534R**

(अपीलार्थी/Appellant)

(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/Appellant by

: Shri Porus Kaka, Sr. Advocate for  
Shri Aditya Vora, Advocate

प्रत्यर्थी की ओर से/Respondent by

: Shri M. Murali, CIT

सुनवाई की तारीख/Date of Hearing

: 08.03.2022

घोषणा की तारीख/Date of Pronouncement

: 04.05.2022

**आदेश /O R D E R**

**PER BENCH:**

These four appeals by the assessee are arising out of different orders of Learned Commissioner of Income Tax (Appeals)-16, Chennai in ITA Nos.295/CIT(A)-16/2010-11, 294/CIT(A)-16/2012-12, 293/CIT(A)-16/2012-13 & 296/CIT(A)-16/2013-14 vide orders of even

date 31.01.2018. The assessments were framed by the DCIT, International Taxation 1(1), Chennai u/s. 201(1)/(1A) of the Income Tax Act, 1961 (hereinafter 'the Act') vide orders of even date 04.11.2016 for the assessment years 2010-11, 2011-12, 2012-13 & 2013-14.

2. The only common issue in these four appeals of assessee is as regards to the order of CIT(A) confirming the action of AO in holding the payments made by ESPN India constitutes 'royalty' falling u/s.9(1)(vi) of the Act and thereby, treating the assessee as 'assessee in default' for non-deduction of tax at source u/s.201(1) & 201(1A) of the Act. For this, assessee has raised exactly identically worded grounds in all the four years. The issue and facts, as conceded by both the sides, are exactly same, except the quantum. As the facts are identical in all the four assessment years and issue is exactly one, we will take the facts from assessment year 2010-11 in ITA No.1070/Chny/2018 and will decide the issue. The relevant grounds Nos.2.1 to 2.14 read as under:-

**2. Payment made should not be considered as royalty :**

2.1 The order passed by Hon'ble CIT(A) and the learned AO is bad in law and in facts, stating that the payments made by ESPN India constitute as royalty and is subject to withholding tax.

2.2 The Hon'ble CIT(A) and the learned AO has erred in holding that

ESPN India has obtained the right to use/ exploit the websites without appreciating that the Appellant, as per the reseller agreement, only purchases advertisement space from ESPN UK and resells the same to third parties/ advertisers in India.

2.3 The Hon'ble CIT(A) and the learned AO has failed to appreciate that the purchase of advertisement space by ESPN India was on principal to principal basis.

2.4 The Hon'ble CIT(A) and the learned AO has erred in holding that the Appellant was given direct access to servers for the purpose of uploading the advertisements.

2.5 The Hon'ble CIT(A) and the learned AO has erred in holding that the Appellant has used the servers of ESPN UK. The learned CIT(A) and the learned AO failed to appreciate that, ESPN UK renders the web publishing services using servers as the medium and sale of advertisement space cannot be deemed as providing a right to use of equipment or process as alleged by the learned CIT(A).

2.6 The Hon'ble CIT(A) and the learned AO has erred in holding that the Appellant uploads advertisement content on the website of ESPN UK without considering the submissions made by the Appellant that it only provides the advertisement content as per ESPN UK standards and the uploading on the websites are handled by third Party.

2.7 The Hon'ble CIT(A) and the learned AO has erred in holding that the Appellant has failed to deduct withholding tax without appreciating that the consideration paid to ESPN UK is not chargeable to tax in India as per section 9(1)(vi) of the Act read with India-UK Double Taxation Avoidance Agreement ["India- UK tax treaty"] and hence, withholding tax under section 195 of the Act does not arise.

2.8 The Hon'ble CIT(A) and the learned AO failed to appreciate that the consideration for purchase of advertising space neither falls under the definition of "royalty" under section 9(1)(vi) of the Act nor the same is in the nature of

- equipment royalty; or
- process royalty; or

- amounts to transfer of all or any rights, property or information under the Act.

2.9 The Hon'ble CIT(A) and the learned AO failed to appreciate that mere sale of advertising space which involves use of certain equipment, does not tantamount to payments being made for "consideration for the use of, or right to use of, equipment".

2.10 The Hon'ble CIT(A) and the learned AO failed to appreciate that the consideration for purchase of advertising space is not in the nature of "royalty" specified under Article 13 of India- U K tax treaty.

2.11 The Hon'ble CIT(A) and the learned AO has erred in holding Appellant as "assessee-in-default" for non-deduction of tax at source and initiated recovery proceedings under section 201(1)/(1A) of the Act.

2.12 The Hon'ble CIT(A) and the learned AO has erred in relying on the decision of Hon'able Madras High court in the case of Verizon Communication Singapore Pte Ltd., without appreciating the fact that the said decision is not applicable to the facts of Appellant's case.

2.13 The Hon'ble CIT(A) and the learned AO has erred in not relying on the judicial precedents quoted by the Appellant.

2.14 The Hon'ble CIT(A) while upholding the order of learned AO fails to give conclusive finding as to how such payments are taxable under the India UK tax treaty.

