आयकर अपीलीय अधिकरण "J" न्यायपीठ मुंबई में।

IN THE INCOME TAX APPELLATE TRIBUNAL "J" BENCH, MUMBAI
BEFORE SHRI MAHAVIR SINGH, JUDICIAL MEMBER
AND SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER

आयकर अपील सं./I.T.A. No.4534/Mum/2012

(**निर्धारण वर्ष /** Assessment Year: 2007-08)

NGC Network (India) Pvt. Ltd Star House, 3rd Floor, Off Dr. E. Moses Road, Mahalaxmi, Mumbai- 400011	**बनाम**/ v.	ACIT Range- 11(1) R.No. 439, Aayakar Bhavan, M.K Marg, Mumbai- 400020
स्थायी लेखा सं./PAN :AABCN1401A		

आयकर अपील सं./I.T.A. No.4388/Mum/2012

(**निर्धारण वर्ष /** Assessment Year: 2007-08)

ACIT Range 11(1) R.No. 439, Aayakar Bhavan, M.K Marg, Mumbai- 400020	**बनाम**/ v.	NGC Network (India) Pvt. Ltd Star House, 3rd Floor, Off Dr. E. Moses Road, Mahalaxmi, Mumbai- 400011
	स्थायी लेखा सं./PAN : AABCN1401A	
(अपीलार्थी /**Appellant**)	..	(प्रत्यर्थी / **Respondent**)

Assessee by:	Shri. Porus Kaka
Revenue by :	Shri. Pavan K Beerla (DR)

सुनवाई की तारीख /**Date of Hearing : 24-04-2019**

घोषणा की तारीख /**Date of Pronouncement : 23-07-2019**

आदेश / O R D E R

PER RAMIT KOCHAR, Accountant Member

These are cross appeals filed by the assessee and Revenue, being ITA No. 4534/Mum/2012 and ITA No. 4388/Mum/2012 respectively both for assessment year 2007-08 , which are directed against appellate order dated 02.04.2012 in Appeal No. CIT(A)-15/Curr.46/11-12 passed by learned Commissioner of Income Tax (Appeals)-15, Mumbai (hereinafter called "the CIT(A)"), for

assessment year(AY) 2007-08, the appellate proceedings had arisen before learned CIT(A) from assessment order dated 01st February 2011 passed by learned Assessing Officer (hereinafter called "the AO") u/s 143(3) read with Section 144C of the Income-tax Act, 1961 (hereinafter called "the Act") for AY 2007-08, which was passed in pursuance to transfer pricing additions with respect to international transaction entered into by the assessee with its Associated Enterprises(AE) , as were made by Transfer Pricing Officer(TPO) in its order dated 23.08.2010 passed u/s 92CA(3) of the 1961 Act.

2. The grounds of appeal raised by the assessee in memo of appeal filed with the Income-Tax Appellate Tribunal, Mumbai (hereinafter called "the tribunal") in ITA no. 4534/Mum/2012 for AY 2007-08, reads as under:-

> *"1. The learned CIT(A) has erred in upholding the transfer pricing adjustment of Rs 4,904,938 made by the Assessing Officer ('AO') and not giving due cognizance to the submissions placed on record by the Appellant.*
>
> *Your Appellant prays that the transfer pricing adjustment of Rs 4,904,938 made by the AO should be deleted.*
>
> *2. The learned CIT(A) has erred in upholding the action of the AO of referring the Appellant's case to the Transfer Pricing Officer ('TPO') under Section 92CA(3) of the Act, without satisfying the conditions specified therein.*
>
> *Your Appellant prays that the reference of the Appellant's case to the TPO should be considered bad in law and void.*
>
> *3. The learned CIT(A) has erred in law and in facts in upholding the action of the AO of rejecting the economic analysis undertaken by the Appellant in accordance with the provisions of the Act read with the Income Tax Rules, 1962, ('Rules'). Further, the learned CIT(A) has also erred in upholding the action of the AO of using single year data (i.e. for FY 2006-07) for computing the operating margins of the companies considered to be comparable.*
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> *Your Appellant prays that the economic analysis undertaken by the Appellant using 3-year weighted average data of comparables in accordance with the provisions of the Act read with the Rules, should be upheld.*
>
> *4. The learned CIT(A) has erred in law and in facts in upholding the action of the AO of rejecting certain companies considered to be comparable by the Appellant in the benchmarking analysis for determination of the arm's length price and in not accepting the Appellant's contentions against certain additional companies considered by the AO to be comparable to the Appellant.*
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> *Your Appellant prays that the companies considered to be comparable by the Appellant should be reinstated and the additional companies considered to be comparable by the TPO should be rejected.*

5. The learned CIT(A) has erred in upholding the action of AO of not considering the effect of differences in the functional and risk profile of the Appellant and the comparable companies and thus not granting any adjustments to the Appellant in this regard in terms of the transfer pricing regulations.

Your Appellant prays that it should be granted adjustments to account for differences in the functional and risk profile of the Appellant and the comparable companies.

