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

INCOME TAX APPEAL NO.103 OF 2017
WITH
INCOME TAX APPEAL NO.207 OF 2017

Commissioner of Income Tax (IT)-3 … Appellant

V/s.

M/s MSM Satellite (Singapore) Pte. Ltd. … Respondent

Mr.Tejveer Singh for the Appellant.
Mr.Percy Pardiwalla, Senior Counsel with Mr.Nitesh Joshi i/by Mr.Sameer Dalal for the Respondent.

CORAM : AKIL KURESHI AND
SARANG V. KOTWAL, JJ.
DATE : APRIL 23, 2019.

P.C.:-

1. Issues being identical, we may notice facts from Appeal No. 103 of 2017.

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

3. Question Nos.a and b arise in following background. Respondent-assessee is a Singapore based company engaged in the Telecasting of Channels in the Indian sub-continent. The assessee operates through a local company called Multi Screen Media Private Limited. The assessee contends that said Multi Screen Media Private Limited is not a dependent agent which the revenue disputes. Question (a) raised by the revenue relates to the advertisement revenue and distribution revenue generated out of such activity by the assessee. The revenue wishes to

tax such income of the assessee in India on the ground that the assessee has a permanent establishment in India.

4. It is undisputed that in case of this very assessee, such a question had come up for consideration before this Court in case of **Set Satellite (Singapore) Private Limited Vs. Deputy Director of Income Tax**[1]. The Court after a detailed discussion and examination of facts and law applicable, reversed the decision of the Tribunal and allowed the assessee's appeal making following observations :-

> "13. Considering the above principle as may be discerned from the judgment in DIT (International Taxation 292 ITR 416 (supra) it would be clear that -
> (1) Considering the CBDT Circular No.742 it would be fair and reasonable that the taxable income is computed at 10 percent of the gross profits. In the instant case insofar as marketing services are concerned by the arm's length principle what has been paid is more than 10 percent as can be seen from the order of CIT (A). This was not disputed by the revenue in its Appeal before the ITAT.
> (2) The only contention advanced and which found favour with the Tribunal was that the advertisement revenue received by the assessee was also income liable to tax in India. The CIT (A) relied upon Circular No.23 of 1969. That

1 307 ITR 205

> Circular read with Article 7(1) would result in holding that advertisement revenue received by the appellant are not taxable in India as long as the treaty and Circular stands.
> 14. In the light of the above Appeal filed by the Appellant herein is allowed and the order of the ITAT is set aside. Merely because tax on income was paid for some assessment years would not estop the assessee from contending that its income is not liable to tax. The order of CIT is restored except to the extent that it has said that it cannot interfere because the Appellant had paid the tax. That part is set aside."

5. It was in this context that the Tribunal in the impugned judgment had referred to the earlier assessments in case of this very assessee, in which the issue was decided in favour of the assessee. In that view of the matter, question No.a is not required to be entertained. Once we come to this conclusion, question (b) becomes academic. In any case, the Tribunal had proceeded on the basis that the assessee has a permanent establishment in India despite which it would have no tax liability in India. In that view of the matter, it can also be stated that question (b) does not arise out of the judgment of the Tribunal.

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. 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 ld 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 ld. 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 ld CIT (A) has also considered Clause 6.3 of the distribution agreement entered into between assessee company and Non-resident company, which states that the right granted to the assessee under the agreement is not and shall not be construed to be a grant of any license or transfer of any right in any copyright. Ld CIT(A) has stated that the assessee submitted before him that the cable operator only retransmits the television signals transmitted to it by a broadcaster without any editing, delays, interruptions, deletions or additions and therefore payment made by the assessee to the Non-resident company is not for use of any copyright and consequently cannot be characterized as Royalty. Ld CIT (A) has held that Broadcasting Reproduction Right is not covered under the definition of Royalty under section 9(1) (vi) of the Income Tax Act as well as Article 12 of the Treaty. Accordingly, the payment is not in the nature of Royalty but in the nature of business income."

10. In our opinion, the Tribunal has not committed any error. As noted, the assessee would receive a part of subscription charges paid by a large number of customers through different agencies. The said subscription charges would enable the customers to view channels operated by such assessee. The assessee was thus not parting with any of the copyrights for which payment can be

considered as royalty payment. Term "copyright" has been defined in Section 14 of the copy right Act, 1957. A glance at the said provision would show that the copyright means exclusive right, subject to the provisions of this Act, to do or authorise the doing of any of the following acts specified in the said provision in respect of a work or any substantial part thereof. Term "work" is defined under Section 2(y) of the Copyright Act, 1957, as to mean any of the works namely a literary, dramatic, musical or artistic work or a cinematograph film and a sound recording. Sub-section (1) of Section 14 of the Copyright Act, 1957 lists several Acts in respect of a work in relation to which exclusive right would be termed as copyright. In the present case, the assessee had not created any literary, dramatic, musical or artistic work or cinematograph film and/or a sound recording.

11. Infact, Section 37 of Copyright Act, 1957 separately defines broadcast reproduction right. Sub-section (1) of Section 37 of the said Act provides that every broadcasting organisation shall have special rights to be known as "broadcast reproduction right" in respect of its broadcasts. Sub-section (2) of Section 37 provides

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

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

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

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

> "Explanation 2.- For the purposes of this clause, "royalty" means consideration (including any lump

> sum consideration but excluding any consideration which would be the income of the recipient chargeable under the head "Capital gains")for-"

13. In our opinion, these provisions would in no manner change the position. Only if the payment in the present case by way of a royalty as explained in explanation (2) below sub-section (1) of Section 9 of the Act, the question of applicability of clause (vi) of sub-section (1) of Section 9 would arise. Learned counsel for the revenue placed considerable tress on clause (v) of explanation (2) by virtue of which the transfer of the rights in respect of copyright of a literary, artistic or scientific wok including cinematograph film or films or tape used for radio or television broadcasting etc. would come within the fold of royalty for the purpose of Section 9(1) of the Act. We do not see how the payment in the present case could be covered within the said expressions. As noted, this is not a case where payment of any copyright in literary, artistic or scientific work was being made.

14. We may also notice that India Singapore Double Taxation Avoidance Agreement contains Article 12 pertaining to royalty

and fees for technical service. Paragraph (3) of Article 12 defines the term "Royalty" as under:-

> "The term "royalties" as used int his 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 Article8."

15. Even going by this defination, the payment in question can not be categorized as royalty.

16. In the result, we do not find any reason to interfere.

17. Income Tax Appeals are dismissed.

(SARANG V. KOTWAL, J.) **(AKIL KURESHI, J.)**