IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'D' NEW DELHI

BEFORE Dr. B. R. R. KUMAR, ACCOUNTANT MEMBER
AND
SHRI YOGESH KUMAR U.S., JUDICIAL MEMBER

I.T.A. No. 2432/DEL/2023 (A.Y 2020-21)

Turner Broadcasting System Asia Pacific, Inc. United States of America 1050 Techwood Drive, N. W. Atlanta, GA 30318, U.S.A **PAN No. AABCT6254F** **(APPELLANT)**	Vs.	Deputy Commissioner of Income-tax, 4th Floor, E-Block, Circle-3(1)(1), International Taxation, Civic Centre, Minto Road, New Delhi **(RESPONDENT)**

I.T.A. No. 3717/DEL/2023 (A.Y 2021-22)

Turner Broadcasting System Asia Pacific, Inc. United States of America 1050 Techwood Drive, N. W. Atlanta, GA 30318, U.S.A **PAN No. AABCT6254F** **(APPELLANT)**	Vs.	Deputy Commissioner of Income-tax, 4th Floor, E-Block, Circle-3(1)(1), International Taxation, Civic Centre, Minto Road, New Delhi **(RESPONDENT)**

Assessee by :	**Sh. Manuj Sabharwal, Adv & Sh. Drona Negi, Adh & Sh. Ayush Kumar, Adv**
Department by:	**Sh. Vijay B Vasanta, CIT DR**

Date of Hearing	**13.08.2024**
Date of Pronouncement	**09.09.2024**

ORDER

PER YOGESH KUMAR U.S., JM

The above mentioned Appeals are filed by the assessee for Assessment Years 2020-21 and 2021-22 against the order passed by the Assessing Officer('A.O' for short) u/s 143(3) r.w.s 144C (13) Delhi order dated 29/06/2023 & 20/10/2023 respectively.

2. The assessee has raised the common Grounds of Appeal. For the sake of convenience the Grounds of Appeal for Assessment Year 2020-21 are reproduced as under:-

> *"The following grounds are independent of each other and without any prejudice to one another.*
>
> *1. General*
>
> *1.1. That on the facts and in the circumstances of the case and in law, the assessment order passed by the Ld. AO in line with the directions of DRP for the subject AY is bad both in law and on facts. The Ld. AO, based on surmises/ conjectures and in violation of the principles of natural justice, has grossly erred in assessing the income of TBSAP for subject AY at INR 1,51,71,99,007 as against INR 34,96,99,010 per return of income filed by the Appellant.*
>
> *2. Grounds relating to taxability of distribution revenues*
>
> *2.1. That on the facts and circumstances of the case and in law, the Ld. AO has grossly erred in alleging that the net distribution revenues (as received by TBSAP from*

Warner Media India Private Limited ('WMIPL')) of INR 1,25,00,00,000 qualify as 'Royalty' under section 9(1)(vi) of the Income Tax Act, 1961 ('the Act') and Article 12 of the India- United States of America ('USA') Double Taxation Avoidance Agreement ('the Treaty');

2.2. That on the facts and in circumstances of the case and in law, the Ld. AO has erred in disregarding the principles arrived for in the Mutual Agreement Procedure ('MAP') resolution arrived at between the Competent Authorities of India and the USA for TBSAP for AY 2001-02 to AY 2004-05 wherein distribution revenues have been taxed as business income and not royalty;

2.3. That on the facts and in circumstances of the case and in law, the Ld. A.O. has erred in disregarding the decision of Hon'ble Delhi Bench of ITAT in Appellant's case for AY 2009-10 to 2017-18 wherein it was held that distribution revenues do not qualify as Royalty under the Treaty and u/s 9(1)(vi) of the Act.