3. Brief facts relating to the issue are that the assessee ESPN India (erstwhile Cricinfo India Private Limited) is a private limited company incorporated in India entered into an agreement ("Re-seller agreement") dated 01.04.2010 with ESPN Limited, United Kingdom (in short "ESPN UK") for the resale of advertisement space on websites owned by it. The Re-seller agreement is for a term of one-year and was automatically renewed as per Clause 5.1 of the agreement and was valid for all the assessment years in the present appeal.

4. As per the Re-seller Agreement, ESPN India purchased advertising space on websites owned and hosted by ESPN UK on servers outside India, which was to be sold to advertisers who wished to advertise their product/services. For purchase of advertising space on the websites owned by ESPN UK which were then resold to advertisers, ESPN India was required to make payments to ESPN UK as per Clause 2 of the Re-seller Agreement. Based on the cost and revenue projections for the year, ESPN India furnishes requisition for website space with ESPN UK as per Clause 4.1 of the agreement.

5. The AO during the course of assessment of TDS returns noted that as to why the payment made by ESPN India should be considered as "Royalty" and hence liable for withholding tax. The AO noted that the word "use" in relation to provision of clause (iva) of Explanation 2 to Section 9(1)(vi) has to be understood in a broad sense for availing the benefit of the equipment in the present digital era. The context and combined use of the word "use" and "right to use" followed by the word "equipment" indicates that there must be a positive act of utilization, application and employment of equipment for the desired purpose. The assessee before AO replied that the Re-seller agreement is merely a sale of advertisement space, but the AO incorrectly states that ESPN India collects the advertisement material from Indian

advertisers and uploads the same in the web server thereby positively utilizing the web server. The submissions of the assessee that the majority of the ad sales by way of dynamic banner and video advertisements are uploaded on a third-party websites are ignored by the AO who reasoned that the mere uploading of the advertisement would be sufficient to constitute "use" without appreciating that the "use" must be in conjunction with the provision of industrial, commercial or scientific experience and no such experience or know how is transferred or provided by ESPN UK to ESPN India nor any industrial commercial or scientific equipment is given by ESPN UK and under the control of ESPN India in the present case. Further, the AO relies on the Explanations 5 and 6 to section 9(1)(vi) without appreciating that their retrospective introduction vide Finance Act, 2012 which only came into effect on 28<sup>th</sup> May, 2012 but with retrospective effect from 1 June 1976. The AO also relies on the UK-India DTAA, quoting as under:

3. For the purposes of this Article, the term "royalties" means:

- (a) payments of any kind received as consideration for the use of , or the right to use, any copyright of a literary, artistic or scientific work, including cinematography films or work on films tape or other means of reproduction for use in connection with radio or television broadcasting any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience; and
- (b) payments of any kind received as consideration for the use of, or the right to use, any industrial, commercial or scientific equipment,

other than income derived by an enterprise of a Contracting State from the operation of ships or aircrafts in international traffic.

6. Further, AO notes that in the 'modern era', the geographical location is immaterial and therefore where the server lies is not relevant. For this proposition, the AO relied on the decision of Hon'ble Madras High Court in the case of Verizon Communications Singapore v. ITO 361 ITR 575. The AO further holds that the consideration is for the provision of comprehensive services rendered and the payment falls within the definition of "Royalty" as prescribed in Article 13 of India-UK treaty since the payment was made for *"use of the equipment and the use of the process, provided by ESPN UK, whereby enabling ESPN India to upload the advertisements sourced from its Indian customer clearly amounts to Royalty"*. Finally, the AO ultimately holds the payments to be made for consideration for "transfer" of "all or any rights property or information" under section 9(1)(vi) of the Act. Aggrieved, assessee filed appeal before CIT(A).

7. The CIT(A) considered this issue, noted that consideration paid by ESPN, India to ESPN UK is royalty as per the Act for the reason that ESPN, India directly access and use the server for uploading the contents as contemplated by the word "use" in clause (via) of

explanation 2 to section 9(1)(vi) of the Act. Therefore, according to CIT(A), the payment made for these services will fall within the ambit of royalty and this payment is made as a consideration for transfer of all or any rights, property or information. The CIT(A) also discussed the issue as regards to taxability of this consideration as per India-UK DTAA and held that payment of any kind received as consideration for the use of or right to use, any industrial, commercial or scientific equipment and consideration paid for a process is taxable as royalty as per India UK DTAA. The relevant finding of CIT(A) reads as under:-

