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

% **Judgment reserved on: 12 August 2024**
Judgment pronounced on: 22 August 2024

\+ W.P.(C) 6589/2024

ESS SINGAPORE BRANCH .....Petitioner

Through: Mr. Porus Kaka, Senior Advocate with Mr. Ashok Mathur, Mr. Divesh Chawla, Mr. Saurabh Jain and Ms. Sandy Sharma, Advocates.

versus

DEPUTY COMMISSIONER OF INCOME TAX & ORS. .....Respondents

Through: Mr. Puneet Rai, Sr. St. Counsel with Mr. Ashvini Kumar and Mr. Rishabh Nangia, Advocates.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE RAVINDER DUDEJA

J U D G M E N T

YASHWANT VARMA, J.

1. The writ petitioner impugns the order dated 08 April 2024 in terms of which the **Assessing Officer**[1] while giving appeal effect has restricted the benefit of **Tax Deducted at Source**[2] to INR 24,46,62,305/- being the amount as claimed in the Return of Income. It has proceeded consequently to frame an order of refund of INR 4,92,208/- along with interest under Section 244Aof the **Income Tax Act, 1961**[3].

2. The petitioner is aggrieved by the aforesaid action since the AO had failed to take into consideration the total TDS which had been

[1]AO
[2]TDS
[3]Act

deducted and deposited and the refund thus being computed in light of what had been claimed in the original Return of Income. For the purposes of disposal of the instant writ petition, we take note of the following salient facts.

3. For **Assessment Year**[4] 2014-15, the petitioner had furnished a Return of Income declaring its total income therein to be INR 90,35,46,340/-. It had also claimed a refund in the sum of INR 3,65,970/-. The said Return was selected for scrutiny on an issue raised as to whether the revenue earned by the writ petitioner, including the consideration with respect to live feed, would constitute royalty and thus be taxable.

4. On 31 December 2017, a draft assessment order came to be framed with the AO holding that the consideration received by the petitioner towards live feed was taxable as royalty under the Act. Aggrieved by the aforesaid, the petitioner filed objections before the **Dispute Resolution Panel**[5] which affirmed the view taken in the draft assessment order in terms of a direction dated 05 September 2018.Pursuant to the aforesaid determination, a final assessment order came to be framed on 08 October 2018.

5. The petitioner assailed the view as taken by the DRP before the Tribunal contending that the consideration received for the rights relating to live feed would not be taxable as royalty at all. It was also asserted that the respondents had failed to grant the entire TDS credit as reflected in Form 26AS.

6. The Tribunal in terms of its judgment rendered on 21 February

[4]AY
[5]DRP

2023 ultimately came to answer the issue on merits in favour of the writ petitioner and proceeded further to frame directions for the AO to verify and grant the TDS credit as claimed by the writ petitioner. We deem it apposite to extract the following passages from the order of the Tribunal:-

> "7. Heard the learned representatives of the parties and perused the material available on record. We find that under identical facts the co-ordinate Bench of this Tribunal in the case of Fox Network Group Singapore Pte. Ltd. [121 taxmann.com 330 (Delhi-Trib.)], has decided the issue under consideration by observing as under:-
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> *"20. This precise issue had come up for consideration before the Hon'ble Jurisdictional High Court in the case of Delhi Race Club (supra) that, whether any payment for broadcast or live coverage will constitute copyright, and therefore, is taxable under the ambit of royalty in terms of Explanation 2 to Section (l)(vz). The fact of that case was that assessees had made payment to other clubs/centers on account of live telecast of horse racing. The Assessing Officer has made the disallowance u/s. 40(a)(ia) on account of royalty paid to other centers for live telecast. According to him, the same was covered under section 194J The contention of the Revenue before the Hon'ble High Court was:*
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> *(i) clause (v) to Explanation 2 to clause (vi) of sub-section (1) of section 9 is not restricted to Copyright and the use of the words 'literary' and artistic' under clause (v) of Explanation 2 could not have been used for excluding 'copyrights' in areas of drama, music, etc,*
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> *(ii) Further, the live telecast of an event is outcome of 'scientific work' which makes telecast of event possible at a distant place over television and the transaction in the instant case covered.*
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> *(iii) The 'rights of broadcasting' was akin to 'copyright'.*
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> *The substantial question of law involved before the Hon'ble High Court was: "Whether payment for live telecast of horse race is a payment for transfer of any 'copyright' and as such 'royalty' or in the alternative whether the live telecast of the horse race would be termed as a 'scientific work' and payment thereof would be 'royalty'*
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> *21. After considering the definition of Royalty' as given in section 9(1)(vz) and relying upon various sections of Copyright Act, their Lordships held that:-*