2.4 That on the facts and circumstances of the case and in law the Lid. AD erred in disregarding Circular No. 6/2001 saved by the area of red Taxes (CBCT) wherein distribution revenues have been classed as business profits;

2.5. That on the facts and cruces of the case and into the Ld. AO has erred in not recognizing that distribution of television channels/digital platform does not involve grant of Copyright but only involves Broadcasting Reproduction Right (BRR) and hence, the consideration for the distribution of television channels/digital platform cannot qualify to be in the nature of Royalty under section (1)(vi) of the Act and under Article 12 of the Treaty;

2.6. That on the facts and circumstances of the case and in law, the Ld. AD has erred in disregarding The decision of Hon'ble Delhi Bench of ITAT in the case of BBC World

Distribution Ltd. (2023) 148 taxmann.com 122 (Delhi ITAT) and in the case of ESS Distribution (Mauritius) SNC et Companies Ltd. (2022) 145 taxmann.com 267 (Delhi ITAT), wherein it was held that a distribution right is purely a commercial right in the form of 'BRR' which is separate and distinct from Copyright as defined under the Copyright Act 1957 and is accordingly not in nature of Royalty under the respective tax treaties:

2.7. That on the facts and circumstances of the case and in law, the Ld. AO has erred in disregarding the decision of Hon'ble Bombay High Court in the case of MSM Satellite (Singapore) Pte Ltd [2019] 265 Taxmann 376 (Bom) and the decisions of Hon'ble Mumbai Bench of ITAT in the case of Dy. CIT v. Set India (P.) Ltd. (IT Appeal No. 4372 (Mum.) and ADIT (IT) v. Taj TV Ltd. [2016] 72 taxmann.com 143/161 ITD 339 (Mum.) wherein it was held that consideration received for the distribution of television channels does not qualify as Royalty under the respective tax treaties.

2.8. That on the facts and circumstances of the case and in law, the Ld. AO has erred in not considering Clause 5 of the inter-company agreement between the Appellant and WMIPL covering the subject AY wherein it has been specifically mentioned that the Appellant is the owner of the channel and no proprietary rights have been given to WMIPL. Hence, the consideration received by the Appellant in lieu of grant of distribution rights to WMIPL does not qualify as Royalty under the Treaty;

2.10. That on the facts and circumstances of the case and in law, the Ld. AO has erred in not recognizing that Explanation 6 to section 9(1)(vi) of the Act wherein transfer of process has been included under the definition of Royalty cannot apply in the instant case since similar amendment has not been made under the Treaty.

2.11. Without prejudice to the above, even where it is assumed that there is an element of copyright involved in

distribution of channels, the Ld. AO has erred in disregarding that transfer of a non- exclusive, non-transferable license, merely enabling the use of a copyrighted product cannot be construed as a license to enjoy any of the enumerated rights in the Copyright Act. 1957 which has also been upheld by the Hon'ble Supreme Court of India (SC) in the case of Engineering Analysis Centre of Excellence (P.) Ltd. [2021] 432 ITR 471 (SC).

3. Grounds relating to taxability of advertisement revenues.

3.1. That on the facts and circumstances of the case and in law, the Ld. AO has erred in alleging that TBSAP has a Dependent Agent Permanent Establishment ('DAPE') in India in the form of WMIPL and has grossly erred in holding that a sum of INR 12,75,00,000 (being 15% of the net advertisement revenues of INR 85,00,00,000 as earned by TBSAP) is attributable as business income of the alleged DAPE of the Appellant:

3.2. That on the facts and in the circumstances of the case and in law, the Ld. AO has grossly erred in not appreciating that where the agreement is on principal-to-principal basis, WMIPL will not constitute a DAPE of TBSAP in India:

3.3. Without prejudice to the above, that on the facts and circumstances of the case and in law, the Ld. AO has grossly erred in not considering binding circulars issued by CBDT and in not following judicial pronouncements by the Indian courts including that of Hon'ble SC in the case of DIT (International Taxation), Mumbai v. Morgan Stanley and Co. Inc. (292 ITR 416) (SC) wherein it was held that where a PE has been remunerated at an arm's length, no further attribution of profits can be done for such PE:

3.4. That on the facts and circumstances of the case and in law, the Ld. AO has erred in disregarding the decision

of Hon'ble Delhi High Court in the case of BBC Worldwide Limited (ITA No. 1341 of 2010; ITA No. 703 and 705 of 2011) (Del) and Hon'ble Delhi Bench of Income-tax Appellate Tribunal ('ITAT') in the case of ESPN Star Sports Mauritius [2021] (123 taxmann.com 220) (Delhi- Trib) wherein it was held that once the PE is remunerated at an arm's length, no further attribution of profit is required;

3.5. Without prejudice to the above, that on the facts and in circumstances of the case and in dave shof Ld. AO haserred in disregard that on the doch anved at between the Competent Authorstenment India and USA for TBsgarding the resolution arve 2004-05 wherein 10% of advertisement revenues received by TBSAP have been attributed to its alleged PE.