**“Consideration paid by ESPN India to ESPN UK is Royalty as per IT Act:**

The word "use" in relation to equipment occurring in clause (iv a) of explanation 2 to section 9(1) (vi) needs to be understood in a broad sense for availing the benefit of an equipment in the present digital era. The context and combined use of the two expressions "use" and "right to use" followed by the word "equipment" indicates that there must be some positive act of utilisation, application or employment of equipment for the desired purpose. If an advantage was taken from a sophisticated equipment, in the instant case a web server installed and provided by another entity namely ESPN UK, it means that ESPN India has "used" the equipment. ESPN INDIA collects the advertisement material from Indian advertisers and upload the same in the web server thereby positively utilise the web server for the desired purpose. ESPN India directly access and use the server for uploading the contents as contemplated by the word "use" clause (via) of explanation 2 to section 9(1) (vi). Therefore the payment made for these services it will fall within the ambit of "royalty" in clause (via) of Explanation 2 to section 9(1) (vi) of the Act. ESPN India has clarified before the AO that it has no power to upload the advertisements it only collects and forward the material to ESPN UK. The same is factually not

found to be correct because ESPN India in its submission has already clarified that(dated 23/01/2014 in para 1.3 and 2.6.6) that ESPN INDIA uploads the advertisements in the server therefore to that extent ESPN India enjoys the right or right to use the server/ equipment to upload the advertisement. The contention of ESPN India that double click a division of google Ireland only upload the advertisement is not acceptable because the ESPN India itself has submitted that the advertisement are uploaded by ESPN India.

In the Morden digital era, the geographical location of server does not make any sense because the advertisement were uploaded in ESPN UK and server as well as third parties ad server (in case of video ads and dynamic banner ads) and when an Indian browser surfs the web site he will only view Indian ads because the IP {Internet Protocol) address will identify the location a browser and display only those countries ads. Therefore it is immaterial where the server lies what is important is to decide what right to use or use of equipment was gained by ESPN India. The Hon'ble Madras high court in the case of Verizon communications (Reported in 39 Taxmann.com 70 (2013)) as held as under

"In a virtual world, the physical presence of an entity has today become an insignificant one; the presence of the equipment of the assessee, its rights and the responsibilities of the assessee, vis-a-vis the customer and the customers' responsibilities clearly show the extent of the virtual presence of the assessee which operates through its equipment placed in the customer's premises through which the customer has access to data on the speed and delivery of the data and voice sent from one end to the other. The Explanations inserted thus clearly point out that the traditional concepts relating to control, possession, location on economic activities and geographic rules of source of income recede to the background and are not of any relevance in considering the question under Section 9(1)(vi) read with Explanation 2. Thus, more so when it comes to the question of dealing with issues arising on account of more complex situations brought in by technological development by the use of and role of digital information, goods etc., and the foreign enterprise does not need physical presence at all in a country for carrying on business. (Para 101)."

Further, it is not in dispute that the consideration has been made for the comprehensive services rendered by way of digital data display in the

website of ESPN UK and that the same will fall within the meaning of royalty as envisaged u/s. 9 (1)(vi) of the Act. From the facts it is clear that the said ESPN UK allot the space to the ESPN India in its website and ESPN India will upload the advertisements, whenever any internet user surfs for certain webs, the advertisement would appear and its contents be displayed on the computer screen. The term property used in clause (i) of explanation 2 to section 9(1) (vi) includes patent, invention, model, design, secret formula or process and similar property. The clause covers income in the form of any consideration received for transfer of all or any rights or use of such property. The clause typically covers those cases where the user of such property gains a right over the same. In ESPN (INDIA) case, such condition relating to transfer of right over website is satisfied as ESPN India is conferred with right on the website to upload the advertisement on the website. The payments made by ESPN India to ESPN UK, is a payment made as a consideration for transfer of all or any rights property or information. Therefore payments made by ESPN INDIA TO ESPN UK clearly amounts to Royalty as per IT Act 1961.

#### **Taxability as per India-UK DTAA**

Payment of any kind received as consideration for the use of or the right to use, any industrial, commercial or scientific equipment and consideration paid for a process is taxable as Royalty as per India UK DTAA. The use of portal/Website(uploading of ads) was not possible without use of server and the server platform being a scientific equipment, the payment made for concurrent access to utilise the sophisticated services offered by the portal of ESPN UK or Third parties is covered by the expression "Royalty" as used in Article 13 of the DTAA. The payment was made for the use of the equipment and the use of the process which was provided by the ESPN UK, whereby enabling ESPN India to upload the advertisements sourced from its Indian customer clearly amounts to Royalty. Since the payments are royalty in nature the amount paid on such account would be liable to be taxed in India and ESPN India is liable to deduct the tax on such payment.

ESPN India's reliance on Yahoo India Private Limited is not acceptable as the facts are entirely different because in Yahoo's case, uploading and display of banner advertisement on its portal was entirely the responsibility of YHHL (Yahoo Holdings Hong Kong Limited) and assessee-company was only required to provide the banner advertisement to YHHL for uploading the same on its portal. The assessee had no right to access the

portal of YHHL and there was nothing to show any positive act of utilization or employment of the portal of YHHL by the assessee-company. But in the instant case it is ESPN India which upload the advertisement into the website of ESPN UK or third parties therefore the facts are not same.