6. The learned CIT(A) has erred in law and in facts in upholding the action of the AO of not considering that the adjustment to the arm's length price, if any, should be limited to the lower end of the 5 percent range as the Appellant has the right to exercise this option under the proviso to Section 92C of the Act.

Your Appellant prays that any adjustment to the arm's length price, if any, should be limited to the lower end of the 5 percent range.

Each of the above grounds of appeal is without prejudice to and independent of one another.

The Appellant craves leave to add, alter, amend or delete the above grounds of appeal at or before the time of hearing of the appeal, so as to enable the Hon'ble Income tax Appellate Tribunal to decide this appeal according to law."

2.2 The grounds of appeal raised by Revenue in its appeal in memo of appeal filed with the tribunal in ITA no. 4388/Mum/2012 for AY 2007-08, read as under:-

" 1. On the facts and in the circumstances of the case and in law, the Ld.CIT(A) erred in allowing deduction in respect of 'Advertisement and Publicity expenses' amounting to Rs.7,34.37,217/- ignoring the facts that the said expenditure was not incurred wholly and exclusively for the purpose of business, as provided in Section 37(1) r.w.s. 40A(2) of the Act.

2. The appellant prays that the order of the CIT(Appeals) on the above grounds be set aside and that of the Assessing Officer restored.

3. The appellant craves leave to amend or alter any ground or add a new ground which may be necessary."

3. At the outset Ld. Senior Counsel for the assessee Shri. Porus Kaka submitted that the assessee does not want to pursue its appeal filed with the tribunal in ITA no. 4534/Mum/2012 for AY 2007-08 owing to low quantum of tax-effect and prayers were made before the Bench by learned Senior Counsel to dismiss appeal filed by the assessee as not being pressed . The Ld. DR did not raised any objection to the dismissal of the assessee's appeal in ITA no. 4534/Mum/2012 for AY 2007-08 . After hearing both the parties , we dismiss assessee's appeal in ITA no. 4534/Mum/2012 for AY 2007-08 filed with tribunal as not being pressed. Thus, in nutshell assessee's appeal

in ITA no. 4534/Mum/2012 for AY 2007-08 stand dismissed as not being pressed. We order accordingly.

4. This leads us to Revenue's appeal in ITA No. 4388/Mum/2012 in which only one effective ground is raised by Revenue concerning allowability of deduction in respect of 'Advertisement and Publicity expenses' amounting to Rs. 7,34,37,217/- which was added to the income by the AO while framing assessment against the assessee, which additions to income was later deleted by learned CIT(A) vide first appellate order dated 02.04.2012 wherein deductions for 'Advertisement and Publicity Expenses' to the tune of Rs. 7,34,37,217/- were allowed by Ld. CIT(A) while computing income of the assessee. Revenue is aggrieved by appellate order dated 02.04.2012 passed by learned CIT(A) granting aforesaid relief to the assessee and has now filed this appeal with tribunal.

4.2 The learned DR at the outset submitted that these Advertisement and Publicity Expenses were not incurred wholly and exclusively for the purposes of business of the assessee as provided u/s. 37(1) r.w.s. 40A(2) of the 1961 Act. The Ld. DR submitted that the channel is owned by foreign entity and the assessee is acting as agents in India for promoting their channel for which revenues are realised by way of advertisements and fixed sum is paid to foreign entity w.e.f. 01.05.2006 as prior to that it was variable amount which was paid to foreign entity. The learned DR also drew to our attention to the assessment order passed by the AO and reliance was placed by learned DR upon assessment order passed by the AO.

4.3 The Ld. Counsel for the assessee submitted that this issue of allowability of 'Advertisement and Publicity Expenses' is recurring issue on year to year basis in assessee's own case and our attention was drawn to para 5.2 of the appellate order dated 02.04.2012 passed by learned CIT(A) for the impugned assessment who has granted relief to the assessee for impugned assessment year by allowing these Advertisement and Publicity Expenses as deduction while computing business income of the assessee, by following confirmatory order dated 29.07.2011 passed by tribunal to confirm the appellate order dated 17.06.2011 passed by Third Member of Mumbai-tribunal in ITA no. 635/Mum/2010 for AY 2005-06 in assessee's own case ,wherein Third Member appointed to adjudicate this issue owing to differences between

members of the Division Bench held in favour of the assessee . The learned CIT(A) while adjudicating appeal for impugned assessment year decided the issue in favour of the assessee by holding as under:-

