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

\+ ITA 333/2023
THE COMMISSIONER OF INCOME TAX - INTERNATIONAL TAXATION -1 ..... Appellant
Through: Mr. Ruchir Bhatia, SSC with Ms. Deeksha Gupta, Adv.

versus

ESPN STAR SPORTS MAURITIUS S.N.C ET COMPAGNIE ..... Respondent
Through: Mr. Porus Kaka, Sr. Adv. with Mr. Ashok Mathur, Mr. Divesh Chawla, Mr. Saurabh Jain, Ms. Manpreet Kaur Bhalla & Ms. Sandy Sharma, Advs.

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\+ ITA 336/2023
THE COMMISSIONER OF INCOME TAX - INTERNATIONAL TAXATION -1 ..... Appellant
Through: Mr. Ruchir Bhatia, SSC with Ms. Deeksha Gupta, Adv.

versus

ESS DISTRIBUTION (MAURITIUS) S.N.C. ET. COMPAGNIE ..... Respondent
Through: Mr. Porus Kaka, Sr. Adv. with Mr. Ashok Mathur, Mr. Divesh Chawla, Mr. Saurabh Jain, Ms. Manpreet Kaur Bhalla & Ms. Sandy Sharma, Advs.

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\+ ITA 382/2023
THE COMMISSIONER OF INCOME TAX - INTERNATIONAL TAXATION -1 ..... Appellant
Through: Mr. Ruchir Bhatia, SSC with

Ms. Deeksha Gupta, Adv.

versus

ESS DISTRIBUTION (MAURITIUS) S.N.C. ET. COMPAGNIE ..... Respondent

Through: Mr. Porus Kaka, Sr. Adv. with Mr. Ashok Mathur, Mr. Divesh Chawla, Mr. Saurabh Jain, Ms. Manpreet Kaur Bhalla & Ms. Sandy Sharma, Advs.

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\+ ITA 344/2023

THE COMMISSIONER OF INCOME TAX - INTERNATIONAL TAXATION -1 ..... Appellant

Through: Mr. Ruchir Bhatia, SSC with Ms. Deeksha Gupta, Adv.

versus

ESS DISTRIBUTION (MAURITIUS) S.N.C. ET. COMPAGNIE ..... Respondent

Through: Mr. Porus Kaka, Sr. Adv. with Mr. Ashok Mathur, Mr. Divesh Chawla, Mr. Saurabh Jain, Ms. Manpreet Kaur Bhalla & Ms. Sandy Sharma, Advs.

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\+ ITA 380/2023

THE COMMISSIONER OF INCOME TAX - INTERNATIONAL TAXATION -1 ..... Appellant

Through: Mr. Ruchir Bhatia, SSC with Ms. Deeksha Gupta, Adv.

versus

ESS DISTRIBUTION (MAURITIUS) S.N.C. ET. COMPAGNIE ..... Respondent

Through: Mr. Porus Kaka, Sr. Adv. with

Mr. Ashok Mathur, Mr. Divesh Chawla, Mr. Saurabh Jain, Ms. Manpreet Kaur Bhalla & Ms. Sandy Sharma, Advs.

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\+ ITA 381/2023

THE COMMISSIONER OF INCOME TAX - INTERNATIONAL TAXATION -1 ..... Appellant

Through: Mr. Ruchir Bhatia, SSC with Ms. Deeksha Gupta, Adv.

versus

ESS DISTRIBUTION (MAURITIUS) S.N.C. ET. COMPAGNIE ..... Respondent

Through: Mr. Porus Kaka, Sr. Adv. with Mr. Ashok Mathur, Mr. Divesh Chawla, Mr. Saurabh Jain, Ms. Manpreet Kaur Bhalla & Ms. Sandy Sharma, Advs.

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\+ ITA 773/2023 & CM APPL. 65149/2023

THE COMMISSIONER OF INCOME TAX - INTERNATIONAL TAXATION -1 ..... Appellant

Through: Mr. Ruchir Bhatia, SSC with Ms. Deeksha Gupta, Adv.

versus

ESS DISTRIBUTION (MAURITIUS) S.N.C. ET. COMPAGNIE ..... Respondent

Through: Mr. Porus Kaka, Sr. Adv. with Mr. Ashok Mathur, Mr. Divesh Chawla, Mr. Saurabh Jain, Ms. Manpreet Kaur Bhalla & Ms. Sandy Sharma, Advs.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE PURUSHAINDRA KUMAR KAURAV

O R D E R

% 13.02.2024

1. The Commissioner of Income Tax impugns the decision rendered by the **Income Tax Appellate Tribunal**[1] dated 21 November 2022 in ITA 382/2023 for **Assessment Year**[2] [AY 2003-2004], ITA 381/2023 [AY 2004-2005], ITA 380/2023 [AY 2009-2010], ITA 344/2023 [AY 2011-2012], ITA 336/2023 [AY 2012-2013], ITA 773/2023 [AY 2014-2015] and ITA 333/2023 [AY 2014-2015]. The following questions are proposed for our consideration: -