In view of the foregoing, the payments made by ESPN India to ESPN UK is a payment made as a consideration for transfer of all or any rights property or information and therefore amounts to Royalty as per section 9(1) of the Income Tax Act, 1961. The appellant's reliance on various case laws referred therein are clearly distinguishable on facts. Hence reliance is taken on the statute provision. As the assessee has failed to deduct tax on the remittances made to ESPN UK towards purchase of advertisement space for the F.Y. 2009-10 relevant to Asst. Year 2010-11, therefore I upheld the action of the AO to treat an assessee in default u/s 201/201(1A) of the Act for non deduction of tax at source and liable to pay the tax and interest @ 10% amounting to Rs. 32,72,363/- and interest u/s 201(1A) @ 1% amounting to Rs.30,10,608/-. Thus the addition made by the AO for total of tax and interest u/s 201(1)/1A of the Act for Rs. 62,82,971/-is hereby confirmed. The ground of appeal on the issue is accordingly **dismissed**.

Aggrieved, assessee came in second appeal before Tribunal.

8. Ld Counsel for the assessee Shri Porus Kaka argued that consideration paid to ESPN UK as per the Re-seller Agreement is not chargeable to tax in India as Royalty as per section 9(1)(vi) of the read with the India-UK DTAA (the "India-UK DTAA"). It was contented that there is no right, property or information that is transferred from ESPN UK to ESPN India and the requirements of the definition of royalty under section 9(1)(vi) are as follows:

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

(vi) Income by way of royalty payable by –

.....

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) .....
- (iv) The imparting of any information concerning technical, industrial, commercial or scientific knowledge, experience or skill;

8.1 He argued that the above requirements are totally absent in the case of the Assessee as ESPN UK does not transfer any know-how to ESPN India and the consideration payable to ESPN UK is only for the purchase of “advertisement space”. There is no imparting of any information or transfer of any secret formula or process or trademark or similar property or any imparting of any information concerning technical, industrial, commercial, or scientific knowledge, experience or skill. He argued that the issue of uploading of advertisements and purchase of advertisements space is no longer *res integra*. A catena of decisions from the ITAT to the Hon’ble Supreme Court has considered that the issue that the same does not constitute royalty. Reliance was placed on the decision of the Tribunal in *Urban Ladder Home Décor Solutions Pvt. Ltd., v. ACIT*,

ITA No.615/Bang/ 2020, dated 17.08.2021 which on similar facts held that the expenditure towards advertisement was not in the nature of royalty. The Tribunal noted on perusing the relevant agreements that, *"both these non-resident companies are allowing the Assessee to use the facilities provided in their sites, which includes, inter alia, software facilities also. The purpose of compelling the Assessee to use those facilities, as could be inferred by us, is to create an environment of ease in creating the "advertisement content" to suit the platforms of Facebook or Mailchimp."* This is discussed in para 16 of the decision.

8.2 He further argued that, the Tribunal relying on the decision of the Hon'ble Madras High Court in the case of Skycell Communications Limited vs. DCIT, 251 ITR 53, noted that *"The above said decision clarifies the point that mere usage of a facility does not give rise to provision of any technical service. Under same analogy, mere usage of facility provided by the above said non-residents does not render the payments as "royalty payments", since the core point of parting of any "copyright" attached the said facilities does not arise at all."* The Tribunal followed the decision of the Hon'ble Supreme Court in Engineering Analysis Centre of Excellence Pvt. Ltd., v. CIT, 432 ITR 471, to hold as under:

20. In the case of Engineering Analysis Centre of Excellence (P) Ltd (supra), the issue related to “issuing of license to use software”, i.e., the software purchased by a person shall be used by the buyer for his own business purposes. Since the license was granted without parting the copy rights attached to the software, the Hon’ble Supreme Court held that the payments received by the non-resident software companies cannot be taxed as “royalty” under the provisions of DTAA and hence there is no requirement to deduct tax at source from the payment made to them by a resident assessee.

21. In the instant case, the recipients, i.e, M/s Facebook and Rocket Science group only allow the assessee to use their facilities for the purpose of creating advertisement content. The payment made to Amazon Web Services (AWS) is only for using the information technology facilities provided by it, that too the billing would depend upon the extent of usage of those facilities. In fact, these non-resident companies do not give any specific license for use or right to of any of the facilities (which include software) and those facilities are not going to be used for the use in the business of the assessee. The right to use those facilities, as stated earlier, is intertwined with the main objective of placing advertisements in the case of Facebook and Mailchimp. In the case of AWS, the payment is made only for using of information technology infrastructure facilities on rental basis. Hence the question of transferring the copy right over those facilities does not arise at all. The agreements extracted above also make it clear that the copyright over those facilitating software is not shared with the assessee. In any case, the main purpose of making payment is to place advertisements only and not to use the facilities provided by the non-resident companies. Thus the facilities provided by the nonresident companies are only enabling facilities, which help a person to place his advertisement contents on the platform of Facebook or to use MailChimp facility effectively. In case of AWS, the payment is in the nature of rent payments for use of infrastructure facilities.