> *" 5.2 The submissions of the appellant are summarized as under;*
>
> *i) During AY 2007-08, the Appellant has incurred advertisement and publicity expenses amounting to Rs 110,155,825 for the purpose of promoting its channels. Accordingly, the Appellant has claimed the same as a deduction under Section 37(1) of the Act while computing taxable income, inter-alia, on the ground that there is a direct nexus between incurring the expenditure and the revenues of NGC India. The details of advertisement and publicity expenses amounting to Rs 110,155,825 were enclosed as Annexure 4 of the submission.*
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> *ii) The learned Assessing Officer ('AO') has allowed only 33.33% of the total advertisement and publicity expenditure and has disallowed the balance amount of Rs73,437,217.*
>
> *iii) In this connection, the Appellant submitted that the issue under consideration has already been decided favorably by the Third member of the Hon'ble Mumbai tribunal in Appellant's own case in AY 2005-06. Relevant extracts of the favorable order passed by the Third member of the Mumbai Tribunal is as follows:*
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> *"... I have carefully considered the rival submissions and perused the record. In my considered opinion the expenditure incurred by the assessee can be said to be wholly and exclusively incurred for the purpose of business. No doubt, there is no straight jacket formula to apply the test for commercial expediency it has to be analysed by taking into consideration various facts....*
>
> *... It is not disputed by the Assessing Officer that by virtue of advertisements the principals would get greater revenue in the form if subscription fees as well as advertisement revenue and a percentage thereof has to be shared with the assessee. The very fact that l/3rd of the expenditure was allowed by the assessing officer indicates his satisfaction that the expenditure was incurred wholly and exclusively for the purpose of business. However, he was of the opinion that section 40A(2) comes into play since there is a probability of principals getting higher revenue at the expense of the assessee and thus he sought to disallow 2/3rd of the expenditure invoking section 40A(2) of the Act. Learned CIT(A) rightly observed that section 40A(2) has no application in the instant case and this view was accepted by the learned Accountant Member. Learned Judicial Member however proceeded on the footing that the expenditure incurred by the assessee is more than the total income declared*

and thus it cannot be said to be exclusively incurred for the purpose of business overlooking the fact that the expenditure has to be compared with the gross revenue and not with reference to income declared by the assessee. In the instant case the gross revenue is more than 40 crores where as the expenditure incurred by the assessee is only 6.21 crores on advertisement. Even taking cue from the circular issued by the CBDT, the gross total income declared by the assesses is more than 10% of the gross revenue and the total income declared by the assessee after debiting a sum of 6.21 crores and thus income declared by the assessee cannot be said to be low. Consequently, the expenditure cannot be said to be excessive or unreasonable...

... Once the main test is satisfied, as held by the Apex Court, in the case of Sassoon J Dravid & Co. Ltd vs CIT (supra), merely because a third party is benefited by virtue of such expenditure, it cannot take the case out of the purview of Section 37 (1) of the Act. Assessing Officer has not disputed the fact that subscription fees/ distribution revenue is not fixed but variable and depends upon the popularity and viewer-ship of the channels in which event it has to be assumed that the expenditure on advertisement is intimately connected to the revenue earned by the assessee. The expression 'trader' or 'businessman ' cannot be viewed in its narrow sense and even an agent rendering services for and on behalf of principal has to be treated as a businessman since the agency services are rendered in his capacity as a businessman. Thus, taking a holistic view of the matter, I am in agreement with the view taken by the learned Accountant Member... "

A copy of the said order of ITAT for AY 2005-06 was enclosed as Annexure 5 of the submission.

iv) Relying on the said order of the Third member of the Hon'ble Mumbai tribunal, the Mumbai Tribunal has in Appellant's own ease for AY 2003-04, decided the Issue on deducibility of advertisement and publicity expenditure in favour of the Appellant. Relevant extracts of the order is as follows:

> *"...In view of (he fact that reassessment itself is quasher; merits of the additions made during the reassessment proceedings are wholly academic issue. However, we may record the fact that both the parties agree that the issue is covered by Third Member decision dated 17.6.2011 of this Tribunal, in assesses 's own case for the assessment year 2005-06 and also on merits also, assessee deserves to succeed... "*

A copy of the said order of the ITAT for AY 2003-04 was enclosed as Annexure 6 of the submission.

v) It was further submitted that a similar issue of deductibility of advertisement and publicity expenditure, has

been decided favorably by the various orders of CIT(A) in Appellant's own case for various AYs i.e. AY 2002-03, AY 2003-04 and AY 2005-06. Relevant extracts of the said orders passed by the CIT(A) were also reproduced in the submission of the appellant. Copies of all the above orders were enclosed as Annexure 7 of the submission.

vi) It was submitted that thus, this ground is covered by various ITAT/CIT(A)'s orders in Appellant's own case for various assessment years as mentioned above. Further, it was submitted that it is a settled principle of law that the decision of jurisdictional Tribunal is binding on all authorities under its jurisdiction. In this regard, reliance was placed on the decision of the Hon'ble Supreme Court in the case of Union of India vs. Kamalakshmi Finance Corporation Limited[(1992) AIR (SC) 711)]; in the case of Nokia Corporation vs DIT (292 ITR 22) (Del); in case of Agrawal Warehousing and Leasing Ltd. vs. CIT (257 ITR 235) (MP) and also on the case of Bunk of Baroda vs. H.C. Shirivatsava (256 ITR 385) (Bom).

vii) In view of the above, applying the principles laid down by the above judicial precedents including Hon'ble SC decision in the case of Kamalakshmi Finance Corporation Limited [(1992) AIR (SC) 711], it was submitted that the above decision of the jurisdictional Mumbai Tribunal in case of NGC India is binding and accordingly, it was requested to consider this ground of appeal favorably.