3.6. That on the facts and in circumstances of the case and in law, the Ld. AO has erred in disregarding the fact that attribution of 10% of advertisement revenues received by TBSAP has been accepted by the Hon'ble Delhi Bench of ITAT. Hon'ble Dispute Resolution Panel as well as the L.d. AO in the Appellant's own case for AY 2007-08 to AY 2017-18, facts of which are similar to the subject AY

3.7. That on the facts and in circumstances of the case and in law, with respect to the Appellant's advertisement revenue (as received by TBSAP from WMIPL), the Ld. AO has grossly erred in deviating from its consistent position per earlier years i.e. increasing the attribution from 10% to 15% on adhoc and arbitrary basis merely based on surmises/ conjectures without any cogent evidence/ reasoning for increasing the same and in complete violation of various legal principles. applicable provisions of the Treaty in this regard,

3.8. That on the facts and in circumstances of the case and in law, the Ld. AO erred in applying an ad- hoc methodology as the basis for attribution of 15% of advertisement revenue to the alleged PE in India without

considering that the Function Asset and Risk (FAR) profile of the Appellant has remained unchanged as compared to earlier AYs:

3.9. That on the facts and circumstances of the case and in law, the Ld. AO has erred in disregarding the decision of Hon'ble SC in the case of Radhasoami Satsang vs. CIT [1992] 60 Taxman 248 (SC) wherein it was held that where a fundamental aspect through different AYs has been found as a fact and the parties have allowed that position to be sustained by not challenging the order, it is not appropriate to allow such position to be changed in a subsequent AY in the absence of any material change

4. Grounds relating to taxability of advertisement revenues as Equalization Levy ('EL')

4.1. Without prejudice to the above, on the facts and circumstances of the case, the Ld. AO has erred in drawing reference of EL on advertisement revenues of the Appellant since the EL is a levy Introduced as a part of the Finance Act. 2016 which is a separate statute and does not include any provisions pertaining to assessment proceedings.

Other Grounds

5.1. That on the facts and circumstances of the case and in law, the Ld. AO erred in levying interest under section 234A and 234C of the Act.

5.2. That on the facts and in the circumstances of the case and in law, the Ld. AO has erred in proposing to initiate penalty proceedings under Section 270A of the Act since there is no under- reporting by the Appellant for subject AY.

5.3. That on the facts and in the circumstances of the case and in law, the Ld. AO has erred in proposing to initiate penalty proceedings disregarding that the explanation provided by the Appellant is bona-fide and all relevant material has been furnished by the Appellant during the course of assessment proceedings.

The Appellant craves leave to add, alter, amend and/ or modify any of the grounds of appeal at or before the hearing of appeal.

The Appellant prays for appropriate relief based on said grounds of appeal and the facts and circumstances of the case."

3. Since the issues involved in both the appeals are identical, both the Appeals for Assessment Years 2020-21 and 2021-22 are heard together and disposed in this common order. Brief facts of the case are as under:-

3.1. The assessee is a tax resident of USA within the meaning of Article 4 of the India-USA Double Taxation Avoidance Agreement ('DTAA') and holds a valid Tax Residency Certificate for the Financial Year relevant to Assessment Year 2020-21 as well as 2021-22. For the years under consideration, the assessee entered into an agreement with WarnerMedia India Private Limited ('WMIPL') effective from April 01, 2011, as amended from time to

time, wherein the assessee granted WarnerMedia India Private Limited the rights to sell advertising and distribution of television and interactive platforms namely Cartoon Network, Cartoon Network HD (CN HD+) and POGO, and any other television, interactive television, and/or telecommunication services for viewership in India. As per the said agreement, WarnerMedia India Private Limited is to retain 50 percent of revenues earned from sale of advertisement inventory for the channels in India and from distribution of channels in India as an Arm's Length Price consideration for services rendered to the assessee subject to an annual minimum guarantee. The assessee received following revenues from WarnerMedia India Private Limited:

Particulars	Amount (in INR) for F.Y relevant to A.Y 2021-22	Amount (in INR) for F.Y relevant to A.Y 2021-22
Advertisement Revenue	85,00,00,000	52,00,00,000
Distribution Revenue	125,00,00,000	78,00,00,000

3.2. The assessee filed return of income in respect of assessment years under consideration offering the above-mentioned revenues to tax on the basis of erstwhile Mutual Agreement Procedure ('MAP')

resolution arrived at between the Competent Authorities of USA and Competent Authorities of India under Article 27 of the Treaty, for earlier years (i.e. A.Y 2001-02 to 2004-05) whereby 10% of the both the advertising and distribution revenues were held as business income in India.

3.3. The case of the assessee was selected for scrutiny and a draft assessment order came to be passed on 28/09/2022 by determining total income as under:-

- Distribution revenues were held as royalty and taxed at 10% as per Article 12 of the Treaty/Section 9(1)(vi) of the Act; and
- 15% of net advertising revenues received by TBSAP from WMIPL are attributable to the alleged Permanent Establishment ('PE') of TBSAP in India.

3.4. The assessee filed objections before the Dispute Resolution Panel ('DRP') and the DRP directed the A.O. to examine the order of the Tribunal in Assessee's own case for Assessment Year 2009-10 to 2017-18 in respect of taxability of distribution revenues and held that altering the attribution based on a factor which had no bearing in FAR profile is against the law, and not

warranted. Accordingly the DRP directed the A.O. to incorporate the findings on evidence if any for altering the attribution and pass speaking order for the years under consideration. The Ld. A.O. without taking into consideration of the directions of the DRP, passed the final Assessment Orders on 28/09/2022 and 20/10/2023 for Assessment Years 2020-21 and 2021-22 respectively u/s 143(3) read with Section 144C (13) in the line with the draft assessment order. Aggrieved by the final assessment orders, the assessee preferred the present Appeals on the grounds mentioned above.

4. The Ld. Counsel for the assessee submitted that the issues involved in the present Appeals are squarely covered in Assessee's own case for Assessment Years 2010-11 to 2017-18 of the Tribunal, which has been upheld by the Jurisdictional High Court, therefore, sought for allowing the Appeal.

5. Per contra, the Ld. Departmental Representative relying on the orders of the Lower Authorities sought for dismissal of the appeal, but neither disputed the order of the Tribunal in Assessee's

own case for Assessment Year 2009-10 to 2017-18 which has been upheld by the Hon'ble High Court of Delhi, nor produced any contrary judicial precedents before us.

6. We have heard both the parties and perused the material available on record. The identical question came up before the Tribunal in Assessee's own case for Assessment Year 2009-10 to 2017-18, wherein the Coordinate Bench of the Tribunal in ITA Nos. 1343/Del/2014, 631/Del/2015, 4987/Del/2016 and 2610/Del/2017 held that distribution revenues received by the assessee from WarnerMedia India Private Limited towards granting distribution rights of its channels constitutes business income, wherein rejected the stand of the revenue to tax the same as 'Royalty' under the Act and the treaty in following manners:-

> "*41. We have heard the rival submissions, perused the relevant finding given in the impugned orders as well as material referred to before us. The appellant-assessee is a US based Company and is tax resident of US. During the relevant assessment years, it has derived advertisement and distribution revenue from grant of exclusive rights to an Indian Company TIIPL to sale advertisement on the products and to distribute the products as incorporated above. The Indian Company has an exclusive distributor of the said products to the cable operators on principle to principle basis. The distribution agreement allowed the TIIPL to distribute the products to various cable operators and ultimately to consumers in India. The distribution revenue collected by the TIIPL was to be shared between the appellant. The ownership of*

copyright was stipulated in clause 5 of the agreement which is reproduced hereunder:

"5 Ownership As between TBSAP and Company:

(a) TBSAP has the sole right to determine the content of the Products and reserves the right to change such content from time to time;

(b) Subject to the license granted in Paragraph 4 above, all copyrights and other proprietary rights in the Products and in any promotional material relating to them are vested in and shall remain vested in TBSAP."

