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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ W.P.(C) 12110/2022

TRANS WORLD INTERNATIONAL
LLC TWI

.....Petitioner

Through: Mr. Ajay Vohra, Sr. Adv. with
Mr. Shashwat Bajpai & Mr. Mahir
Khanna, Adv.

versus

DEPUTY COMMISSIONER OF INCOME TAX CIRCLE 3 (1)
(1)INTERNATIONAL TAX NEW DELHIRespondent

Through: Mr. Puneet Rai, SSC with Mr.
Rishabh Nangia, Adv.

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+ W.P.(C) 16672/2022

TRANS WORLD INTERNATIONAL
LTD. LLC (TWI)

.....Petitioner

Through: Mr. Ajay Vohra, Sr. Adv. with
Mr. Shashwat Bajpai & Mr. Mahir
Khanna, Adv.

versus

DEPUTY COMMISSIONER OF INCOME TAX CIRCLE 3(1)(1),
INTERNATIONAL TAX, NEW DELHIRespondent

Through: Mr. Puneet Rai, SSC with Mr.
Rishabh Nangia, Adv.

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+ W.P.(C) 16699/2022

TRANS WORLD INTERNATIONAL
LTD. LLC TWI

.....Petitioner

Through: Mr. Ajay Vohra, Sr. Adv. with
Mr. Shashwat Bajpai & Mr. Mahir
Khanna, Adv.

versus

DEPUTY COMMISSIONER OF INCOME TAX CIRCLE 3(1)(1)
INTERNATIONAL TAX NEW DELHIRespondent

Through: Mr. Puneet Rai, SSC with Mr.
Rishabh Nangia, Adv.

CORAM:

HON'BLE MR. JUSTICE YASHWANT VARMA

HON'BLE MR. JUSTICE RAVINDER DUDEJA

ORDER

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14.08.2024

1. These writ petitions impugn the reassessment action initiated



for **Assessment Years**¹ 2018-19 [W.P.(C) 12110/2022], 2016-17 [W.P.(C) 16672/2022], and 2017-18 [W.P.(C) 16699/2022]. For the sake of brevity, we propose to notice the facts as set out in W.P.(C) 12110/2022.

2. The reassessment proceedings were initiated in terms of an original notice under Section 148A(b) of the **Income Tax Act, 1961**² dated 31 March 2022 and which culminated in the passing of an order Section 148A(d) and the issuance of a consequential notice under Section 148 dated 26 May 2022.

3. As is evident from a reading of the initial notice referable to Section 148A(b), the respondent had asserted that the revenue received by the petitioner from an Indian payer had not been subjected to a deduction of tax at source even though the consideration received was income chargeable to tax in India. It accordingly called upon the petitioner to show cause why the income of INR 6,186,635/- being income sourced in India and chargeable to tax be not viewed as income which had escaped assessment.

4. The revenues earned by the writ petitioner emanated from an agreement dated 31 December 2016 entered into between it and **Lex Sportel Vision Private Ltd.**³ for the grant of exclusive rights for telecast of matches pertaining to the Brazilian National Championship First Division League and the Brazil's State Championship First Division (Serie A1).

5. Before us, it was categorically stated that the aforesaid agreement covered the entire period comprised in AY 2016-17, 2017-18 and 2018-19 and was the solitary agreement concerned with the

¹ AYs

² Act

³ Lex Sportel



grant of license to Lex Sportel.

6. We also deem it apposite to notice the bifurcation of license fee between live feed and recorded content and which was regulated by Clause D of the agreement and which is reproduced hereinbelow:-

“D. LICENCE FEE:

One hundred and twenty thousand Euro (€120,000.00), which Licence Fee shall be allocated as sixty thousand Euro (€60,000.00) in respect of each of the 2017 Competition and the 2018 Competition, which Licence Fee shall be apportioned per Competition as being forty eight thousand Euro (€48,000.00) in respect of the Television Designated Rights and as twelve thousand Euro (€12,000.00) in respect of the Digital Designated Rights and which Licence Fee shall be payable by Licensee to Licensor as follows, in accordance with the terms and conditions of and subject always to Licensee's receipt of a valid invoice(s) in advance from Licensor (it is acknowledged and agreed that, of the value of the Licence Fee mentioned above, 95% of such value shall be attributed as the value attached to the live transmissions and 5% of such value shall be attributed as the value attached to the non-live programming provided by Licensor to Licensee):

<u>Licence Fee</u>	<u>Due Date</u>
€24,000.00	on or before 1 st February 2017;
€24,000.00	on or before 1 st July 2017;
€12,000.00	on or before 2 nd July 2017;
€24,000.00	on or before 15 th January 2018;
€24,000.00	on or before 1 st July 2018; and
€12,000.00	on or before 2 nd July 2018.”