5.3 I have considered the facts of the case and the submission of the appellant as against the observations/findings of the AO in his order u/s 143(3) of the Act. This issue on similar facts have been subject matter of consideration in the case of the appellant in the earlier years.

The issue has been decided in favour of the appellant in the A.Y. 05-06 by my Ld. Predecessor in the office and has been affirmed by the third member decision of the Hon'ble ITAT Mumbai in ITA No. 635/Mum/2010. Further following such decisions of the Ld. CIT(A)/ITAT, the case of the appellant for the A.Y. 2003-04 was decided in its favour. Accordingly keeping in view the principles of judicial discipline and principles of judicial consistency, the grounds of appeal so raised are allowed."

4.4 Further our attention was drawn by learned Senior Counsel of the assessee to judgment dated 13.10.2014 passed by Hon'ble Bombay High Court in ITA no. 538 of 2012 for AY 2005-06 in assessee's own case wherein Hon'ble Bombay High Court has upheld the confirmatory order dated 29.07.2011 of the tribunal for AY 2005-06 in ITA no. 635/Mum/2010 and held that these Advertisement and Publicity Expenses are allowable business expenses as these expenses were incurred wholly and exclusively for the

purposes of the business of the assessee. It has been submitted by learned counsel for the assessee that for other assessment years also , Hon'ble Bombay High Court has held that these expenses were incurred wholly and exclusively for the purposes of the business of the assessee. Our attention was also drawn to judgment of Hon'ble Bombay High Court in ITA no. 539 of 2012 with ITA no. 595 of 2012, vide common judgment dated 13.10.2014 in assessee's own case wherein Hon'ble Bombay High Court followed its own judgment in ITA no. 538 of 2012 of even date and held these expenses were incurred wholly and exclusively for the purposes of the business of the assessee. Our attention was also drawn to judgment of Hon'ble Bombay High Court in ITA no. 161 of 2013 , dated 09.01.2015 wherein Hon'ble Bombay High Court held these expenses were incurred wholly and exclusively for the purposes of the business of the assessee, in assessee's own case for AY 2002-03.

5.We have considered rival contentions and perused the material on record including cited case laws. We have observed that the assessee is resident company and is engaged in the business of marketing and distribution of National Geographic , History and Entertainment Channel , sale of advertisement airtime on the above channel and other incidental activities. These channels are owned by foreign entities. The assessee has claimed that upto 30.04.2006 , it had an agreement with NGC Network Asia LLC (hereinafter called " the NGC Asia") and Fox International Channels (US) Inc. (hereinafter called " the FOX") for distributing their channels. The agreement was on P2A model wherein the assessee was appointed as an marketing and collection agent for channels of NGC Asia and FOX while wef 01.05.2006, the agreement was on P2P model wherein NGC Asia/ FOX sold the advertisement and sponsorship time on the channels to assessee on a principal to principal basis for a lumpsum basis from 01.05.2006 to 31.03.2007. The assessee had incurred Advertising and Publicity Expenses to the tune of Rs. 11,01,55,825/- during the year under consideration. The AO has disallowed these expenses to the tune of 66.67% on the ground that the assessee could not explain commercial expediency and rest of the 33.33% expenses were allowed by the AO , which led to the disallowance of said expenses to the tune of Rs. 7,34,37,271/- which was added by the AO to the income of the assessee. The learned CIT(A) has granted relief to the

assessee by holding that these expenses were incurred wholly and exclusively for the purposes of business of the assessee, mainly by following decision of Mumbai-tribunal for AY 2005-06 in assessee's own case.

5.2 We have observed that tribunal has consistently held in assessee's own case that these 'Advertisement and Publicity Expenses' were incurred wholly and exclusively for the purposes of business of the assessee and are to be allowed as business expenses, in ITA no. 635/Mum/2010 for AY 2005-06, ITA no. 3545/Mum/2010 for AY 2004-05, ITA no. 5499/Mum/2010 for AY 2003-04 and ITA no. 2867/Mum/2010 for AY 2002-03. We have also observed that Hon'ble Bombay High Court has consistently held that these expenses are business expense incurred wholly and exclusively for the purposes of business of the assessee . The judgment of Hon'ble Bombay High Court in ITA no. 538 of 2012 for AY 2005-06 in assessee's own case is reproduced as hereunder:-