> "2.1 Whether on the facts and in the circumstances of the case and in law, the Ld. ITAT is correct in holding that assessee did not have a dependent agent PE (DAPE) in India by observing that the transaction between the assessee and ESPN India is limited to conferring of right to distribute the channels of ESPN Star Sport in India through cable operators in an independent manner when it has been brought out that the assessee had complete control over sale of agent, bore commercial risk on behalf of the agent thereby not appreciating the principle of substance over form?
>
> 2.2. Whether on the facts and in the circumstances of the case and in law, the Ld. ITAT is correct in holding that the assessee did not have a fixed place PE in India by observing that there was nothing to suggest that the assessee had any control over the business/premises of ESPN India when it has been clearly brought out that the assessee and ESPN India has common management and identical functions and for all practical purposes the distinction between the two was insignificant?
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> 2.3 Whether on the facts and in the circumstances of the case and in law, the Ld. ITAT is correct in holding that assessee has no business connection in India and is not taxable in terms of section 9(1) of the Income Tax Act when the assessee had complete control over sale of the agent and bore commercial risk on behalf of the agent?
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> 2.4 Whether on the facts and in the circumstances of the case and in law, the Ld. ITAT is correct in holding that if the purported PE is remuneration on arm's length as subsidiary company, no further attribution of profit be made on foreign company, when the

[1] ITAT
[2] AY

> functions performed by the subsidiary company are much more what has been reported before TPO Analysis?
>
> 2.5 Whether on the facts and in the circumstances of the case and in law, the Ld. ITAT is correct in holding that no further attribution of profit be made on foreign company when the TP analysis did not adequately reflect the FAR borne by the Indian enterprise, for additional functions/risk performed by it as DAPE?"

2. The appeals emanate from agreements entered into between **ESS Distribution (Mauritius) S.N.C. ET Compagnie**[3], ESPN Star Sports and **ESPN Software India Private Limited**[4]. ESS Distribution (Mauritius) holds a valid **Tax Residency Certificate**[5] and claims benefits in terms of the provisions contained in the India -Mauritius **Double Taxation Avoidance Agreement**[6]. The subject matter of the agreements executed by it with ESPN Star Sports and ESPN India pertain to distribution of Star Sports and ESPN channels in India. Both ESPN Star Sports and ESPN India are designated as Distributors under the two agreements.

3. The appellants invoke Articles 5 and 12 of the India - Mauritius DTAA asserting that ESS Distribution (Mauritius) has a fixed place **Permanent Establishment**[7] and / or in the alternative by virtue of the distribution agreements with the Indian entities, the Court should recognise the existence of a **Dependent Agent PE**[8]. They additionally raise the issue of subscription and distribution revenues generated pursuant under the aforenoted contracts as being liable to be viewed as royalty.

4. Insofar as the issue of a fixed place PE and DAPE is concerned,

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[3] ESS Distribution (Mauritius)
[4] ESPN India
[5] TRC
[6] DTAA
[7] PE
[8] DAPE

the ITAT has returned compelling findings of fact to hold that there is no fixed place PE. It becomes pertinent to note at this stage that when assessment was undertaken under Section 143(1) of the **Income Tax Act, 1961**[9], the **Assessing Officer**[10] had while dealing with the facts as they obtained for AY 2003-2004 held that ESS Distribution (Mauritius) had a fixed place PE in India and consequently 70% of the gross distribution revenue was liable to be treated as business income of the assessee in India. On the appeal which was taken by ESS Distribution (Mauritius), the **Commissioner of Income Tax (Appeals)**[11] had not only confirmed the view taken by the AO, it additionally held that ESPN India constituted a DAPE of the assessee. It was the aforesaid decision which was thereafter taken in appeal before the ITAT.

5. We note that insofar as the issue of fixed place PE is concerned, the ITAT has held as under: -

> "**22**. We have considered rival submissions and perused the materials on record. At the outset, we need to examine, whether the assessee has a fixed place PE in India. The distribution agreement between the assessee and ESPN India clearly stated that the transaction is on principal to principal basis. The agreement further allowed ESPN India to enter into agreement with sub-distributors/cable operators so that the channels can be distributed to end consumers in India. As per the terms of the agreement, the revenue earned from distribution of channels has to be shared between the assessee and ESPN India in certain ratio. The materials on record demonstrate that ESPN India is carrying on its distribution activity as well as other activities, such as, acquisition and allotment of air time for advertisement and sale/leasing of decoders. No material has been brought on record by the Revenue to suggest that the assessee has any kind of control over the business of ESPN India or the premises of ESPN India have been given at the disposal of the assessee or the assessee carries on any kind of business through the premises of ESPN India. In case of

[9] Act
[10] AO
[11] CIT(A)

ADIT Vs. E Funds IT Solutions Inc. (supra), the Hon'ble Supreme Court while deciding the issue of existence to fixed place PE has held as under:

> "5. As against this, Shri S. Ganesh, learned senior counsel for the respondents, has argued that the tests for whether there is a fixed place PE have now been settled by the judgment of this Court in Formula One (supra), and that it is clear that for a fixed place PE, it must be necessary that the said fixed place must be "at the disposal" of the assessees, which means that the assessees must have a right to use the premises for the purpose of their own business, which has not been made out in the facts of this case. He further argued that, on the facts of this case, both the US companies as well as the Indian company pay income tax, and the Transfer Pricing Officer by his order dated 22nd February, 2006, has specifically held that whatever is paid under various agreements between the US companies and the Indian company are on arm's length pricing and that, this being the case, even if a fixed place PE is found, once arm's length price is paid, the US companies go out of the dragnet of Indian taxation. He also adverted to Article 5(6) to state that the mere fact that a 100% subsidiary may be carrying on business in India does not by itself means that the holding company would have a PE in India. Further, according to learned counsel, so far as the service PE is concerned, even the assessing officer did not find that such a PE existed.
>
> According to him, under Article 5(2)(l), it is necessary that the foreign enterprises must provide services to customers who are in India, which is not Revenue's case as all their customers exist only outside India. Further, according to the learned counsel, the entire personnel engaged in the Indian operations are employed only by the Indian company and the fact that the US companies may indirectly control such employees is only for purposes of protecting their own interest. Ultimately, there are four businesses that the assessees are engaged in, namely, ATM Management Services, Electronic Payment Management, Decision Support and Risk Management and Global Outsourcing and Professional Services. Since all these businesses are carried on outside India and the property through which these businesses are carried out, namely ATM networks, software solutions and other hardware networks and information technology infrastructure were all located outside India, the activities of e-Funds India are independent business activities on which, as has been noticed by the High Court, independent profits are made and income assessed to tax

under the Income Tax Act. According to the learned counsel, “agency PE” was never argued before the assessing officer and even before the ITAT. Therefore, no factual foundation for the same has been laid. Equally, according to the learned counsel, the settlement procedure availed for the assessment years in question cannot be said to be binding for subsequent years as they were without prejudice to the assessees’ contention that they have no PE in India. He also relied upon the OECD Commentary, paragraph 3.6 in particular, to demonstrate that the so-called admissions made and relied upon by the three authorities below were correctly overturned by the High Court.

Learned counsel also stated that the ground of adverse inference was never argued or put before any of the authorities below, and the only place that it could be found is in the assessment order for the year 2003-04, which order became non-est as it was substituted by the agreement entered into between the parties ending in withdrawal of appeals before the CIT (Appeals). Thus, according to the learned counsel, the view of the High Court is absolutely correct and should not be interfered with. Learned counsel also argued that the cross- appeals of the Revenue were correctly dismissed in that, even though the ITAT decided the case in law against the assessees, yet it found on facts, differing from the calculation formula by the authorities below, that nil tax was payable. This is the only part of the ITAT judgment upheld by the High Court, and should not, therefore, be disturbed in any case.

6. Before we deal with the submissions made on both sides, it is necessary to first set out the statutory background. This is contained in Section 90 of the Income Tax Act, before it was amended in 2009. Section 90(1) and 90(2) of the Income Tax Act, as it then stood, read as under:

“Section 90. Agreement with foreign countries.—

1) The Central Government may enter into an agreement with the Government of any country outside India—

(a) for the granting of relief in respect of—

(i) income on which have been paid both income-tax under this Act and income-tax in that country; or

(ii) income-tax chargeable under this Act and under the corresponding law in force in that country to promote mutual economic relations, trade and investment, or

(b) for the avoidance of double taxation of income under this Act and under the corresponding law in force in that country, or

(c) for exchange of information for the prevention of evasion or avoidance of income-tax chargeable under this Act or under the corresponding law in force in that country, or investigation of cases of such evasion or avoidance, or

(d) for recovery of income-tax under this Act and under the corresponding law in force in that country, and may, by notification in the Official Gazette, make such provisions as may be necessary for implementing the agreement.

(2) Where the Central Government has entered into an agreement with the Government of any country outside India under sub-section (1) for granting relief of tax, or as the case may be, avoidance of double taxation, then, in relation to the assessee to whom such agreement applies, the provisions of this Act shall apply to the extent they are more beneficial to that assessee."

7 xxxx

8 xxxx

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11 xxxx

12. Thus, it is clear that there must exist a fixed place of business in India, which is at the disposal of the US companies, through which they carry on their own business. There is, in fact, no specific finding in the assessment order or the appellate orders that applying the aforesaid tests, any fixed place of business has been put at the disposal of these companies. The assessing officer, CIT (Appeals)and the ITAT have essentially adopted a fundamentally erroneous approach in saying that they were contracting with a 100% subsidiary and were outsourcing business to such subsidiary, which resulted in the creation of a PE. The High Court has dealt with this aspect in some detail in which it held:

"49. The Assessing Officer, Commissioner (Appeals) and the tribunal have primarily relied upon the close association between e-Fund India and the two assessees and applied functions performed, assets used and risk assumed, criteria to determine whether or not the assessee has fixed place of

business. This is not a proper and appropriate test to determine location PE. The fixed place of business PE test is different. Therefore, the fact that e-Fund India provides various services to the assessee and was dependent for its earning upon the two assessees is not the relevant test to determine and decide location PE. The allegation that e-Fund India did not bear sufficient risk is irrelevant when deciding whether location PE exists. The fact that e-Fund India was reimbursed the cost of the call centre operations plus 16% basis or the basis of margin fixation was not known, is not relevant for determining location or fixed place PE.

Similarly what were the direct or indirect costs and corporate allocations in software development centre or BPO does not help or determine location PE. Assignment or sub-contract to e-Fund India is not a factor or rule which is to be applied to determine applicability of Article 5(1). Further whether or not any provisions for intangible software was made or had been supplied free of cost is not the relevant criteria/test. e-Fund India was/is a separate entity and was/is entitled to provide services to the assessees who were/are independent separate taxpayers. Indian entity i.e. subsidiary company will not become location PE under Article 5(1) merely because there is interaction or cross transactions between the Indian subsidiary and the foreign Principal under Article 5(1). Even if the foreign entities have saved and reduced their expenditure by transferring business or back office operations to the Indian subsidiary, it would not by itself create a fixed place or location PE. The manner and mode of the payment of royalty or associated transactions is not a test which can be applied to determine, whether fixed place PE exists."