7. Ultimately, the objections preferred by the petitioner came to be negatived by the respondent who took the following view:-

“2. During the year under consideration, the assessee i.e. TRANS WORLD INTERNATIONAL. LLC. had received a sum of Rs. 6,186,635/- from an Indian payer (Lex Sportel) and TDS was not deducted by the Indian payer on such payments even though the consideration received by the non-resident assessee was income



that was chargeable to tax in India. Thus, the aforementioned income received by the assessee had not been offered to tax, and no justification had been provided for the same.

3. The income of Rs. 6,186,635/-, being income sourced in India and chargeable to tax therein, had not been offered for taxation. Therefore, the aforesaid information suggested that income chargeable to tax in the case of the assessee for the given AY 2018-19 has escaped assessment.

4. In view of the above, the assessee was asked to show cause vide notice u/s 148A(b) of the Act dated 31.03.2022 as to why a notice u/s 148 of the Act should not be issued to it. Such notice was duly served upon the assessee through E-mail. The date for compliance was fixed on or before 18.04.2022 which was further extended upto 04.05.2022 and 23.05.2022 upon the request of the assessee. The assessee has claimed that it has received an amount of Rs.45,88,036/- from the said payer instead of Rs.61,86,635/-. However, the assessee has not furnished any material evidence to back such claim. Further, from examination of the response submitted by the assessee it is noticed that only a nominal fraction of above income amounting to 5% of the same has been offered to tax as Royalty by the assessee in its ITR filed on 31/10/2018 on the ground that only broadcasting rights for non-live content are taxable in India. For the remaining amount, the assessee has claimed that being live content, the same is not covered under Royalty. However, the assessee has not provided any document to substantiate/support such bifurcation. The underlying agreement furnished by the assessee does not make such distinction. Moreover, the assessee has not submitted any document to substantiate its tax residency and in turn its eligibility for the DTAA. Therefore, the assessee's contentions cannot be accepted at this stage."

8. Undisputedly, the issue of taxability of 'live feed' is no longer one in respect of which any contestation may exist bearing in mind our decision rendered in **Commissioner of Income Tax- International Taxation – 1 vs. Fox Network Group Singapore Pte. Ltd.**⁴ While dealing with the aspect of 'live feed' and its asserted taxability as royalty, we had in *Fox Network* observed as follows:-

"6. Insofar as the principal question of whether income derived from transmission of 'live feed' would fall within the ambit of

⁴ 2024 SCC OnLine Del 433



royalty, reliance appears to have been placed on the decision rendered by a Division Bench of our Court in *Commissioner of Income Tax v. Delhi Race Club(1940) Ltd.*¹. The attention of the ITAT was additionally drawn to the decisions rendered by the Mumbai Bench of the ITAT in the *Assistant Director of Income Tax, Mumbai v. Neo Sports Broadcast Private Limited*² and *Deputy Director of Income Tax, Mumbai v. Nimbus Communications Limited*³ wherein the issue had come to be decided and answered in favour of the assessee.

7. Insofar as the bifurcation of revenue is concerned, the Tribunal has returned the following findings:—

“15. We have perused the various agreements placed in the paper book with various sporting and governing bodies of sports and in all the agreements, there are specific clause under the head ‘Consideration’ that the parties hereby acknowledged and agree that value commercial right fee is attributable 95% to live transmissions and 5% to non live transmissions. This specific clause is permeating in all the agreements between the parties that, 95% of the license fee/commercial right fee is via live transmission and only 5% is for non live transmission. Thus, if the parties to the agreement have clearly stated and agreed that there are two streams of fees, one from live transmission and other from non-live and even payments have been made separately under these distinctive heads, then to hold that both constitutes one and the same thing will not be correct specifically when the core issue involved in this appeal is, whether the fees from live transmission constitute copyright so as to fall within the ambit of ‘royalty’ or and whether it is taxable.”