Thus, in view of the said agreement the appellant had the sole right to determine the content of the products and also the right to change such content from time to time and secondly, all the copyrights and other priority rights in the products and in any promotional material vested in the appellant company alone. It is a copyright of the content in the product which always remained with the appellant-assessee and was never transferred. The clause merely provides right to distribute the product.

42. In the case of the assessee in the earlier assessment year, the competent authority of India and USA had reached the agreement that 10% of the advertisement and subscription revenue received from the Indian sources was deemed to be net profit from the business chargeable to tax in India. In line of such an agreement the assessee in Assessment Years 2007-08 and 2008-09 had related its income on the same basis as agreed by the competent authority of both the countries. Accordingly fully disclosed its computation of income along with notice to the tax computation filed during the return of income/assessment proceedings, the same has been accepted by the Department in the assessment orders for Assessment Years 2007-08 and 2009. Though assessee's case was throughout had been that it does not have any kind of plea and the transaction with TIIPL are on principle to principle basis and even if TIIPL is an agent of independent status, then remuneration paid to TIIPL was at arm's length, and therefore, TIIPL cannot be considered to be PE of assessee in India. It has been brought on record that in all the years and in subsequent years also Assessing Officer has held the advertisement revenue to be the business income following the MAP order. However, during the impugned assessment years, the said position has been digressed by the Assessing Officer without there being any material change in the facts and circumstances or the terms of agreement or the business mutual. Therefore, we are in tandem with the contention of the ld. counsel that when this fundamental aspect is permeating through different assessment years which have been accepted by the parties, then as a rule of consistency,

the same position should not be altered or should be allowed to be changed.

43. Be that as may be, now we will independently analyse, whether distribution revenue on the facts of the present case can be considered as 'royalty' in terms of Article 12 of the DTAA between India and USA. Ld. Assessing Officer had applied the provision of domestic law u/s.9(1)(vi) and held that payment received by the assessee for grant of right or license to distribute the channel in India tantamount to transfer of rights including the granting of license in of any copyright, etc. would amount to royalty. The relevant finding and observation of the Assessing Officer has already been dealt above. On perusal of the material placed on record and the facts of the case it is quite evident that the appellant- assessee has merely granted rights to TIIPL to 'receive, promote, market, license, distribute and sub-distribute the products to cable, satellite, broadcast, hotel, interactive and telecommunication entities and other users", "sell advertising" and performing ancillary activities. Clause 5 as reproduced above provides the sole ownership of the rights and the contents of the products to the assessee company and Indian Company had no right to copy, modify or alter the content therein. The definition of royalty as given in Article 12(3) which has been reproduced above, envisages that "payments of any kind received as a consideration for the use of, or the right to use, any copyright of a literary, artistic, or scientific work, including cinematograph films or work on film, tape or other means of reproduction for use in connection with radio or television broadcasting, any patent, trademark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience....." The Term copyright has not been defined in the DTAA albeit has been defined in Section 14 of the Copyright Act, 1957 as an exclusive right to do or authorize being of any of the acts specified in the said provision in respect of work or any substantial part thereof likewise work being defined in Section 2(y) of the said Act which is namely, literary, dramatic, musical or artistic work or a cinematograph film and a sound recording. Sub-section (1) of Section 14 of the Copyright Act, 1957 lists several Acts in respect of a work in relation to which exclusive right would be termed as copyright. Section 37 of the Copyright Act separately defines broadcast reproduction right. The Term 'Copyright' has defined in Section 14 and 'broadcast reproduction right' has been defined in Section 37 and both are two distinctive and separate rights. 'Broadcast reproduction right' is not reckoned as copyright. Here, in this case, appellant never granted any licenses to use any copyright, either to distributor or to the cable operator albeit it has only granted right for purpose of selling advertisement on the product that are channels, etc. and distribution of such products in India. The Indian company is carrying out the distribution and selling of the advertisement and it

does not have any kind of right to edit, interpret, add the products distributed by it. The assessee company only granted commercial rights in the nature of 'broadcast reproduction right' to the TIIPL, which has been separately defined u/s. 37 of the Copyright Act and therefore, it cannot be held that revenue derived by the assessee for distribution of products is taxable as 'royalty' albeit it is a business income of the assessee.