22. Accordingly, we are of the view that the these non-resident recipients stand on a better footing than those assessees before the Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence Private Ltd (supra). Accordingly, following the ratio laid down by Hon'ble Supreme Court, we hold that the payments made to the above said three non-resident companies do not fall within the meaning of “royalty” as defined in DTAA.

The AO has not made out an alternative case that these payments are taxable as business income in India. Hence, there is no necessity for us to deal with that aspect.

23. We have noticed earlier that the Ld CIT(A) has followed the decision rendered by Hon'ble Karnataka High Court in the case of Samsung Electronics Co Ltd (supra). In the case of Engineering Analysis Centre of Excellence Private Ltd (supra), the decision rendered by Hon'ble Karnataka High Court in the above said case has been overruled by Hon'ble Supreme Court. Hence on this reasoning also, the decision rendered by Ld CIT(A) would fail.

24. In view of the foregoing discussions, we are of the view that the payments made by the assessee to the three non-resident companies referred above cannot be considered as "royalty payments" and hence they do not give rise any income chargeable in India under Indian Income tax Act in all the three years under consideration. In that view of the matter, there is no requirement to deduct tax at source from those payments u/s 195 of the Act. Hence the assessee herein cannot be considered as an assessee in default u/s 201(1) of the Act.

25. Accordingly, we set aside the orders passed by Ld CIT(A) for the years under consideration and direct the AO to delete the demand raised u/s 201(1) of the Act and also the consequential interest charged u/s 201(1A) of the Act in all the three years under consideration.

8.3 The ITAT in Myntra Designs Private Limited v. DCIT, ITA No.598/Bang/2020, dated 03.09.2021 has taken identical view. Further, Ld Counsel for the assessee relied on the decision of Kolkata Tribunal, wherein it has been held, even before the decision of Engineering Analysis (supra), in the case of ITO v. Right Florists (2013) 32 taxmann.com 99 (Kol. Trib.) relying on the decisions in Pinstorm Technologies (P) Limited vs. ITO (24

taxmann.com 345) (Mum) and Yahoo India (P) Limited vs. DCIT (2011) (11 taxmann.com 431) (Mum.) that the services rendered for uploading and display of banner advertisements on its portal was in the nature of business profit on which no tax is deductible at source. Based on the above, it was argued that Re-seller agreement with ESPN UK is merely for the sale of advertisement space. There is no right, property, information or scientific experience transferred in any manner. There is no copyright or right to reproduce either software or any other property granted and the assessee is a mere reseller and neither the website nor the server is placed under the control of the Assessee. It is therefore stated that the case of the assessee is covered by the decision of the Hon'ble Supreme Court in Engineering Analysis Centre for Excellence and the Tribunal's decision in Urban Ladder and Myntra Designs.

8.4 He also argued that, it was in fact to overcome the decisions of the Tribunal in Right Florists (supra), Yahoo India (supra) and Pinstorm (supra) that the provisions of Equalisation Levy ["EL"] were introduced as a separate enactment outside the Income Tax Act by the Finance Act 2016. As a result, if such consideration be considered Royalty, it would be contrary even to the legislature

intend and result in absurdity and lead to double taxation. The provisions of EL and the resultant absurdity.

9. On the other hand, Ld CIT-DR Shri M.Murali relied on the orders of the lower authorities. He argued that the payment of any kind received as consideration for use of or right to use, any copyright or a literary, artistic or scientific work, including cinematography films or work on films, tape other means of reproduction for use in connection with radio or television broadcasting, any patent, trade mark design or model or process or for information concerning industrial, commercial or scientific experience covers the definition of royalty. He stated that the ESPN, India has purchased advertising space from ESPN UK and sold it to third party for advertisements. The consideration for all the four years was for the purpose of purchase of advertisement space on which TDS was not deduction. The Id. CIT-DR stated that the consideration is paid for use in relation to equipment as envisaged under clause (via) of Explanation 2 to Section 9(1)(vi) is for availing the benefit of an equipment in the present digital era. He tried to explain the context and combined use of the two expressions 'use' and 'right to use' followed by the work equipment indicates that there must be some positive act of utilization,

application or employment of equipment for the desired purpose. For this, he explained that in the instant case, a web server was installed and provided by another entity namely ESPN UK and it is used by ESPN, India for a consideration. The ESPN collects the advertisement material from Indian advertisers i.e., third parties and upload the same in the web server thereby positively utilizing the web for the desired purpose. Therefore, the payment made for these services will fall within the ambit of royalty as falling in the provision of the Act i.e., clause (via) of explanation 2 to section 9(1)(vi) of the Act. The Id.CIT-DR referred to the order of CIT(A) page 17 last para and stated that the facts narrated in this para clearly covers those cases where the user of such property gains a right over the same. He explained that in the case of ESPN, India, the assessee, such condition relating to transfer of right over website is satisfied as ESPN, India is conferred with the right on the website to upload advertisements on the website. Hence, according to him, payment made by ESPN, India to ESPN UK clearly amounts to royalty and for this, the assessee should have deducted TDS u/s.195 of the Act. Hence, he supported the order of AO treating the assessee as assessee in default u/s.201(1) & 201(1A) of the Act for non-deduction of TDS. He also supported the order of CIT(A) and asked the Bench to confirm the orders of lower authorities.