> " *1. This appeal seeks to challenge the order of the Income Tax Appellate Tribunal dated 29th July, 2011 being a confirmatory order recording formation of a majority view pursuant to the order passed by the Third Member dismissing the appeal filed by the revenue. The Appellant seeks to raise following questions :-*
>
> > *"(a) Whether in the facts and circumstances of the case and in law, the Hon'ble ITAT is justified in confirming the order of the CIT(A) deleting the disallowance of Rs.4,14,20,843/- made by the Assessing Officer out of advertisement and publicity expenses incurred by the Assessee ?*
> >
> > *(b) Whether in the facts and circumstances of the case and in law, the Hon'ble ITAT was justified in not taking cognizance of the transfer pricing provisions because, the expenditure incurred by the Assessee by way of advertisement and publicity expenses, substantially benefited the two foreign principals and the Assessee did not receive any compensation on that account from the foreign principals and whether upon the aforesaid consideration, the Hon'ble ITAT was justified in not upholding the order of the Assessing Officer ?*
> >
> > *(c) Whether in the facts and circumstances of the case and in law, the Hon'ble ITAT was justified in rejecting the alternative claim of the Revenue that the huge advertisement and publicity expenses should be treated as deferred revenue expenditure since, the benefit of the expenditure spread over future years ?*
>
> *2. It will be convenient to narrate few facts which led upto present appeal : The respondent – assessee is a company incorporated in India and engaged in the business of distribution of T.V. channels popularly known as National Geographic and History Channel. The assessee - NGC Network (India) P. Ltd. also acts as airtime advertising Sales Representative for its principals NGC Network Asia LLC ("NGC Asia") which operates the National Geographic Channel and Fox International Channels (US) Inc. ("FOX") which owns and operates "the History channel". The*

Assessee has paid fixed fees to "NGC Asia" and "FOX" in consideration for being appointed as distributor of the two channels. The distribution fees are paid by way of lump sum amounts. The assessee being distributor was entitled to enter into agreements with re-distributors, cable networks and other media distributors (collecting operators) to ensure that the contents of channels are viewed by the consumers. The assessee collects subscription fees for such re-distributors. The consumer would pay the subscription fees to view such channels.

3. The "Advertising Sales representation agreements" (Ad-sales agreement) under which the Respondent - assessee was appointed as advertising sales agents came into effect on 1st July, 2004. Under the Ad-sales agreements, the assessee would solicit advertisers, who wish to advertise "on air" during the telecast of the aforesaid channels in their capacity as agents of the principals, namely, N.G.C. Asia and FOX. By way of agency commission the assessee would earn 15% of the net billed advertising charges collected by the Respondent and balance 85% was remitted by the assessee to the foreign principals.

4. The assessee filed return of income during 2005-06 on 30th October, 2005 declaring total income of Rs.4,85,16,730/- and also filed form 3CEB in view of there being international transactions with Associated Enterprises, namely, the foreign principals. The items mentioned in 3CEB were referred to Transfer Princing Officer, who by his order dated 23rd October, 2008 passed under section 92CA(3) of the Income-Tax Act accepted the arm's length price declared by the assessee.

5. During the assessment proceedings, the assessing officer observed that the assessee's expenditure under head "Advertising and Publicity Expenses" of Rs.6,21,31,262/- was claimed as deduction under section 37(1) of the Income Tax Act. On being queried about the said expenses the respondent assessee sought to justify the expenses by reiterating the need for vide publicity to ensure channel's recall in the minds of viewers which would lead to increased demand and viewership and therefore, higher subscription fees for enhancing and maintaining existing level of the subscription revenues. The assessee contended that promotion of the programmes of the channel by way of such advertising and publicity increases popularity of the programme which would result in higher demand for advertising spots on the channel resulting in high advertising revenue and consequent increase in commission of the assessee. Thus, the assessee contended that there is direct nexus between advertising and promotions of the Channels and increase in advertising revenue and entailing increased commission.

6. The Assessing Officer, it appears, noted that the Respondent had incurred expenses towards advertising and publicity which benefited not only the assessee but also the foreign principals i.e. aforesaid "NGC Asia" and "FOX". That the assesee did not disclose such benefit to the members as part of form 3CEB. Accordingly, it was held that the entire expenditure under head "Advertising and Promotion" amounting to Rs.6,21,31,262/- was not allowable as deduction under section 37(1) of the Act. He restricted allowable deduction under section 37(1) to only 33.33% of the total amount of Rs.6,21,31,262/- which is to a sum of Rs.2,07,10,419/-.

7. Being aggrieved by the order dated 11th December, 2008 passed by the Assessing Officer the respondent-assessee preferred an appeal before the Commissioner Income Tax (Appeals) on 13th January, 2009. The Commissioner Income Tax (Appeals) allowed the appeal holding that entire expenditure is allowable under section 37(1). The Commissioner of Income-Tax (Appeals) observed that since expenses were made to Indian residents they were not covered in Form 3CEB as section 92 covers only international transactions. Being aggrieved by the order of the Commissioner of Income-Tax (Appeals) the appellant filed an appeal before the Appellate Tribunal. Two members of the tribunal passed separate orders,

one allowing the appeal and the other dismissing it. The accountant member upheld the order of the Commissioner of Income-Tax (Appeals) and whereas judicial member allowed the appeal of revenue. The matter was therefore referred by the President to the third member. The third member vide order dated 17th June, 2011 concurred with the accountant member and thereby upheld the decision of the Commissioner of Income-Tax (Appeals). Pursuant to that a confirmatory order was passed by the Appellate Tribunal on 29th July, 2011. The Revenue is in appeal against this order.