13. It further went on to hold that the ITAT's finding that the assessees were a joint venture or sort of partnership with the Indian subsidiary was wholly incorrect. Also, none of these arguments have been invoked by the Revenue and such a finding would, therefore, be perverse. After citing Klaus Vogel on Double Taxation Conventions, Arvid A. Skaar in Permanent Establishment: Erosion of a Tax Treaty Principle and Bollinger vs. Commissioner, 108 S.Ct.1173, the High Court found against the Revenue, holding that there is no fixed place PE on the facts of the present case. We agree with the findings of the High Court in this regard.
14. Reliance placed by the Revenue on the United States Securities and Exchange Commission Form 10K Report, as has been correctly pointed out by the High Court, is also

misplaced. It is clear that the report speaks of the e-Funds group of companies worldwide as a whole, which is evident not only from going through the said report, but also from the consolidated financial statements appended to the report, which show the assets of the group worldwide.

15. xxxxx

16. This report would show that no part of the main business and revenue earning activity of the two American companies is carried on through a fixed business place in India which has been put at their disposal. It is clear from the above that the Indian company only renders support services which enable the assessees in turn to render services to their clients abroad.

This outsourcing of work to India would not give rise to a fixed place PE and the High Court judgment is, therefore, correct on this score."

6. It is thus manifest and as would be evident from the definitive findings of fact recorded, the appellant had woefully failed to adduce any evidence which may have lent credence to its contention of a fixed place PE. Proceeding to deal with the argument of DAPE, the ITAT has held as follows:-

"23. As per the ratio laid down in the aforesaid decision of the Hon'ble Supreme Court, burden is on the revenue to establish the existence of fixed place PE. Insofar as the issue, the ESPN Indian is a dependent agent of the assessee, the agreement between the parties does not make out a case of DAPE. There is no privity of contract between the assessee with the cable operators or end customers in India. It is ESPN India who has entered into contracts with cable operators for distribution of the channels in India and responsible for breach of contract with cable operators. The transaction between the assessee and ESPN India is limited to conferring of right to distribute the channels of ESPN Star Sports in India through cable operators. How, ESPN India does such distribution activity is not the concern of the assessee. The assessee is only concerned with share in distribution revenue depending on the total amount received by ESPN India from sub-distributors. We have also noted that in certain instances of alleged breach of contract between ESPN India and cable operators, it is ESPN India, which is liable and not the assessee.

> Further, other factors, such as, acquisition of air time and sale of decoders clearly indicate that ESPN India has its independent business and cannot be called as dependent agent of the assessee. Though, the Revenue has alleged that ESPN India is a DAPE, however, it has failed to demonstrate that in terms with Article 5(4) of India – Mauritius Tax Treaty, ESPN India habitually exercises authority to conclude contracts on behalf of the assessee.
>
> 24. That being the factual position emerging on record, in our view, ESPN India cannot even be considered to be a DAPE of the assessee. The decisions cited before us, particularly the decision of the Coordinate Bench in case of TAJ TV Ltd. (supra) and Turner Broadcasting Systems Asia Pacific Inc (supra) squarely apply to the facts of the present appeal. Therefore, following them, we hold that the assessee does not either had a fixed place PE or dependant agent PE in India under Article 5 of the India-Mauritius Tax Treaty. In any case of the matter, it is an undisputed factual position that ESPN India has been remunerated at arm's length and there are no adjustments suggested by the TPO in any of the assessment years under dispute. That being the case, no further attribution of profit can be made to the PE. In this regard, we rely upon the decisions cited by learned counsel for the assessee. Thus, we hold that the distribution revenue received by the assessee is not taxable in India."

7. The aforesaid conclusions of the ITAT clearly merit no interference nor do they give rise to any substantial question of law.

8. While dealing with the issue of royalty, the ITAT has on a detailed review of the contract terms and the facts as placed before it recorded the following conclusions:-

> "13. A reading of the aforesaid Article would make it clear that the expression royalty means consideration received for the use of or right to use of any copyright of literary, artistic or scientific work (including cinematograph films and films or tapes for radio or television broadcasting, any patent trade-mark design, model plan, secret formula plan etc. Admittedly, the expression copyright has not been defined either under the Income Tax Act or under the India–Mauritius Tax Treaty. Therefore, we have to find the meaning of copyright in the Copyright Act. As discussed earlier, section 14 of the Copyright Act defines copyright as under:

***14. Meaning of copyright.**-- For the purposes of this Act, copyright means the exclusive right subject to the provisions of this Act, to do or authorise the doing of any of the following acts in respect of a work or any substantial part thereof, namely--*

(a) in the case of a literary, dramatic or musical work, not being a computer programme,--

(i) to reproduce the work in any material form including the storing of it in any medium by electronic means;

(ii) to issue copies of the work to the public not being copies already in circulation;

(iii) to perform the work in public, or communicate it to the public;

(iv) to make any cinematograph film or sound recording in respect of the work;

(v) to make any translation of the work;

(vi) to make any adaptation of the work;

(vii) to do, in relation to a translation or an adaptation of the work, any of the acts specified in relation to the work in sub-clauses (i) to (vi);

(b) in the case of a computer programme:

(i) to do any of the acts specified in clause (a);

2[(ii) to sell or give on commercial rental or offer for sale or for commercial rental any copy of the computer programmer:

Provided that such commercial rental does not apply in respect of computer programmes where the programme itself is not the essential object of the rental.]