- It is not in dispute that the payment has been made by the respondent assessee to other clubs/centres on account of live telecast of races. The payment of 'royalty' is covered under section 1941 which was inserted with effect from 13-7-2006. The said section, contemplates that in the eventuality a payment is made towards 'royalty', an amount equal to 10 percent of such sum needs to be deducted as income-tax on income comprised therein. Explanation (ba) to the section stipulates 'royalty' shall have the same meaning as in Explanation 2 to clause (vi) of sub-section (1) of section 9. [Para 7]

- A perusal of clause (v) would reveal that consideration for transfer of all or any rights in respect of any 'copyright' and the word 'copyright' is followed by the words 'literary', 'artistic' or 'scientific work'. It also exists in other works like dramatic, musical etc. It is not in dispute that 'copyright' exists in literary and artistic work, It also exists in other works like dramatic musical etc. If the intention of the legislature was to include other work like dramatic, musical etc. the legislature would have said so or would, not have qualified the word 'copyright' with the words literary' and 'artistic' as the word 'copyright' encompasses in itself all the categories of work. Having done it is a case of Expressio Unis'. *(The mention of one thing is the exclusion of the other). It was also noted that the word 'copyright' does not synchronize with the word 'literary', 'artistic' as they are the works in which 'copyright' exists. The provision if read as suggested by the revenue to that extent would be meaningless. Thus, the provision would be more meaningful if the word in is read by implication in-between the words- 'copyright and 'literary'. [Para 8]*

- There is limitation on the Court in adding and rejecting a word in the provision and the statute. Presumption is there that the legislature inserted every part of the statute for a purpose with an intention that every part thereof should have effect. At the same time, it is also a settled law that a construction which attracts redundancy, will not be accepted except for compelling reasons. Where alternative lies between either supplying by implication, words which appear to have been accidentally omitted or adopting a construction

depriving certain existing words of all meaning, it is permissible to supply the words. It is also settled position of law that a purposive construction may also enable reading of words by implication when there is doubt about the meaning and ambiguity persists. In such circumstances, the purpose which the Parliament intended to achieve should be examined. [Para 9]

- Accordingly in provision (v) the words 'in respect of any copyright in literary, artistic or scientific work' were read to, inter alia, hold that 'royalty' is payable only on 'transfer of all or any right (including grantingof licence) in respect of any copyright in literary, artistic or scientific word including films or videotapes for use in connection were used in connection with radio broadcasting but not including consideration for the distribution or exhibition of cinematographic films' [Para 14]

- Now the question which arises is whether live telecast of a horse race is a work to have a 'copyright'.[Para 15]

- A live TV coverage of any event is a communication of visual images to the public and would fall within the definition of the word 'broadcast' in section 2(dd). That apart it was noted that section 13 does not contemplate broadcast as a work in which 'copyright' subsists as the said section contemplates 'copyright' to subsist in literary, dramatic, musical and artistic work, cinematograph films and sound recording. Similar is the provision of section 14 of the Copyright Act which stipulates the exclusive right to do certain acts. A reading of section 14 would reveal that 'copyright' means exclusive right to reproduce, issue copies, translate, adapt etc. of a work which is already existing. [Para 16]

- Adverting to the facts of the instant case, it was noted that the assessee was engaged in the business of inducting 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 my 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 doesn't fall within the ambit of section 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 case of ESPN Star Sport v. Global Broadcast News Ltd. 2008 (38) PTC -"7, 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. [Para17]

- 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' Thus, in view of the conclusion of this Court in ESPN Star Sports case (supra), the submission of the revenue 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 needs to be rejected. [Para 18]

- Insofar as the submission of revenue that the 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 clause (v) to Explanation 2 to clause (vz) or subsection(1) of section 9 would relate to work which includes films or videotapes 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 videotapes would include a lie telecast. The clause is an inclusive provision for films or videotapes for use in connection with television or tapes for use in connection with radio broadcasting. It was noted that such a case was not set up by the revenue before the authorities below. It was held by the Assessing Officer that when any person pays any amount forgetting 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 section 9(1)(vz). 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 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 videotapes 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 sound recording or any medium or video tape and can be seen on television surely such a work does not include a live telecast. This submission is also need to be rejected. Insofar as the submission of revenue 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. [Para 19]

22. The aforesaid principle and sequitur of the judgment of the Hon'ble Jurisdictional High Court clearly clinches the

issue in favour of the assessee, wherein it has been categorically held that there is a clear distinction between a copyright and a broadcasting right, broadcast or live coverage which does not have a copyright, and therefore, payment for live telecast is neither payment for transfer of any copyright nor any scientific work so as to fall under the ambit of royalty under Explanation 2 to Section 9(1)(vi).