8. Mr.Chottaray, learned counsel appearing on behalf of the Appellants submits that the order of the tribunal is unsustainable by reason that the respondent-assessee did not disclose in Form 3CEB, the fact that the respondent's principal "NGC Asia" and "FOX" would derive benefit from the expenditure towards advertisement and publicity claimed as deduction under section 37(1). That, it had been so disclosed, the Transfer Pricing Officer would have taken a different view and the assessee should have offered the test of arm's length price and therefore enabled a proper decision to be taken by transfer pricing officer. He submitted that in case of Star India (P) Ltd. the assessment officer had disallowed 100% of the advertisement expenses for the assessment year 1999-2000 since the expenses were incurred for and on behalf of Star HongKong and the Commissioner of IncomeTax had upheld disallowance to the extent of 80%. The two members of the tribunal were not divided in their judgments. In that case the judicial member granted relief to the Appellant relying on the Supreme Court decision in the case of Sassoon J. David and Co. Ltd. vs. Commissioner of Income-Tax, Bombay Vol.118 ITR 261 whereas the Accountant Member supported contention of the revenue relying upon decision of Supreme Court in Sassoon J. David (supra). Mr.Chottaray further submitted that the assessee had not expended any amount under the head advertisement and promotion of NGC Asia but are still deriving benefit therefrom. In the circumstances according to Mr.Chhotaray it is not permissible to allow the deduction. Firstly, because the benefit accruing to the foreign principals was not disclosed in Form 3CEB and secondly, because despite such benefit foreign principal had not contributed towards the costs of advertising, publicity and promotion.

9. Mr.Chhotaray relied upon the order of the Transfer Pricing Officer pertaining to assessment year 2008-09 to show that the expenses have been debited under head Advertising and Publicity in the Profit and Loss Account of the Assessee without disclosing the benefits to foreign principals which according to him ought to have been disclosed. This was fourth year of the assessment under section 92CA(3) of the Act. The first one was assessment year 2004-05 followed by 2005-06 with which we are presently concerned. At page 2 of the order of the Transfer Pricing Officer it records that the assessee has recorded international transactions with two of its associates, namely, principal "NGC Asia" and "FOX". The transactions recorded did not disclose benefit accruing to foreign principals. He then relied upon the decision of the Delhi High Court in Maruti Suzuki India Ltd. vs. Transfer Pricing Officer in support of his submission that arms length price has to be determined and relied upon conclusion at item (viii).

10. The said judgment observes that expenditure incurred by domestic entity, which is an associated enterprise of a foreign entity on advertising, promotion and marketing of its products using foreign trade mark logo does not require any payment or compensation by the owner of the foreign trade mark/logo to the domestic entity on account of use of the foreign trade mark/logo in the promotion, advertising and marketing undertaken by it, so long as the expenses incurred by the domestic entity do not exceed the expenses incurred by similarly situated and comparable independent domestic entities. Further that the expenses incurred by a domestic entity which is a associated enterprise of a foreign entity a similarly situated and comparable independent domestic entity needs to suitably

compensate the domestic entity in respect of the advantage obtained by it in the form of brand building and increased awareness of its brand in the domestic market.

11. The facts in this case largely arise out of change of logo which amounted to sell of brand to the domestic entity. In that case the Transfer Pricing Officer observed that Maruti has paid royalty to Suzuki in year 2004-05 whereas no compensation had been paid by Maruti to Suzuki on account of deemed sale of that trade mark. Later, the order of the Transfer Pricing Officer was under challenge and the Court came to the conclusion that the order passed by the Transfer Pricing Officer was not based on any evidence and it is in this context that the court came to the conclusion set out above. The conclusion in the said judgment cannot be applied to the facts of the present case. In any event as rightly pointed out by Shri Kaka, this judgment is set aside by the Hon'ble Supreme Court.

12. Mr.Chhotaray then relied upon the judgment of Gujarat High Court in Commissioner of Income-Tax, Baroda vs. Navsari Cotton and Silk Mills Ltd. Vol.135 ITR 546 in support of his contention that in order to qualify for deduction under section 37(1) certain conditions must be satisfied which included positive and negative tests inasmuch as expenditure must be in the nature of revenue and not capital expenditure. It must be laid out or expended wholly and for the purpose of business and it must not be of the nature described in section 30 to 36 and section 80VV. One of the negative tests according to the judgment which is relied upon by Mr.Chhotaray is that the expenses must not be unreasonable and out of proportion.

13. In this respect he submits that in the case at hand the sum expended on the publicity and promotions exceeded amount of revenue earned, therefore, the same cannot be allowed as a deduction. This submission of Mr.Chhotaray cannot be accepted for the simple reason that the amount of expenses incurred may be at times larger than actual revenue.