8. In view of the findings as expressed above, we find no merit in the contention of the appellants that the ratio adopted for the purposes of bifurcation of income was either unsubstantiated or arbitrary.

9. Before us, both Mr. Bhatia as well as Mr. Rai have assailed the view taken by the ITAT contending that the service from which income was generated would clearly fall within the ambit of Explanation 2 as placed in Section 9(1)(vi) of the Act.

10. We, however note that *Delhi Race Club* has clearly ruled on the scope and ambit of the expression “*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 tube tapes....*” as finding place in clause (v) of Explanation 2 to Section 9(1)(vi).

11. On a due consideration of the relevant provisions contained in



the Copyright Act, 1957, the Court in *Delhi Race Club* observed as follows:—

“16. Adverting to the facts of this case we note that the assessee was engaged in the business of conducting horse races and derived income from betting, commission, entry fee, etc. and had made payment to other centres whose races were displayed in Delhi. It is not known whether such races had any commentary or analysis of the event simultaneously. It is not the case of the Revenue that the live broadcast recorded for rebroadcast purposes. Having held that the broadcast/live telecast is not a work within the definition of 2(y) of the Copyright Act and also that broadcast/live telecast does not fall within the ambit of s. 13 of the Copyright Act., it would suffice to state that a live telecast/broadcast would have no ‘copyright’. This issue is well-settled in view of the position of law as laid down by this Court in *ESPIV Star Sports case* (supra), wherein this Court after analysing the provisions of the Copyright Act was of the view that legislature itself by terming broadcast rights as those akin to ‘copyright’ clearly brought out the distinction between two rights in Copyright Act, 1957. According to the Court, it was a clear manifestation of legislative intent to treat copyright and broadcasting reproduction rights as distinct and separate rights. It also held that the amendment of the Act in 1994 not only extended such rights to all broadcasting organizations but also clearly crystallized the nature of such rights. The Court did not accept the contention of the respondent that the two rights are not mutually exclusive by holding that the two rights though akin are nevertheless separate and distinct.

17. In view of the aforesaid position of law which brought out a distinction between a copyright and broadcast right, suffice would it be to state that the broadcast or the live coverage does not have a ‘copyright’. The aforesaid would meet the submission of Mr. Sawhney that the word ‘Copyright’ would encompass all categories of work including musical, dramatic, etc. and also his submission that the Copyright Act acknowledges the broadcast right as a right similar to ‘copyright’. In view of the conclusion of this Court in *ESPN Star Sports case* (supra), such a submission need to be rejected.

In this regard we also quote for benefit the judgment of this Court in the case of *Akuate Internet Services (P) Ltd. v. Star India (P) Ltd.* (supra) as relied upon by learned counsel for the respondent assessee wherein a Division Bench of this Court has applied the test of ‘minimum requirement of creativity’ for claiming a right under the Copyright Act, which is absent in a ‘live telecast of an event’.

We note for benefit that the United States Court of Appeal Second



Circuit Ruling in *National Basket Ball Association & NBA Properties NIC v. Motorola Inc*, 105 F.3d. 841 (1997) held that a sports event is a performance and not a work. It is not copyrightable.