(c) in the case of an artistic work,--

3[(i) to reproduce the work in any material form including--

(A) the storing of it in any medium by electronic or other means; or

(B) depiction in three-dimensions of a two-dimensional work; or

(C) depiction in two-dimensions of a three-dimensional work;]

(d) in the case of a cinematograph film,--

4[(i) to make a copy of the film, including--

(A) a photograph of any image forming part thereof; or

(B) storing of it in any medium by electronic or other means;]

5[(ii) to sell or give on commercial rental or offer for sale or for such rental, any copy of the film.]

(iii) to communicate the film to the public;

(e) in the case of a sound recording,--

(i) to make any other sound recording embodying it 6[including storing of it in any medium by electronic or other means];

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15. It is further relevant to observe, the consequences for infringement of copyright and broadcast reproduction right have been dealt with differently under the Copyright Act. Thus, on a conjoint reading of section 14 and 37 of the Copyright Act, a holistic view can be taken that broadcast reproduction right is distinct and separate from Copyright Act. In case of DDIT Vs. SET India Pvt. Ltd (supra), the Coordinate Bench, while dealing with aforesaid aspect, has held as under:

"16. Having heard both the sides, we observe that Id 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 Id 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 Id 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 the 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 Acts well as Article 12 of the Treaty. Accordingly, the payment is not in the nature of Royalty but in the nature of business income."

9. In order to appreciate the arguments which were addressed before us, we deem it apposite to briefly notice the following salient clauses as they appear in the agreement between ESPN Star Sports and ESS Distribution (Mauritius):-

"1(a) ESS hereby appoints Distributor as distributor to distribute and, or make available for distribution (subject to ESS's prior written approval, not to be unreasonably withheld or delayed) the international ESPN network programming service (the "E$PN Service") throughout the Area effective April 1, 2002 through March 31, 2003(the "Term") and Distributor hereby, accepts such appointment. The Term shall automatically renew for successive periods of one year each unless ES5 gives written notice to Distributor of its intent not to renew at least forty-five days prior to the scheduled expiration of the original or then applicable renewal Term.

(b) Distributor acknowledges and agrees that the above appointment is limited and qualified to the extent of solely making the ESPN Service available in the Area to approved sub distributors in strict accordance 'With the terms and conditions herein. Distributor further agrees that nothing in this Agreement shall provide Distributor with any rights whatsoever to the ESPN Service, nor convey, confer, grant, assign or otherwise provide Distributor with copyright, title or any other proprietary or ownership interest in or to the ESPN Service or any elements thereof. All rights in the content of the ESPN Service are expressly reserved by ESS. Distributor shall not use, authorize or permit the use of the FSPN Service, or any element thereof, for any purpose other than the purpose expressly specified under this Agreement. Notwithstanding anything contained in this Agreement, if the Distributor becomes aware of any infringement or threatened infringement in the Area, of the. rights and entitlements of ESS in the ESPN Service, the Distributor shall inform ESS of such infringement. ESS may require Distributor to take, either by itself *or* through a person authorised by it, all reasonable steps to end such infringement, including initiating appropriate legal action on behalf of ESS.

(c) Distributor agrees and undertakes to distribute the ESPN Service provided by ESS in its entirety, without any alteration,

editing, dubbing, scrolling or ticket tape, substitution or any other modification, addition, deletion or any other variation whatsoever.

xxx xxx xxx

(2) Neither Distributor nor ESS shall have, or shall hold itself out as having, the right or authority to bind the other or to assume, create or incur any liability or any obligation of any kind, express or implied, against or in the name of or on behalf of the other.

3(a) Distributor shall comply with all laws, rules and regulations, and &hall obtain all necessary licenses and permits.

(b) Distributor acknowledges that the names and marks of ESPN STAR Sports and ESPN (and the names of certain programs which appear in the ESPN Service) are the exclusive property of ESPN, Inc., ESS and its program suppliers and that Distributor has not acquired and will not acquire any proprietary rights therein by reason of this Agreement. Subject thereto and to the terms of this Agreement, ESS grants to the Distributor a non exclusive license to use the said names and marks on advertising and promotional material, notepapers, stationery and related materials used by the Distributor for its business activities under the Agreement. ESS shall have the right to approve any of Distributor mentioning or using of such names or marks and publicity about ESS or the programming included in the ESPN Service. Distributor shall not publish or disseminate any material which violates any restrictions imposed by ESS or ESPN, Inc. program suppliers and disclosed to Distributor by ESS Distributor shall be entitled to allow sub-distributors appointed by it to distribute the ESPN Service to use the names and marks of ESPN STAR Sports and ESPN to the extent permitted hereunder. Upon ESS's request, Distributor shall promptly discontinue, and sha11 procure all sub-distributors to promptly discontinue, use of any material or material containing any of the names and marks of ESPN STAR Sports and ESPN.