10. We have heard rival contentions and gone through the facts and circumstances of the case. First of all, we try to understand the process of uploading of advertisements. The process explained by assessee is as under:-

**Process of uploading advertisements:**

- i. ESPN India purchases advertising space through the Re-seller agreement on websites owned by ESPN UK and subsequently sells the advertising space as a non-exclusive distributor to advertising agencies / third parties (“customers”) in India or outside India for publishing their advertisements the websites.
- ii. Three types of advertisements were sold by ESPN India to advertise, which were then published on the websites by ESPN UK (hosted on servers located outside India). The three types of advertisements are dynamic banner advertisements, video advertisements hard coded banner advertisements.
- iii. **Dynamic banner advertisements and video advertisements**, which formed the bulk of the advertisement sales made by ESPN India, the same are uploaded on third party websites who have contracted with ESPN UK, primarily Double Click, a unit of Google Ireland Limited, through which the advertisements uploaded on to the Google Ad Manager. For dynamic banner advertisements and video advertisements, ESPN India uploaded the ad creatives directly into the Google Ad Manager dashboard and did not access the ESPN UK websites of servers.
- iv. **Hard coded banner advertisements**, which formed a miniscule portion (approximately 1%) of the advertisement sales made by ESPN India. These types of advertisements were uploaded by ESPN India directly on the ESPN UK websites.
- v. The process of uploading the advertisements is as below:

- 1) Advertisement Re-seller Agreement signed between ESPN UK and ESPN India for purchase of space on websites owned by ESPN UK for which payment is made by ESPN India to ESPN UK.
- 2) Double Click, a division of Google Ireland Limited which allows the affiliates of ESPN UK to upload the advertisements on the Google Ad Manager.
- 3) ESPN India approaches advertisers for selling advertisements under the Advertisement Re-seller Agreement.
- 4) Advertiser provides advertisement in jpeg / video / any other format to ESPN India. No copy right in the advertisement is ever given to ESPN India or ESPN UK.
- 5) ESPN India uploads advertisements in the form of “Hard Coded Banners” on the websites owned by ESPN UK.
- 6) ESPN India uploads “Dynamic” and “Video” advertisements on the Google Ad Manager, owned by Google Ireland.
- 7) The Advertisement uploaded on the Google Ad Manager is placed on the website owned by ESPN UK by Google Ad Manager.

10.1 We noted the facts that the assessee ESPN India is a private limited company incorporated in India entered into an agreement (“Re-seller agreement”) dated 01.04.2010 with ESPN Limited, United Kingdom (in short “ESPN UK”) for the resale of advertisement space on websites owned by it. The Re-seller agreement is for a term of one-year and was automatically renewed as per Clause 5.1 of the agreement and was valid for all the assessment years in the present appeals. We have gone through the

reseller agreement and noted that the Re-seller agreement does not provide any "right to use" of any industrial, commercial, or scientific equipment nor is the website not the server that is placed under the control or domain of the Assessee, nor has a right, property, information or scientific experience been transferred in any manner whatsoever. The reliance placed on the decision of Right Florists (supra), which in paragraphs 15 holds that, *"The underlying principle is this. While website per se which is a combination of software and electronic data, does not constitute a tangible property as it cannot have a location which constitutes place of business, a web server, on which the web site is stored and through which it is accessible is a piece of equipment having a physical location and much location may thus constitute a "fixed place of business" of the enterprise that operates that server"*.

10.2 We have gone through the decision of the Hon'ble Delhi High Court in the case of Asia Satellite Telecommunications Co. Ltd., vs. DIT, 332 ITR 340, which held that *"by earmarking a space segment capacity of the transponder for use by the appellant, the applicant does not get possession (actual or constructive) or control of the equipment"*. The Chennai Tribunal in the case of Sical

Logistics Limited vs. ADIT, [2017] 78 taxmann.com 158 (Chennai – Trib.), relying on the decision of Asia Satellite (supra) held that, *“two things are necessary to christen a payment as a ‘royalty’ under Explanation 2 appended to clause (vi), which speaks about possession and control of the vessel in the given case, the assessee neither has control nor possession over the vessels”*.