23. In so far as reference of phrase 'process' in Explanation 6 the same will not be applicable in the case of the assessee because admittedly it is SIPL which is doing the transmission and makes the payment to Asia Satellite and it is not a case of transfer of process.

24. Further, on similar set of issues on live broadcast of sporting and cricket events, ITAT Mumbai Bench in the case of Neo Sports Broadcast (P.) Ltd. (supra) and Nimbus Communication Ltd. (supra) have held that there is no copyright on live events, and therefore, it is not taxable as 'royalty' Thus, we hold that the fee received towards live transmission cannot be taxed as 'royalty' in terms of Section 9(1)(vi) as held by the Hon'ble Jurisdictional High Court and also by the Coordinate Bench of ITAT Accordingly, we decide this issue in favour of the assessee.

8. In the present case the facts and issues are identical. We do not see any reason to deviate from the reasoning of Hon'ble Co-ordinate bench in the case of Fox Network Group Singapore Pte. Ltd. (supra). We, therefore, direct the Assessing Officer to delete the impugned addition.

9. As regards the issue raised in ground no. 7, relating to grant of short credit of taxes deducted at source amounting to 2,03,36,66, 125, though reflected in Form 26AS, we direct the Assessing officer to verify the same and grant correct credit of taxes deducted at source. Ground is allowed for statistical purposes."

7. As is manifest from the above, the Tribunal had framed an unequivocal direction for the AO to verify and attend to the grievance of short credit of TDS, bearing in mind what stood reflected in Form 26AS, and which amount was quantified at INR 2,03,36,66,125/-. Pursuant to the aforesaid direction, the petitioner filed an application before the AO which has come to be disposed of in terms of the order impugned.

8. The respondents have filed a counter affidavit in these proceedings in which although the amounts reflected in Form 26AS are not disputed, it is essentially averred that since the petitioner did not claim the amount of INR 2,03,40,32,090/- in its income tax return, TDS credit is liable to be denied. They further take the position that the TDS credit has been duly verified from the Return of Income that was submitted and credit can only be granted to the extent as claimed therein. They also take the stand that for purposes of refund, the petitioner was obliged to follow the procedure as laid out in Section 239 of the Act and since no claim had been raised within the period prescribed therein, the impugned order does not merit interference.

9. Having heard Mr. Kaka, learned senior counsel appearing for the writ petitioner and Mr. Rai, learned counsel who appears for the respondents, we find ourselves unable to sustain the position as taken by the respondents bearing in mind the apparent and unquestionable mandate of Section 240 of the Act.

10. As would be manifest from a reading of that provision, in cases where a refund becomes due and payable consequent to an order passed in an appeal or other proceedings, the AO is obliged to refund the amount to the assessee without it having to make any claim in that behalf. The reference to Section 239 is thus clearly misconceived. The claim of the petitioner for being accorded credit of the entire TDS as reflected in Form 26AS was thus liable to be accorded recognition along with interest to be computed in accordance with Section 244A of the Act.

11. Regard must also be had to the fact that the TDS which had been

duly deposited becomes liable to be treated as tax duly paid in terms of Section 199 and interest thereon would consequently flow from the first day of April of the relevant AY to the date on which the refund is ultimately granted by virtue of Section 244A(1)(a) of the Act. The contention of the respondents, therefore, that interest would flow only from the date of the order of the Tribunal is thoroughly misconceived.

12. We bear in mind the undisputed position that in the present case the AO was called upon to give effect to a direction framed by the Tribunal. Viewed in that light, the stand as taken by the AO is clearly rendered unsustainable insofar as it restricts the claim of the petitioner to the disclosures made in the Return of Income.

13. In our considered opinion, it would be wholly illegal and inequitable for the respondents to give short credit to the tax duly deducted and deposited based on the claim that may be made in a Return of Income. It is pertinent to note that insofar as the question of rights to live feed being treated as royalty is concerned and other allied issues pertaining to the merits of the dispute stand settled right up to this Court by virtue of the judgment rendered by us in ITA 812/2023.