4(a) In consideration of the appointment of the Distributor to distribute the ESPN Service in the Area, Distributor shall pay ESS (subject to deduction, if required, of all applicable taxes), the aggregate of the following amounts:

(i) a minimum guaranteed amount of USD 9,500,000 (United States Dollars Nine Million Five Hundred Thousand only) per annum; and

(ii) an amount which is equal to 88% of the excess of the total gross revenues of the Distributor per annum over and above USD 9,500,000. For this purpose gross revenues shall mean the amount due to the Distributor from distributing the ESPN Service in the Area as reduced by any taxes that are withheld in the Area.

xxx xxx xxx

7(c) ESS will indemnify Distributor from and against any and all claims, damages, liabilities, costs and expenses arising out of the distribution, pursuant to this Agreement, of the ESPN Service to the extent that such claims, damages, liabilities, costs and expenses are: (i) based upon alleged libel slander, defamation or invasion of the right of privacy (as such concepts are limited and defined by New York and United States federal law), or violation or infringement of copyright or literary or dramatic rights or the requirements of applicable laws within the Area arising out of the content of the ESPN Service (other than music performing or music synchronization rights); and (ii) based upon the distribution of the ESPN Service as furnished by ESS without alterations, modifications, variations, additions or deletions by Distributor. It is hereby agreed and declared that ESS makes no representation or warranty as to whether or not the ESPN Service or any of its content requires any governmental consent or approval within the Area to distribute.

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(e) Except as herein provided to the contrary, neither Distributor nor ESS shall have any rights against the other party hereto for claims by third persons or for the non operation of facilities or the non-furnishing of the ESPN Service if such non operation or non-furnishing is due to failure of equipment, action or claims by any third person, labour dispute or any cause beyond such party's reasonable control."

10. A similar agreement came to be executed between ESS Distribution (Mauritius) and ESPN India. That agreement incorporates the following salient clauses:-

"1(a) ESS Distribution hereby appoints Distributor as distributor to distribute and, or make available for distribution (subject to ESS Distribution's prior written approval, not to be unreasonably withheld or delayed) the international ESPN network programming service (the "ESPN Service") throughout the Area effective April 1, 2002 through March 31, 2003 (the "Term") and Distributor hereby, accepts such appointment. The Term shall automatically renew for successive periods of one year each unless ESS Distribution gives written notice to Distributor of its intent not to renew at least thirty days prior to the Scheduled expiration of the original or then applicable renewal Term.

(b) Distributor acknowledges and agrees that the above appointment is limited and qualified to the extent of solely making ESPN Service available in the Area to approved sub-distributors in strict accordance with the terms and conditions herein. The terms

of appointment of each sub-distributor shall provide that if this Agreement is terminated, then at ESS Distribution's election, (i) the arrangement with such sub-distributor may be terminated; or (ii) the rights and obligations of distributor under the arrangement with such sub-distributor may, automatically, be assigned to ESS Distribution. Distributor further agrees that nothing in this agreement shall provide Distributor with any rights whatsoever to the ESPN Service, nor convey, confer, grant, assign or otherwise provide Distributor with copyright, title or any other proprietary or ownership interest in or to the ESPN Service or any elements thereof. Distributor shall not use, authorize or permit the use of the ESPN Service or any element thereof, for any purpose other than the purpose expressly specified under this Agreement. Notwithstanding anything contained in this Agreement, if the Distributor becomes aware of any infringement or threatened infringement in the Area of-any intellectual property in the ESPN Service, the Distributor shall inform ESS Distribution of such infringement. ESS Distribution may require Distributor to take, either by itself or through a person authorised by it, all reasonable steps to end such infringement including initiating appropriate legal action on behalf of ESS Distribution.

(c) Distributor agrees and undertakes to distribute the ESPN Service provided by ESS Distribution in its entirety, without any alteration, editing, dubbing, scrolling or ticker tape, substitution or any other modification, addition, deletion or any other variation whatsoever.

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2. Neither Distributor nor ESS Distribution shall have, or shall hold itself out as having, the right or authority to bind the other or to assume, create or incur any liability or any obligation of any kind, express or implied, against or in the name of or on behalf of the other.

3(a) Distributor shall comply with all laws, rules and regulations, and shall obtain all necessary licenses and permits.

(b) Distributor acknowledges that the names and marks of ESPN STAR Sports and ESPN (and the names of certain programs which appear in the ESPN Service) are the exclusive property of ESPN, Inc., ESPN STAR Sports and their program suppliers and that Distributor has not acquired and will not acquire any proprietary rights therein by reason of this Agreement. Subject thereto and to the terms of this Agreement, ESS Distribution grants to the Distributor a non exclusive license to use the said names and marks on advertising and promotional material, notepapers, stationery and related materials used by the Distributors for its

business activities under the Agreement. ESS Distribution shall have the right to approve any of Distributor mentioning or using of such names or marks and publicity about ESPN STAR Sports or the programming included in the ESPN Service. Distributor shall not publish or disseminate any material which violates any restrictions imposed by ESPN STAR Sports or ESPN, Inc. program suppliers and disclosed to Distributor by ESS Distribution. Upon ESS's request, Distributor shall promptly discontinue the use of any material or material containing any of the names and marks of ESPN STAR Sports and ESPN."