14. Mr.Chhotaray also relied upon decision of Supreme Court in case of D. B Madon vs. Commissioner of Income Tax Vol.192 ITR 344 to support his submission that it is always open to the High Court to follow its earlier decision and answer the question of law one way or other according as whether the view taken in the earlier commends itself to the Court or whether in its opinion earlier view needs to be re-considered. It is not necessary that a similar question of law is to be answered in particular way. Mr.Chhotaray therefore submits that questions of law may be answered in favour of the revenue.

15. Mr.Kaka, learned Senior Counsel appearing on behalf of the respondent-assessee submitted that contentions of the appellant are misconceived. He submitted that the respondent-assessee has acquired distribution rights of two channels on exclusive basis after paying due consideration and that it is entitled to thereafter earn profits in its business of distribution. He submitted that in the business of TV channels it is necessary to promote the channels in order to ensure higher viewership and that higher viewership alone brings in advertising interest. He submitted that apart from the business of distributing channels, the respondent-assessee was also engaged in selling of advertising time on channels. The sale proceeds of which are required to be shared with the foreign principals, who are owners/controllers of the channel and channel content. He submitted that as consideration for selling airtime to advertisers/other advertising agencies the respondents earned commission at 15% of the value of advertising time sold. After retaining the 15% commission, the sum equivalent to 85% is paid over to the foreign principals. In order to generate sales of advertising time, it is necessary for the respondents to publicize and promote channel and its contents thereby ensuring higher viewership which then brings in advertise interest in the channels.

16. Mr.Kaka further submitted that the amount spent towards advertising and publicity of the channels is for benefit of the assessee who holds distribution rights for the channels. But for promotion of channel, the distribution rights will not generate sufficient returns since the promotion and publicity alone help garner higher viewership which would entail higher distributor interest which in turn will ensure higher distribution income from operators who are the end subscriber/viewer. Operator who are assured of higher viewership would be willing to pay higher fees to acquire the distribution rights and the promotion and publicity help generate better viewership. He further contended that the expression "wholly and exclusively" used in section 37 does not mean "necessarily". He submitted that if somebody else other than assessee is also benefited from the expenditure, the deduction under section 37 should not be affected. He relied upon the decision of the Supreme Court in Sassoon J. David (supra) and submitted that merely because foreign principal was benefited by advertising, promotion and publicity it will not prevent the respondent-assessee from claiming benefit of deduction under section 37(1).

17. Mr.Kaka also relied upon the decision in Maruti Suzuki India Ltd. vs. Additional Commissioner of Income Tax in Civil Appeal No.8457 of 2010 reported in (2011) 198 Taxman 102 SC wherein it was held that the compensation of arms length price that the Transfer Pricing Officer had decided the issue pursuant to directions of the High Court in that case and that the findings of the Transfer Pricing Officer were conclusive. The assessee had not challenged the order of the Transfer Pricing Officer. The High Court further directed the Transfer Pricing Officer to decide the matter in accordance with law and directed the Transfer Pricing Officer who has already issued fresh show cause notice to proceed with matter in accordance with law uninfluenced by the observations/directions given by the High Court in the impugned judgment. Thus the Supreme Court found it to be conclusive.

18. In the instant case the order of Transfer Pricing Officer is not under challenge. The question of law raised did not relate to the order of the Transfer Pricing Officer which is final. In the circumstances Mr.Kaka submits that there is no warrant for interference and the questions must be answered in favour of the assessee.

19. Having considered rival contentions we are in agreement with Mr.Kaka. The main grounds on which the revenue has questioned the order of the tribunal are (a) non disclosure in form 3CEB of the fact that the principal is also a beneficiary of the advertising expenses; (b) that the advertising and promotional expenses are not wholly for the benefit of the assessee but it also benefited the principal who was an associated enterprise; (c) that advertising and publicity expenses were far higher than the amount of revenue earned and lastly, that although foreign principals i.e. Associated Enterprise benefited from advertising and publicity no compensation was paid by the foreign principals to the assessee to avail of such benefits.

20. It is not possible to accept the Revenue's contentions for the following reasons : Firstly, the contention that there was no proper disclosure of the benefit before the Transfer Pricing Officer cannot now be a reason to entertain the questions and the order of Transfer Pricing Officer is final. It was admitted position that the assessee is a agent of foreign principal and would naturally benefit from advertising carried on by agent in India. However, these benefits were not ascertainable. The contention of the assessee that the benefits were not ascertainable or taxable in view of extra territory appears to be correct and justified. In the instant case we find that the assessee has not suppressed any information. It has offered to tax its income from both business, namely, distribution business as well as advertisement and promotion business. In the assessment year in question, the Assessing Officer has proceeded to grant 33.33% of the total advertising expenses as allowable deduction. We do not find any justification for such restriction of the same.

Furthermore, the Appellant's case during argument that the fact of the foreign principal benefiting had been disclosed in the Form 3CEB and the Transfer Pricing Officer `could' have taken a different view. Admittedly therefore the Transfer Pricing Officer had followed a possible view which cannot now be faulted.

