

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

INCOME TAX APPEAL NO.1487 OF 2018

Principal Commissioner of
Income Tax-10

.... Appellant

versus

NEO Sports Broadcast Pvt. Ltd.

... Respondent

.....

- Mr.Akhileshwar Sharma, Advocate for Appellant.
- Mr.Rahul Hakani, Advocate for Respondent.

**CORAM : AKIL KURESHI &
SARANG V. KOTWAL, JJ.**

DATE : 23rd APRIL, 2019.

P.C. :

1. 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 in the circumstances of the case and in law, the Hon'ble ITAT erred in deleting the addition towards Satellite Space Fees/transponder charges relying on the decision of Hon'ble Delhi High Court in the case of Asia Satellite Telecommunication 238 CTR (Del) 233, without considering the amendment in section

9(1)(vi) w.r.e.f. 01.06.1976 [by Finance Act, 2012], wherein the intent of legislature in respect of 'royalty' has been clarified thereby deeming the said charges to be 'royalty' in nature?

(b) Whether, on the facts and in the circumstances of the case and in law, the Hon'ble ITAT erred in deleting the addition of Rs.5,44,17,143/- after considering the expost facto agreement between the assessee and the Nimbus and not considering the main agreement dtd. 18.03.2006 between the assessee and the Nimbus?

2. In question (a) the revenue contends that the Satellite Space Fees and transponder charges paid by the assessee were in the nature of royalty payments. From the perusal of the impugned judgment of Income Tax Tribunal ('Tribunal' for short) we notice that the revenue's main thrust before the Tribunal was that the charges paid were capital expenditure and not revenue expenditure. However, in this context, the Tribunal did observe fleetingly on the question of charges being royal payments. We have therefore heard the learned Counsel for the parties on merits on this issue raised by the revenue.

3. We notice that an identical issue came up for consideration before Delhi High Court in case of *Asia Satellite Telecommunications Co. Ltd. Vs. DIT, reported in (2011) 332 ITR 340*. It was the case in which the assessee a non-resident was engaged in satellite communication, having control of satellites. The assessee would provide use of transponder facility on satellite to the television companies outside India, which in turn would be routed to the operators in India, who would pass them on to the customers. The question was whether the payments made to the non-resident were in the nature of royalty and therefore come within the scope of section 9(1) of the Income Tax Act, 1961 ('the Act' for short). The Court by a detailed judgment held that the payments were not in the nature of royalty charges. The Court made a distinction between transfer of rights in respect of property and transfer of rights in the property.

4. Later on similar issue once again came before Delhi High Court in the case of *Directorate of Income-tax Vs. New*

Skies Satellite BV, reported in (2016) 382 ITR 114. The Court followed the earlier decision in case of *Asia Satellite Telecommunication* (supra) and dismissed the revenue's Appeal. It was held that the explanations added below section 9(1) of the Act were not merely clarificatory in nature. Respectfully agreeing with the said decisions of the Delhi High Court, this question is not considered.

5. Question (b) arises in following factual background.
The assessee had an agreement with one M/s. Nimbus Communication Limited for exhibiting cricket matches on television organized by The Board of Control for Cricket in India (BCCI). The assessee would pay a total of Rs.124.98 Crores to Nimbus for executing 8 such matches between India and England. The payment per match came to 24.99 Crores (rounded of). However, one of the matches to be played at Nagpur had to be cancelled for which the assessee received a credit note of Rs.24.99 (rounded of) from Nimbus. For the same year the assessee had to pay Rs.136.89 crores to Nimbus for covering 7 matches between India-Srilanka-West Indies series.

This would come to Rs.19.55 Crores per match. Instead of 7 matches, 8 matches were played. The assessee therefore would have to pay an additional sum of Rs.19.55 crores for such extra match. However, by an agreement between assessee and Nimbus the assessee forgo claim of Rs.24.99 Crores in lieu of Nimbus not demanding additional fees of Rs.19.55 Crores for the additional match. This difference of Rs.5.45 Crores which the assessee had to receive from Nimbus, but did not, the Assessing Officer added to the income of the assessee by invoking section 40A(2) of the Act.

6. The assessee carried the matter in Appeal. CIT (Appeals) who deleted the addition upon which the revenue approached the Tribunal. The Tribunal referred to the extensive discussion in the order passed by the CIT (Appeals) and rejected the ground making following observations;

“20. We noticed that the AO has not doubted the existence of mutual understanding between the assessee and BCCB which gave the assessee the right to telecast live matches. AO has not doubted the existence of

agreement between the assessee and BCCB for live telecast of matches during the year 2006 to 2009. The AO has not made any addition for non-direction of TDS under section 40(a) of the Act, but, held that the expenses in question are not allowable because the same have been made in the absence of any expressed agreement between the parties. In our considered view, the Ld. CIT (A) has rightly allowed the appeal of the assessee. We do not find any reason to interfere with the findings of the Ld. CIT (A). Hence, we uphold the findings of the Ld. CIT (A) and dismiss this ground of appeal of the revenue.”

7. It is undisputed that the assessee and Nimbus are persons referred to in clause (b) of sub-section (2) of Section 40A of the Act. However, in order to invoke sub-section (2) of Section 40A, the Assessing Officer has to come to the conclusion that such expenditure incurred by the assessee being a payment to a person referred to in clause (b), the expenditure is excessive or unreasonable having regard to the fair market value of the goods, services or facilities, for which the payment is made or the legitimate needs of business or profession of the assessee or the benefit delivered by or accruing to him.

8. In the present case, the Tribunal records that the Assessing Officer did not doubt the existence of agreement between the assessee and BCCI. Even independently we find that the entire transaction was in the nature of fresh business transaction under revised circumstances. On one hand, one of the matches which, the assessee had right to exhibit was cancelled. As against this, additional match of another series was played. The assessee and Nimbus in negotiations with BCCI agreed neither to refund the amount for the cancelled match nor to charge for the additional match. It may be that the match which was cancelled was priced higher than the match which was added. That still did not prevent the parties from agreeing to fresh contract as to how to adjust the revenue proceeds.

9. In the result Income Tax Appeal is dismissed.

(SARANG V. KOTWAL, J.)

(AKIL KURESHI, J.)