10.3 The facts of the present case are that, the Re-seller agreement clearly states that the seller, ESPN UK, directly owns or has the rights to exploit numerous digital media websites and no such right has been transferred to ESPN India. Further Clause 4.2 of the Re-seller agreement, which confirms that ESPN UK controls the amount of advertising space available on the websites and the nature of advertisements permitted to be displayed. Hence, assessee does not in any way control the website / server, nor has been conferred with a right over any part of the website / server. We cannot accept the argument of Learned Department Representative, who at the hearing, pointed out the Assessee's submissions as encircled by the AO on page 10 of the order, stating that, *“ESPN UK or third party service provides do not provide specific access to / control over any particular server / website”*, which in fact supports the case of the assessee.

Therefore, in our view neither is any equipment given to the Assessee nor is it under the control of the Assessee. This is only a re-seller agreement of advertising space.

10.4 We noted that the AO and the CIT(A) placed reliance on Explanations 5 and 6 to section 9(1)(vi) of the Act, which are misplaced in light of the decision of the Hon'ble Supreme Court of India in Engineering Analysis Centre for Excellence, which has held that unilateral amendments expanding the definition of royalty under domestic law cannot apply to the Tax Treaties. The Tax Treaty containing the more favourable provision would be applicable. We also noted that the AO and the CIT(A) placed heavy reliance on the decision of the Madras High Court in Verizon Communications Singapore (supra). The relevant portions of the Verizon decision are reproduced as under:

*100.* The definition of “royalty” under DTAA and the Indian Income Tax Act are in parimateria. As rightly pointed out by the Revenue, Explanation 6 defines ‘process’ to mean and include transmission by satellite (including, up-linking, amplification, conversation for down-linking of any signal), cable, optic fibre or by any other similar technology, whether or not such process is secret. Thus, apart from the reliance and applicability of Clause (iva) that the payment is for the use or right to use of the equipment, the Tribunal held that payment for the bandwidth amounts to royalty for the use of the process. The Tribunal also pointed out that out by reason of the long distance, to maintain the required speed, boosters are kept at periodical intervals. Going by this

too, in any event, the payment received by the Assessee was rightly assessed as “royalty” and would constitute so for the purpose of DTAA.

101. Although the Assessee has submitted a voluminous paper book of case law, except for those that are discussed above, others were not touched by the Assessee and hence we have not considered it necessary to discuss these decisions. We may also note that except for making the submission on the question that the transaction is only a service and hence the consideration is not royalty, no arguments are made on permanent establishment or on the effect of the amendments. The Assessee had submitted a detailed written submission on the clauses in the agreement and on the legal submissions. After considering the same, with reference to the arguments made by the learned senior counsel on the issue of royalty, vis-a-vis, the agreement terms, we hold that the order of the Tribunal does not call for any interference. Although in his reply, learned senior counsel appearing for the Assessee pointed out to Article 5 on permanent establishment to contend that VSNL is not an agent and hence cannot be construed as a permanent establishment of the Assessee, no arguments are advanced on this account. In any event, in a virtual world, the physical presence of an entity has today become an insignificant one; the presence of the equipment of the Assessee, its rights and the responsibilities of the Assessee, vis-a-vis the customer and the customers' responsibilities clearly show the extent of the virtual presence of the Assessee which operates through its equipment placed in the customer's premises through which the customer has access to data on the speed and delivery of the data and voice sent from one end to the other. The Explanations inserted thus clearly point out that the traditional concepts relating to control, possession, location on economic activities and geographic rules of source of income recede to the background and are not of any relevance in considering the question under Section 9(i)(vi) read with Explanation 2. Thus, more so when it comes to the question of dealing with issues arising on account of more complex situations brought in by technological development by the use of and role of digital information, goods etc., the foreign enterprise does not need physical presence at all in a country for carrying on business. Hence, we do not think that we need to go in depth in this regard for the reason that we have already given herein before.

10.5 We are of the view that the facts of Verizon are completely different to that of the assessee's case. In Verizon, the Assessee was engaged in providing international connectivity services i.e. bandwidth services and telecom services for transmission of data and voice by way of International Private Leased Circuit ('IPLC'). IPLC is an end-to-end managed dedicated bandwidth service that provides internet service to customers for various applications and consisted of high-tech equipment. The assessee in Verizon had installed customized sophisticated equipment terminals at client locations to enable transmission of signals. Hence Hon'ble High Court held the payment for use of the equipment was to be categorized as royalty. However, that is not so in the present case. In the case of ESPN, no such equipment has been installed by ESPN UK in the premises of ESPN India or any customer of ESPN India to enable the display of ads on the website. ESPN India is merely making a payment under a reseller agreement towards purchase of ad spaces on websites belonging to ESPN UK. A website is not a tangible property and is certainly not high tech equipment.

10.6 In any case, we noted that the Hon'ble Supreme Court in Engineering Analysis (supra) has over ruled the decision of the

Hon'ble Madras High Court in the case of Verizon (supra) by expressly approving the decision of the Hon'ble Delhi High Court in New Skies and by holding that:

100. Also, any ruling on the more expansive language contained in the Explanations to section 9(1)(vi) of the Income-tax Act would have to be ignored if it is wider and less beneficial to the assessee than the definition contained in the DTAA, as per section 90(2) of the Income-tax Act read with Explanation 4 thereof and article 3(2) of the DTAA....