44. The Assessing Officer has tried to justify the tax the distribution revenue in the nature of royalty by applying the retrospective amendment made in Explanation-6 of Section 9(1)(vi) of the Act. Such an approach cannot be upheld because there is no similar amendment in the definition of royalty under the DTAA and it has been well settled by the Hon'ble Delhi High Court in the case of New Skies Satellite BV (supra), that amendment in the domestic law cannot be imported or read into DTAA.

45. The Ld. Departmental Representative has relied upon various clauses of the agreement between the Appellant Company and TIIPL to state that the content in the product was licensed to TIIPL. Accordingly, the amount received by the Appellant Company from TIIPL (Indian Concern) needs to be brought to tax as Royalty and not business income. However, the Ld. DR has completely ignored Clause 5 of the agreement (reproduced above). Considering the specific clause, no inference to the effect that the copyright of the content in the product has been transferred can be drawn. The clause makes it clear that the copyright in the content of the product always remains with the Appellant and is never transferred. The Appellant merely provides right to distribute the product. The ability to initiate legal action against the infringer of the copyright by TIIPL is merely a commercial term incorporated in the agreement to safeguard the interest of the appellant company which is situated in the United States.

46. The Ld. DR has also relied upon the down linking guidelines to state that in order to ensure that the channels are down linked in India an application must be made to the concerned authority in India by a company located in India. The assessee company must be an exclusive distributor of the channel and should have the ability to conclude contracts in India on behalf of the channel for the programme content. TIIPL has been granted exclusive distribution rights by the Appellant Company with respect to the products (channels) in India. Surely, TIIPL can enter into an agreement with respect to the content of the programmes but this right does not allow them to take ownership of the content. The copyright within the product has always been vested with the Appellant Company. The clause must be seen from a business prospective and in a wholesome manner. What is streamed is uplinked and down linked without any change in the content. The Indian

distributor cannot separate content from the channel stream. The product in the case at hand is a channel and what is streamed is the content, all of which gets distributed without any separation or dissection. Accordingly, the amount received from TIIPL cannot be brought to tax as 'royalty' in the hands of the Appellant Company.

47. Ld. DR has tried to distinguish the facts of the captioned matter from the case of MSM Satellite (Supra) and stressed heavily upon the ability of the consumer to 'store' and 'interact' with the content. However, the aforementioned factors cannot form basis for distinguishing the judgement rendered by the Hon'ble Bombay High Court. The crux and the core issue involved in the decision rendered by Hon'ble Bombay High Court and the impugned issue remains to be the same, i.e., whether the amounts received by a non- resident company for granting distribution rights to an Indian Company could be brought to tax as royalty or not. The Hon'ble Bombay High Court has categorically held that subscription charges received by MSM Satellite was for only viewing of the channels operated by it and it cannot be said that such revenue was for parting of any copyright. Accordingly, if the aforesaid principle of the Hon'ble Bombay High Court is to be followed, then the amount received by the appellant company from the Indian concern is to be brought to tax as Business Income.

48. Lastly, the Ld. DR has relied heavily upon the decision rendered by the Hon'ble Supreme Court in the case of Star India Private Limited v. Department of Industrial Policy and Promotions & Others. [C.A. Nos. 7326-7327 of 2018] to contend that the distribution fees[tariff] as received by the assessee relate to "content" which is protected and covered by the Copyright Act in form of "Copyright", "Broadcast Right"

and/or "Rebroadcast Right". Accordingly, the amounts received by the Appellant Company needs to be brought to tax as Royalty.

49. If we go through judgment, it is seen that the issue before the Hon'ble Supreme Court was, whether the TRAI only had the power to regulate the means of transmission and did not have the authority to regulate the content of the program. The Petitioners in the concerned case wanted to be covered under the Copyright Act instead of the TRAI Act. However, the Hon'ble Supreme Court had held otherwise. Further, the question and the Act that were considered in the aforesaid decision has nothing to do with levy of Income-tax and characterization of income in the Income-tax Act, 1961. Accordingly, the ratio of Star India does not have any direct application in the case at hand. The issue before the Hon'ble Apex Court was on the regulatory powers of TRAI and whether the same is inconsistent with the Copyright Act. Therefore, the legal question as well as the judgement of the Apex Court relate to a subject which is alien to the issue involved in the case

at the hand. It is a settled position of law that without appreciating the ratio decidendi of the judgement i.e. the rule of law on which judgement is based, a judgment cannot be applied blindly on different set of facts. Thus, the reliance of the Ld. Departmental Representatives on the judgement of the Hon'ble Apex Court has no application in the case at hand.