14. The reliance placed on the decision of the Supreme Court in **Goetze (India) Ltd. vs. Commissioner of Income Tax**[6] is also clearly misconceived and rendered unsustainable bearing in mind the following principles which have come to be enunciated by us in our recent decision in **Mitsubishi Corporation vs. Commissioner of Income Tax**[7]. While dealing with a similar objection in *Mitsubishi Corporation*, we had held as follows:-

[6]2006 SCC OnLine SC 1446
[7]2024 SCC OnLine Del 5164

"**16.** Any doubt which could have possibly been harboured in this respect in any case stands laid to rest bearing in mind the recent judgment rendered by the Supreme Court in *Wipro Finance Ltd.* v. *CIT*. As would be evident from a reading of paragraph 10 of the report, an identical objection appears to have been raised on behalf of the Revenue with it being contended that since the assessee had taken a particular position with respect to an item of expenditure in the return, not only was the Tribunal disentitled in law to entertain a fresh claim, the same in any case could not have been taken into consideration for the purposes of according relief to the assessee.

17. The aforesaid contention came to be negated by the Supreme Court in the following terms:—

> **"10.** The learned Additional Solicitor General appearing for the Department had faintly argued that since the appellant in its return had taken a conscious explicit plea with regard to the part of the claim being ascribable to capital expenditure and partly to revenue expenditure, it was not open for the appellant to plead for the first time before the Income-tax Appellate Tribunal that the entire claim must be treated as revenue expenditure. Further, it was not open to the Income-tax Appellate Tribunal to entertain such fresh claim for the first time. This submission needs to be stated to be rejected. In the first place, the Income-tax Appellate Tribunal was conscious about the fact that this claim was set up by the appellant for the first time before it, and was clearly inconsistent and contrary to the stand taken in the return filed by the appellant for the concerned assessment year including the notings made by the officials of the appellant. Yet, the Income-tax Appellate Tribunal entertained the claim as permissible, even though for the first time before the Income-tax Appellate Tribunal, in appeal under section 254 of the 1961 Act, by relying on the dictum of this court in National Thermal Power Co. Ltd.. Further, the Income-tax Appellate Tribunal has also expressly recorded the no objection given by the representative of the Department, allowing the appellant to set up the fresh claim to treat the amount declared as capital expenditure in the returns (as originally filed), as revenue expenditure. As a result, the objection now taken by the Department cannot be countenanced.
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> **11.** Learned Additional Solicitor General had placed reliance on the decision of this court in *Goetze (India) Ltd.* v. *CIT* in support of the objection pressed before us that it is not open to entertain fresh claim before the Income-tax Appellate Tribunal. According to him, the decision in National Thermal Power Co. Ltd. merely permits raising of a new ground

> concerning the claim already mentioned in the returns and not an inconsistent or contrary plea or a new claim. We are not impressed by this argument. For, the observations in the decision in Goetze (India) Ltd. itself make it amply clear that such limitation would apply to the "assessing authority", but not impinge upon the plenary powers of the Income-tax Appellate Tribunal bestowed under section 254 of the Act. In other words, this decision is of no avail to the Department."
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> **18.** As is evident from the enunciation of the legal position in the decisions aforenoted, while ordinarily an assessee may be bound by the Return of Income as furnished, in case the Tribunal were to admit a question and proceed to accord relief, the same cannot be denied or be made subject to a Return of Income being revised. The insistence of the respondents on a revision of the return being a precondition clearly fails to take into consideration the plenary powers which stand conferred upon the Tribunal by virtue of Section 254 of the Act.
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> **19.** In light of our conclusions on the principal question which stood posited, we observe that the challenge to the Circular of the CBDT does not really merit further consideration. All that need be observed is that once the Tribunal had called upon the AO to examine the issue afresh, the said direction could not have been disregarded by reference to a Circular issue by the CBDT.
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> **20.** We accordingly allow the writ petitions and quash the final assessment orders dated 30 November 2021 insofar as they negate consideration of the additional grounds which had been urged by the writ petitioners. The AO shall consequently consider the same and pass fresh orders in accordance with law. We, in light of the above, also quash the consequential demand and penalty notices also dated 30 November 2021."

Accordingly, and for all the aforesaid reasons, we find ourselves unable to sustain the view as taken by the respondents.

15. We accordingly allow the instant writ petition and quash the impugned order dated 08 April 2024. A writ shall consequently issue commanding the respondents to acknowledge the credit of TDS as reflected in Form 26AS of the petitioner amounting to INR 2,27,83,28,430/- and to recompute the total refund at INR 2,03,40,32,090/-.

16. The respondents while framing orders and taking appropriate steps for refund shall also bear in mind the interest which is payable to the petitioner in terms of Section 244A (1)(a) of the Act.

YASHWANT VARMA, J.

RAVINDER DUDEJA, J.

AUGUST 22, 2024/*neha*