21. The contention that the expenditure should have been wholly and exclusive for the purpose of business of the assessee under section 37(1) read with provisions of section 40A(2) as being excessive and unreasonable does not appeal to us. There can be no doubt in the instant case, that in view of decision of the Supreme Court in Sassoon David (supra) it cannot be said that the expenditure was not wholly or exclusively for benefit of the assessee. The mere fact that foreign principals also benefited does not entail right to deny deduction under section 37(1). Furthermore, it is seen that all the amounts earned by the assessee were brought to tax, especially in view of the fact that the payment of expenses were made to Indian residents and there payments were not required to be included in form 3CEB since Section 92 which governs the effect of form 3CEB covers only international transactions. Furthermore, it is seen that the respondents income from subscription fee is variable and through commission received on the advertising sales is 15% of the value of Ad-sales. The Assessing Officer's contention that the assessee received fixed income is not justified and there is certainly, in our view, a direct nexus between the amount spent on advertising and publicity, and the appellant's revenue.

22. Advertisers who advertise on these channels act through media houses and advertising agencies and they work to media plans designed in the manner so as to maximise value for the advertiser. They will evaluate expenditure with channel penetration in the market place inasmuch as only channels with high viewership would justify the higher advertising rates which is normally sold in seconds. Merely having high quality content will not ensure high viewership. This content has to be publicized. The great reach of the publicity, the higher chances of larger viewership. The larger the viewership, the better chances of obtaining higher advertisement revenue. The higher advertisement revenue, the higher will be commission earned by the respondent assessee. Accordingly, we have no doubt that there is a direct nexus between advertising expenditure and revenue albiet the fact that there may be a lean period before revenue picks up notwithstanding high amount spent on such publicity. This justifies the higher expenditure vis-a-vis revenue noticed by the department.

23. It is also not necessary that the foreign enterprises must compensate the Indian agent for the benefit it receives or it may receive from the advertisement and promotion of its channels by agent in India. The agent in India earns commission from adsales and distribution revenue, both of which have sufficiently compensated the assessee. We would not expect the revenue to determine the sufficiency of the compensation received by the agent and as such we do not find any justification in this ground either. In the circumstances we answer questions of law (a), (b) and (c) in the affirmative in favour of the assessee and against the revenue. In the result the appeal is dismissed. No order as to costs."

5.3 We have observed that Hon'ble Bombay High Court in assessee's own case for other AY's have also consistently held that these Advertisement and Publicity Expenses are incurred wholly and exclusively for the purposes of business of the assessee and are to be allowed as business income in toto. Reference is drawn to Judgment of Hon'ble Bombay High Court in ITA no. 539 of 2012 with ITA no. 595 of 2012, vide common judgment dated

13.10.2014 in assessee's own case wherein Hon'ble Bombay High Court followed its own judgment in ITA no. 538 of 2012 of even date for AY 2005-06 and held these expenses were incurred wholly and exclusively for the purposes of the business of the assessee. Reference is also drawn to judgment of Hon'ble Bombay High Court in ITA no. 161 of 2013 , dated 09.01.2015 wherein Hon'ble Bombay High Court held these expenses were incurred wholly and exclusively for the purposes of the business of the assessee, in assessee's own case for AY 2002-03. All these judgments passed by Hon'ble Bombay High Court and appellate orders passed by tribunal are placed in file. In earlier years , the assessee was acting as agent of NGC Asia and FOX till 30.04.2006 wherein variable amount was paid by assessee as an agent to its principals NGC Asia and FOX , while since 01.05.2006, the assessee is dealing with NGC Asia and FOX on principal to principal basis and lumpsum amount is paid by assessee to NGC Asia/FOX towards advertisement and sponsorship time on channels sold by NGC Asia and Fox to assessee. Thus, the assessee in this year w.e.f. 01.05.2006 is better placed so as to claim deduction of these Advertisement and Publicity Expenses as business expenses. Thus, Respectfully following the aforesaid judgment(s) of Hon'ble Bombay High Court in assessee's own case , we hold that these Advertisement and Publicity Expenses are business expenses incurred wholly and exclusively for the purpose of business of assessee and we have no reason to take a different and divergent view than as approved by Hon'ble Bombay High Court and hence we uphold the appellate order passed by learned CIT(A) and dismiss the appeal filed by Revenue. The Revenue fails in its appeal. We order accordingly.

8. In the result, both the appeals filed by assessee and Revenue stand dismissed.

Order pronounced in the open court on 23.07.2019

आदेश की घोषणा खुले न्यायालय में दिनांकः 23.07.2019 को की गई ।

Sd/-	Sd/-
(MAHAVIR SINGH) JUDICIAL MEMBER	(RAMIT KOCHAR) ACCOUNTANT MEMBER

Mumbai, dated: 23.07.2019

Nishant Verma
Sr. Private Secretary

copy to…

1. The appellant
2. The Respondent
3. The CIT(A) – Concerned, Mumbai
4. The CIT- Concerned, Mumbai
5. The DR Bench,
6. Master File

// Tue copy//

BY ORDER

DY/ASSTT. REGISTRAR
ITAT, MUMBAI