50. However, if we read para 60 of the aforesaid decision, wherein the Hon'ble Apex Court while delivering the verdict has recognized that the broadcasting is a separate right from the Copyright. Relevant Paragraph for the sake of ready reference is reproduced hereunder:

"60. A reading of the aforesaid provisions, according to the learned Senior advocate for the appellants, makes it clear that broadcasters may, in fact, be the owners of the original copyright of a work- for example, if they themselves have produced a serial. They may also be the copyright owners of the broadcast of this serial which is a separate right under the Copyright Act which they are able to exploit, and if there is a re-broadcast of what has already been copyrighted, this again is protected by Chapter VIII of the Copyright Act."

The argument before the Hon'ble Apex Court on the interpretation of the Copyright Act, 1957 was that, in case of a broadcaster there may be three different rights. First right when the broadcaster has produced the serial and second when they broadcast the serial and third again re broadcast. The Hon'ble Apex Court has concluded the same in para 64 as hereunder:

"The picture that, therefore, emerges is that copyright is meant to protect the proprietary interest of the owner, which in the present case is a broadcaster, in the "work", i.e. the original work, its broadcast and/or its re- broadcast by him."

51. Consequently, even the observations of the Hon'ble Apex Court in fact supports the case of assessee and its reliance on Bombay High Court that the broadcasting right a separate right which cannot come within the purview of copyright gets fortified. Even at the cost of repetition, it is again reiterated that even as per the agreement the copyrights in the product/channel has not been transferred to the Appellant and therefore it would not fall in the first category i.e. wherein the broadcaster himself has produced the serial.

52. The Ld. DR was not correct to compare with the first example wherein the broadcaster himself has produced the serial which is not the case of the Appellant Company In fact the case of the Appellant is covered by the judgement of the Hon'ble Bombay High Court in the case of MSM Satellite (Singapore) Pte Ltd, (Supra) wherein the Hon'ble

Bombay High Court emphatically observed that there is a difference in copyright and "broadcast reproduction rights". The Hon'ble High Court has observed that Section 37 of the Copyright Act, 1957 separately defines the broadcast reproduction right and therefore it is different from the payment of any copyright in literary, artistic or scientific work.

53. Just by way of reference, the famous treaty of Salmond on Jurisprudence, it is explained how a legal right is created. While explaining the jurisprudence behind the concept of right, it is mentioned as hereunder:

"It is to be noticed that in order that an interest should become the subject of a legal right, it must obtain not merely legal protection, but also legal recognition." Meaning thereby, a right can become a legal right only if it is recognized by law and also protected by law. It is further supported by the Latin maxim, Ubi Jus Ibi Remedium i.e. for every wrong there is a remedy. If one applies the same principle in the present case, the copyright and broadcasting reproduction right has been separately recognized in different chapters of the Copyright Act, 1957. The Copyright is defined in Chapter III of the Copyright Act while the broadcasting reproduction rights are a part of Chapter VIII of the same Act. This means the law has recognized separately these two rights. Again separate legal protection is provided for these two different rights. Accordingly, even following the jurisprudential principle it may be observed that the law has itself recognized two different right and exploitation of one cannot be confused with the use of other.

54. Thus, we hold that the distribution revenue earned by the appellant-assessee cannot be taxed as royalty albeit as a business income. Since, assessee has already offered income as business income in terms of the MAP, therefore, the income as declared by the assessee in accordance with the MAP and accepted by the Department in the earlier years has to be accepted. Accordingly, the additions made by the Assessing Officer are deleted."

7. The said order of the Tribunal has been called in question before the Hon'ble High Court in ITA No. 282/2022 and connected matters and the Hon'ble High Court of Delhi vide order dated

28/03/2024, found no justification to entertain the Appeal filed by the revenue in following manners:-

1. *"The Revenue has instituted the instant appeals and has proposed the following questions of law for our consideration:-*

"2.1 Whether on the facts and in the circumstances of the case, the !d. ITAT has erred in holding that the distribution revenue earned by the appellant assessee cannot be taxed as royalty, as per section 9(1)(vi) of the Act and Article 12 of the DTAA between India and the USA but as a business income?