11. Pursuant to the rights conferred, ESPN India entered into distribution agreements with various affiliates in India. One of the Service Contracts so executed and which forms part of our record contains the following stipulations pertaining to the license:-

"B. THE SERVICE

The Licensor is offering two services viz. ESPN Network Programming Service ("ESPN Service)" and Star Sports International Programming Service ("STAR Sports Service"). The Services are available In two packages to the Affiliate namely, a Bouquet, In which both ESPN Service' as well as Star Sports Service will be provided **("Bouquet")** and Alacarte under which package the Affiliate can choose to take either ESPN Service or Star Sports Service. The rates for both these packages have been fully communicated to and understood by the Affiliate. The Affiliate has indicated his choice by ticking the relevant box.

VI. GENERAL TERMS AND CONDITIONS

1. NON EXCLUSIVE RIGHT

The Licensor grants to the affiliate the non-exclusive right to distribute the Service in the area for reception by subscribers of the Distribution System(s) (referred to in Article II) whether directly, or through its sub operators and sub affiliates/cable operators of the Affiliate listed at Annexure I, collectively referred to as the Affiliate's Subscribers. For purposes of this Agreement, sub-operators', 'sub affiliates/ cable operators' shall mean and include and person or entity that receives the service from the affiliate or from a person permitted by the affiliate to provide the service and who re-transmits the same for reception by subscribers. The licensor may terminate this Agreement, at any lime, without liability, upon prior written notice to the affiliate, if he believes in good faith and

reasonable judgment that it is threatened by or may be subject to legal, governmental or other adverse action under applicable treaties, tariffs, laws, Rules, regulations or orders, that may restrict the right of the licensor to provide the Service or any part thereof to the Affiliate, or limit the licensor's right or authorization to offer the service. The Licensor may deactivate/ disconnect the Service hereunder provided and/or terminate this Agreement at any time without liability, by prior written notice to the Affiliate. If the Licensor exercises its discretion to discontinue the Service in the area. For purposes of this Agreement, subscriber shall include any person or entity that receives the Service for exclusive viewership at a location within the area from the affiliate, or from sub-operators, sub-affiliate/ cable operators of the Affiliate and does not further transmit the Service to any other person.

2. OBLIGATIONS OF THE AFFILIATE

The Affiliate shall at its own cost and expense cause the service to be received only from the designated satellite(s) and shall ensure distribution Systems on a separate, dedicated channel(s) (the 'Channel(s)') for reception by all its Subscribers. The Affiliate shall be responsible, at its sole cost and expenses for obtaining all licenses and permits necessary for the foregoing. The Affiliate shall use its best efforts to maintain a high quality of signal transmission for the service and shall take all other necessary steps to ensure that (i) the service is received only by subscribers who pay the full applicable subscription fees for such Service and (ii) no location for which the applicable, subscription fees is not paid shall be capable of viewing the service. The Affiliate further agrees and undertakes that it shall cause continuous distribution of the service to all its Subscribers during Its telecast without blacking it out or interfering with it in any manner whatsoever.

xxx xxx xxx

4. REPRESENTATIONS AND WARRANTIES OF THE LICENSOR

The Licensor represents and warrants the Affiliate that it has the requisite power and authority to enter into this Agreement and to fully perform its obligations hereunder. It is clarified that licensor's authority to Licence the Service is derived from agreements granted to the Licensor by ESPN Star Sports ('ESS') for the ESPN Service and for the Star Sports Service (the ESS Agreements").

Affiliate expressly acknowledges and agrees that upon termination of either of the ESS Agreements by ESPN Star Sports, this agreement shall stand terminated as concerns the service for which the ESS Agreement(s) has been terminated.

xxx xxx xxx

15.3 No Agency
Neither Affiliate nor Licensor shall be or hold itself out as the agent of the other under this Agreement. No Sub-operators/Subscribers shall be deemed to have any privity of contract or direct contractual or other relationship with Licensor by virtue of this Agreement or by Licensor's delivery of the Service of the Affiliate."

12. We also deem it apposite to notice Articles 5 and 12 as contained in the India - Mauritius DTAA and which are reproduced hereinbelow: -

"Article 5 — Permanent establishment

1. For the purposes of this Convention, the term "permanent establishment" means a fixed place of business through which the business of the enterprise is wholly or partly carried on.

2. The term "permanent establishment" shall include—

(a) a place of management;

(b) a branch;

(c) an office;

(d) a factory;

(e) a workshop;

(f) a warehouse, in relation to a person providing storage facilities for others;

(g) a mine, an oil or gas well, a quarry or any other place of extraction of natural resources;

(h) a firm, plantation or other place where agricultural, forestry, plantation or related activities are carried on;

(i) a building site or construction or assembly project or supervisory activities in connection therewith, where such site,

project or supervisory activity continues for a period of more than nine months.

[(j) the furnishing of services, including consultancy services, by an enterprise through employees or other personnel engaged by the enterprise for such purpose, but only where activities of that nature continue (for the same or connected project) for a period or periods aggregating more than 90 days within any 12 month period.]

3. Notwithstanding the preceding provisions of this article, the term "permanent establishment" shall be deemed not to include:

(a) the use of facilities solely for the purpose of storage or display of merchandise belonging to the enterprise;

(b) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage or display;

(c) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise;

(d) the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise or for collecting information for the enterprise;

(e) the maintenance of a fixed place of business solely—

(i) for the purpose of advertising,

(ii) for the supply of information,

(iii) for scientific research, or

(iv) for similar activities,

which have a preparatory or auxiliary character for the enterprise.