10.7 We further noted that Hon'ble Supreme Court in Engineering Analysis (supra) has held that the obligation to deduct tax cannot be retrospective as it leads to impossibility of performance at para 77-85 of the Supreme Court's decision. Similarly, in the present case, assessment years involved are Assessment Years 2010-11, 2011-12 and 2012-13 the law as amended by Finance Act 2012 was not present at the time when the assessee made the payments. Hence, we are of the opinion that withholding obligation cannot be imposed retrospectively as has been held by the Hon'ble Bombay High Court in the case of CIT v. NGC Networks (India) Pvt. Ltd., 432 ITR 326. Consequently, the reliance of the AO and the CIT(A) on Explanations 5 and 6 to section 9(1)(vi) of the Act and the decision of the Hon'ble Madras High Court in Verizon are wholly misplaced. The unilateral amendment by India, irrespective of its retrospective or clarificatory nature cannot override the more

beneficial terms under the UK-India DTAA, which ought to be applicable to the assessee's case.

10.8 Another aspect argued by Ld Counsel for the assessee is that in the present appeals is that the objective of the Equalisation Levy provisions was to levy a tax on online advertisements as it was otherwise not chargeable under the Act read with the Tax Treaties. It was a business profit and in the absence of any permanent establishment was not taxable in India as held by Right Florists (supra). Since the Tax Treaties would override any non-favourable clause under the Act, to overcome this, EL provisions were introduced as a separate stand-alone enactment by the Finance Act 2016 and outside the Act. Consequently, the above object and purpose was achieved by the introduction of section 164 (i) of the Finance Act 2016 that defines a "specified service" to mean *"online advertisement, any provision for digital advertising space or any other facility or service for the purpose of online advertisement and includes any other service as may be notified by the Central Government in this behalf"*. We noted that the Finance Act, 2016 recognizes providing advertising space as a 'specified service' subject to Equalisation levy. Consequently, to suggest that the sale of advertising space is 'royalty' would even be contrary to

the legislative intent, the objects and purpose of the EL provisions and result in absurdity and double taxation, as acknowledged by the Memorandum to the Finance Bill, 2016. We noted that the assessee has filed the details and Challans for the EL payment, which are annexed as a summary of the EL amount paid along with the date of payment and challan details:

| <b>Date</b>  | <b>Amount</b>    | <b>Challan No.</b> |
|--------------|------------------|--------------------|
| 16.09.2016   | 34,77,200        | 53571              |
| 07.10.2016   | 12,52,400        | 74227              |
| 06.04.2017   | 32,62,958        | 59,759             |
| 18.11.2017   | 18,29,823        | 50,684             |
| <b>Total</b> | <b>98,22,381</b> |                    |

10.9 In view of the above and based on the facts of the case and case laws discussed above, we are of the view that the consideration paid by ESPN India for purchase of advertisement space was not taxable during the period under consideration. The consideration paid by ESPN India is not for 'use' of equipment (server) or for any process nor imparting of any information concerning technical, industrial, commercial, or scientific knowledge, experience or skill. Further, no right has been conferred on ESPN India over the server or website belonging to ESPN UK and ESPN India is merely a reseller of advertisement space it purchases on ESPN UK's website. Further, the reliance of

the AO and CIT(A) on the unilateral retrospective amendments to section 9(1)(vi) of the Act to the definition of 'royalty' cannot override the more beneficial definition under Article 13(3) of the UK-India Tax Treaty. Hence, we allow the issue on merits in these appeals of assessee.

11. Accordingly, other grounds raised become academic as it is held that the consideration paid does not amount to 'Royalty'.

12. In the result, the appeals filed by the assessee in ITA Nos.1070, 1071, 1072 & 1073/Chny/2018 are allowed.

Order pronounced in the court on 4<sup>th</sup> May, 2022 at Chennai.

Sd/-

(डॉ एम एल मीना)

**(Dr. M.L. MEENA)**

लेखा सदस्य /ACCOUNTANT MEMBER

Sd/-

(महावीर सिंह )

**(MAHAVIR SINGH)**

उपाध्यक्ष /VICE PRESIDENT

चेन्नई/Chennai,

दिनांक/Dated, the 4<sup>th</sup> May, 2022

**RSR**

आदेश की प्रतिलिपि अग्रेषित/Copy to:

- |                        |                          |                              |
|------------------------|--------------------------|------------------------------|
| 1. अपीलार्थी/Appellant | 2. प्रत्यर्थी/Respondent | 3. आयकर आयुक्त (अपील)/CIT(A) |
| 4. आयकर आयुक्त /CIT    | 5. विभागीय प्रतिनिधि/DR  | 6. गार्ड फाईल/GF.            |