18. Insofar as the submission of Mr. Sawhney that the live telecast of an event is the outcome of 'scientific work' and payment thereof would be covered under the definition of 'royalty' is concerned, the said submission is also liable to be rejected; first, it runs contrary to his earlier submission and also for the simple reason the cl. (v) of explanation 2 to clause (vi) of sub-section(1) of Section 9 would relate to work which includes films or video tapes for use in connection with television or tapes for use in connection with radio broadcasting. It is to be seen whether consideration for transfer of all or any rights of 'scientific work' including films or video tapes would include a live telecast. The clause is an inclusive provision for films or video tapes for use in connection with television or tapes for use in connection with radio broadcasting. We note such a case was not set up by the appellant-Revenue before the authorities below. It was held by the AO that when any person pays any amount for getting rights/licence to telecast any event (Which is a copyright of particular person i.e., no one can copy it for direct telecast or deferred telecast) then amount so paid is to be treated as 'royalty' and very much covered under s. 9(1)(vi). In other words, the" ground of the Revenue was limited to the aspect of copyright. That apart, we find, no such ground has, been taken by the appellant/Revenue even in this appeal. The 'scientific work' has not been defined in the Act nor in the Copyright Act. It is not necessary that because the live telecast of an event is being done at a distant place, the same would be a 'scientific work'. Even otherwise, even by stretching this meaning, it is difficult to include a live broadcast within 'scientific work'. Clause (v) expressly uses the words 'including films or video tapes for use in connection with television or tapes for use in connection with radio broadcasting'. These words become relevant to understand the scope of this part of the provision. Suffice to state, when reference is made to films or video tapes, then the intent of the provision is related to work of visual recording on any medium or video tape and can be seen on the television. Surely such a work does not include a live telecast. This submission is also need to be rejected. Insofar as the submission of Mr. Sawhney that analysis, commentary and use of technology to live feed make the broadcast a subject-matter of distant copyright is concerned, again neither such a case was set up before the authorities, nor in this appeal. In fact it is not known nor pleaded that the live telecast, in this case, was accompanied by commentary, analysis etc. It is an issue of fact, which cannot be gone into or raised at this stage. In view of our discussion above, we are of the view that no question of law



arises in the present appeals. We dismiss the appeals filed by the appellant-Revenue.”

12. In light of the unequivocal conclusions as expressed by the Division Bench in *Delhi Race Club* and with which we concur, we find that once the Court came to the conclusion that a live telecast would not fall within the ambit of the expression ‘work’, it would be wholly erroneous to hold that the income derived by the assessee in respect of ‘live feed’ would fall within clause (v) of Explanation 2 to S. 9(1)(vi) of the Act.

13. Notwithstanding the above, Mr. Rai, learned counsel appearing for the appellant, additionally sought to place the respondent's income in clause (i) of Explanation 2 to Section 9(1)(vi) of the Act and sought to contend that the word ‘process’ as occurring therein would make revenue earned from ‘live feed’ taxable.

14. The aforesaid submission essentially proceeded on the basis of Explanation 6 to Section 9(1)(vi) which reads as under:—

“Explanation 6.—For the removal of doubts, it is hereby clarified that the expression “process” includes and shall be deemed to have always included transmission by satellite (including up-linking, amplification, conversion for down-linking of any signal), cable, optic fibre or by any other similar technology, whether or not such process is secret;]”

15. As is evident from a reading of the said Explanation, the clarification which is entered pertains to “*transmission by satellite (including up-linking, amplification, conversion for down-linking of any signal), cable, optic fibre or by any other similar technology*”. The aforesaid Explanation is thus hinged upon the activity of transmission by satellite. It is the aforesaid activity which is sought to be captured and included in clause (i) of Explanation 2 to Section 9(1)(vi) of the Act.

16. However, in the facts of the present case, it is admitted to the appellant that the actual transmission of content was undertaken by SIPL and not by the respondent. The Explanation, therefore in our considered opinion does not detract from the correctness of the view as ultimately expressed by the ITAT.

17. In addition to the above, we note that the arguments addressed on the anvil of Explanation 6 to Section 9(1)(vi) of the Act lose sight of the salient principles which were enunciated by our Court in *Director of Income Tax v. New Skies Satellite bv*⁴, and where the Court had recognized the primacy of provisions contained in the Double Taxation Avoidance Agreements as opposed to domestic statutes.”



9. In view of the above position in law as enunciated in *Fox Network*, we find no justification to recognize a right inhering in the respondents to continue the impugned reassessment action. The view taken by the AO that there was no basis for the bifurcation of the revenue in the ratio of 95% and 5% is clearly rendered perverse in light of the stipulations contained in the agreement and which has been extracted hereinabove.

10. We accordingly allow the instant writ petitions and quash the order under Section 148A(d) and notice referable to Section 148 dated 26 May 2022 [W.P.(C) 12110/2022], order under Section 148A(d) dated 28 July 2022 and notice referable to Section 148 dated 29 July 2022 [W.P.(C) 16672/2022], order under Section 148A(d) dated 28 July 2022 and notice referable to Section 148 dated 29 July 2022 [W.P.(C) 16699/2022].

YASHWANT VARMA, J

RAVINDER DUDEJA, J

AUGUST 14, 2024/neha