4. Notwithstanding the provisions of paragraphs (1) and (2) of this article, a person acting in a Contracting State for or on behalf of an enterprise of the other Contracting State [other than an agent of an independent status to whom the provisions of paragraph (5) apply] shall be deemed to be a permanent establishment of that enterprise in the first-mentioned State if:

(i) he has and habitually exercises in that first-mentioned State, an authority to conclude contracts in the name of the enterprise, unless his activities are limited to the purchase of goods or merchandise for the enterprise; or

(ii) he habitually maintains in that first-mentioned State a stock of goods or merchandise belonging to the enterprise from which he regularly fulfils orders on behalf of the enterprise.

5. An enterprise of a Contracting State shall not be deemed to have a permanent establishment in the other Contracting State merely because it carries on business in that other State through a broker, general commission agent or any other agent of an independent status, where such persons are acting in the ordinary course of their business. However, when the activities of such an agent are devoted exclusively or almost exclusively on behalf of that enterprise, he will not be considered an agent of an independent status within the meaning of this paragraph.

6. The fact that a company, which is a resident of a Contracting State controls or is controlled by a company which is a resident of the other Contracting State, or which carries on business in that other Contracting State (whether through a permanent establishment or otherwise) shall not, of itself, constitute either company a permanent establishment of the other.

Article 12 — Royalties

1. Royalties arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.

2. However, such royalties may also be taxed in the Contracting State in which they arise, and according to the law of that State, but the tax so charged shall not exceed 15 per cent of the gross amount of the royalties.

3. The term “royalties” as used in this Article means payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work (including cinematograph films, and films or tapes for radio or television broadcasting), any patent, trade mark, design or model, plan, secret formula or process or for the use of, or the right to use, industrial, commercial or scientific equipment, or for information concerning industrial, commercial or scientific experience.

4. The provisions of paragraphs (1) and (2) shall not apply if the recipient of the royalties, being a resident of a Contracting State carries on business in the other Contracting State in which the royalties arise, through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the right or property in respect of which the royalties are paid is effectively connected with such permanent establishment or fixed base. In such a case, the provisions of article 7 or article 14, as the case may be, shall apply.

> 5. Royalties shall be deemed to arise in a Contracting State when the payer is that Contracting State itself, a political sub-division, a local authority or a resident of that State, where, however, the person paying the royalties whether he is a resident of a Contracting State, or not, has in a Contracting State a permanent establishment in connection with which the liability to pay the royalties was incurred, and such royalties are borne by such permanent establishment, then such royalties shall be deemed to arise in the Contracting State in which the permanent establishment is situated.
>
> 6. Where, by reason of a special relationship between the payer and the recipient or between both of them and some other person, the amount of royalties paid, having regard to the use, right or information for which they are paid, exceeds the amount which would have been agreed upon by the payer and the recipient in the absence of such relationship, the provisions of this article shall apply only to the last-mentioned amount. In that case, the excess part of the payments shall remain taxable according to the laws of each Contracting State, due regard being had to the other provisions of this Convention."

13. Taking up the issue of royalty first, it is manifest from a reading of Article 12(3) that payments would fall within its ambit provided they represent "*consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work…..*". As is evident from a reading of the agreement conditions extracted hereinabove, there was no transfer of copyright. The agreement that ESS Distribution (Mauritius) came to execute conferred no right with respect to copyright upon the Indian entities. This aspect, in any case, is liable to be answered in favour of the assessee bearing in mind the decision of the Supreme Court in **Engineering Analysis Centre of Excellence Private Limited vs. Commissioner of Income Tax and Another**[12] and which had clearly held and recognized the distinction between a broadcasting right and a copyright as flowing from Sections

[12] (2022) 3 SCC 321

14 and 37 of the **Copyright Act, 1957**[13]. This quite apart from the undisputed fact that insofar as the present respondent is concerned, even the question of broadcasting rights does not arise since it was in no manner connected therewith.

14. Insofar as the issue of fixed place PE is concerned, the same clearly stands concluded against the appellants by virtue of the findings of fact returned by the ITAT. The case of a DAPE appears to have been raised in the backdrop of Article 12(4)(i) of the India-Mauritius DTAA. However, the contract stipulations would unerringly point towards a manifest absence of a right having been conferred or an authority granted to conclude contracts in the name of ESS Distribution (Mauritius). The ITAT has found that the Indian entities stood conferred with an independent right to enter into contracts with cable operators for channel distribution and that ESS Distribution (Mauritius) was not privy to those agreements. In terms of those agreements, it is the Indian entities which bear associated distribution costs and expenses. The agreements unequivocally establish that ESS Distribution (Mauritius) is in no manner connected with the contracts executed by the Indian entities with cable operators and other intermediaries. Even the right to initiate legal action by the latter is available to be exercised only against the Indian entities.

15. As far as the additional issue of profit attribution is concerned, we note that since there is no PE, the issue of profit attribution would clearly not arise. This issue, in any case, stands concluded in light of the judgment rendered by the Supreme Court in **Commissioner of Income Tax vs. E-Funds IT Solution Inc.**[14]

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[13] 1957 Act
[14] (2018) 13 SCC 294

16. In view of the aforesaid, we find no merit in the instant appeals. They shall stand dismissed.

YASHWANT VARMA, J.

PURUSHAINDRA KUMAR KAURAV, J.

FEBRUARY 13, 2024
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