2.2 Whether on the facts and in the circumstances of the case, the Ld. ITAT is correct in determining the income of the assessee company in the current Assessment Year by following the Income determined in resolution made under Mutual Agreement Procedure (MAP) in respect of earlier years in assessee's own case even though the resolution under MAP is limited to only those assessment years under consideration in MAP and do not apply to other assessment years in its own case even under identical facts?"

2. *We however take note of our order of 14 December 2022 and which is extracted herein below:-*

"2. Issue notice.

2.1 *Mr. Deepak Chopra accepts notice on behalf of the respondent/assessee.*

3. *We may note, that it is Mr. Chopra's contention, that apart from anything else, the issue which arises for consideration in the instant case, i.e., as to whether the revenue received on account of advertising and distribution rights should be treated as royalty, is inter alia, covered by the judgment rendered by the Supreme Court in* ***Engineering Analysis Centre of Excellence Pvt. Ltd. v. CIT*** *(2021)432 ITR 471 (SC).*

4. *Mr Chopra has also emphasized the fact, that after the Mutual Agreement Procedure (MAP) was entered into between the Governments of India and United States via their respective the competent authorities in April-June 2007, 10% of advertising and subscription revenue received during relevant previous years was taken to be net profit chargeable to tax.*

5. *Mr Chopra informs us. that thereafter, the respondent/assessee has consistently offered 10% of the advertising and subscription revenue for levy of tax.*

6. *We are also informed, that the appellant/revenue has accepted the regime put in place by MAP in Assessment Years (AYs) 2007-2008 and 2008-2009.*

6.1 *Mr Chopra says, that the assessment orders, insofar as these assessment years were concerned, were passed under Section 143(3) of the Income Tax Act, 1961 [in short "Act"].*

7. *Insofar as the above-captioned matters are concerned, we are told by learned counsel for the parties, that they relate to AYs 2009- 2010, 2010-2011, 2011-2012, 2012-2013, 2013-2014 and 2015- 2016.*

8. Mr Shlok Chandra, who appears on behalf of the appellant/revenue, informs us that the appellant/revenue has also lodged an appeal concerning Assessment Year 2014-15, which is yet to be listed.

9. We may note that the appellant/revenue has not filed its written submissions in the above-captioned matters.

9.1. Mr Chandra will file the written submissions, not exceeding three pages, within the next two weeks.

9.2. Mr Chandra will also ensure that the appeal for AY 2014-2015 is listed by the next date of hearing.

10. List the above-captioned matters on 28.02.2023, at the end of the Board in the category of "After Notice Miscellaneous Matters".

3. The fact of the Mutual Agreement Procedure having been adhered to by respective parties and consequent to the adjudication completed therein, the assessee having agreed to pay 10% of advertising and subscription revenue is not disputed. As would be manifest from a reading of paragraph nos. 4 to 6 of our order dated 14 December 2022, the aforesaid practice is also stated to have been accepted by the Revenue for Assessment Years 2007-08 and 2008-09.

4. In view of the aforesaid and bearing in mind the principles of consistency, we find no justification to entertain the challenge."

8. By respectfully following the order of the Co-ordinate Bench of the Tribunal and the order of the Jurisdictional High Court (supra), we hold that the subject distribution revenue earned by the

assessee cannot be taxed as Royalty albeit as a business income. Since the assessee has already offered the said income as business income in terms of MAP and the income as declared by the assessee in accordance with the MAP which has been accepted by the Department in earlier years has been accepted, we delete the additions made by the Assessing Officer for the Assessment Year 2020-21 and 2021-22.

9. In the result, Appeal in ITA No. 2432/Del/2023 and 3717/Del/2023 of the assessee are allowed.

Order pronounced in the open court on 09th September, 2024.

Sd/-	**Sd/-**
(Dr. B. R. R. KUMAR)	**(YOGESH KUMAR U.S.)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated : 09/09/2024

*R.N, Sr. PS**

Copy forwarded to :

1. Appellant
2. Respondent
3. CIT
4. CIT (Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI