IN THE INCOME TAX APPELLATE TRIBUNAL
"K" BENCH, MUMBAI

BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND
SHRI RAJESH KUMAR, ACCOUNTANT MEMBER

ITA no. 1947/Mum./2015
(Assessment Year : 2010–11)

Fox International Channel Asia Pacific Ltd. (Formerly known as Satellite Television Asia Region Ltd.), C/o Star India Pvt. Ltd. Star House, Urmi Estate, 95, Ganpat Rao Kadam Marg, Lower Parel (West) Mumbai 400 013 PAN – AAACS5680D	……………. Appellant

v/s

Dy. Commissioner of Income Tax (I.T) Circle–4(2)(2), Mumbai	……………. Respondent

Revenue by : Shri Porus Kaka a/w Shri Divesh Chawala
Assessee by : Shri Anand Mohan

Date of Hearing – 19.11.2018	Date of Order – 15.02.2019

O R D E R

PER SAKTIJIT DEY, J.M.

This appeal has been filed by the assessee challenging the order dated 29th January 2015, passed under section 143(3) r/w section 144C(13) of the Income Tax Act, 1961 (for short *"the Act"*) for the assessment year 2010–11, in pursuance to the directions of the Dispute Resolution Panel–4 (DRP), Mumbai.

2. In grounds no.1, 2 and 3, the assessee has challenged addition made of ₹ 24,79,34,418, on account of transfer pricing adjustment.

3. Brief facts are, the assessee a foreign company is a tax resident of Hong Kong. The assessee is basically engaged in distribution of satellite television channels and sale of advertisement air time for the channel companies at global level. As stated by the Transfer Pricing Officer, the assessee is not a channel owner but is a service provider to group companies owning channels like Star Movies, Star World, Channel–V, Star Plus, Star Utsav, Star Gold, Star One, etc. Further, the channel companies had appointed the assessee as an agent to sell the advertisement air time on the channels, to distribute the channels in the territories where the channels are being broadcast and to procure syndication revenues in respect of the contents of the channels. In the relevant previous year the assessee has earned revenue from management fee and advertising fee. Of–course, it has also earned other income in the nature of royalty from various entities. It is stated that up to financial year 2007–08, the assessee and channel companies had a principle–to–principal relationship in respect of both advertising stream and distribution stream of income. However, in compliance to the guidelines issued by the Ministry of Information & Broadcasting, there was a change in the relationship and the channel companies with effect from 1st April 2008 and the assessee started operating as an agent of the channel companies in respect of advertisement and distribution stream of income. In nut–

shell, in the previous year relevant to the assessment year under dispute, the assessee earned income from agency commission, management fees and other income in the nature of royalty. As submitted by the assessee, being a non–resident company, it is not required to maintain India Specific Financial Statement nor does it maintain any India Specific Account. For the assessment year under dispute, the assessee filed its return of income originally on 14th October 2010, declaring income of ₹ 155,74,12,855. Since the said return of income was on the basis of the unaudited global financial statements of the assessee and the channel companies for the nine month period ended on 31st March 2010, the assessee filed a revised return of income on 29th March 2012, on the basis of audited global financial statements of itself and channel companies for the year ended 31st June 2010, offering income of ₹ 229,68,11,851. In course of assessment proceedings, the Assessing Officer noticing that the assessee has earned revenue from international transaction with its Associated Enterprise (AE) in India made a reference to the Transfer Pricing Officer for determining the arm's length price (ALP) of the international transactions. From the transfer pricing study report of the assessee, the Transfer Pricing Officer found that the assessee and the channel companies have bench marked the international transaction by adopting Profit Split Method (PSM) as the most appropriate method.

Insofar as agency commission is concerned, the global profitability percentage as per the audited financial statements of Star International Movies Ltd. (SIML), Channel–V and overseas entities such as Star Television Entertainment Ltd. (STEL), Star Asian Movies Ltd. (SAML), Star Asia Region FZ, LLC (SARF), since merged with Star India Pvt. Ltd (SIPL), have been applied to the Indian revenues and global revenues earned by the channel companies and the overseas merged entities respectively to arrive at the profit / loss earned by each of the channel companies. As per the contractual arrangement between the assessee and the channel companies, the assessee is compensated so as to earn an amount equal to the profits / loss earned / incurred to by the channel companies, meaning thereby, an amount which is equivalent to the total profits of all the channel companies was also considered as profits in the hands of the assessee. The Transfer Pricing Officer noticed that out of the global commission received by the assessee from the overseas merged entities, commission fee received towards the services rendered outside India was not offered to tax by the assessee in India and only the balance commission fee was offered to tax in India. As regards management fees, the assessee had offered it to tax by applying the ratio of the consolidated revenues earned by the channel companies from India to the consolidated global revenues of channel companies. Further, royalty income was offered in respect of royalty received for grant of license to use Star mark. Since, the global commission paid by the overseas merged entities to the assessee was claimed as deduction by SIPL in its return of income such global commission fee received by the assessee considered for the benchmarking of the overall profitability of the assessee and the channel companies. The consolidated profit computed as a percentage of total revenue earned by the channel companies from India during the 12 months period from April 2009 to March 2010, resulted in an overall profit rate of 28.17% as per the following computation:–

Channel Companies	*Revenues (INR)*	*Global Profitability percentage as per audited global financial state–ments for the year ended 20th June 2010*	*Arm's length price attributable to India (INR)*
	(A)	*(B)*	*(C) = (A x B)*
STEL	*10,744,306,287*	*16.40%*	*1,762,147,856*
SIML	*2,068,465,212*	*19.44%*	*402,144,745*
SAML	*2,142,975,628*	*13.54%*	*290,221,062*
V Partnership	*755,965,049*	*7.25%*	*54,785,906*
SAR	*2,221,731,968*	*0.75%*	*16,662,990*
Total	*17,933,444,143*		*2,525,962,559*
STAR Ltd.			*2,525,962,559*
Total profits including STAR Ltd.			*5,051,925,118*
Total global / India revenue of Channel Companies			*17,933,444,143*
Profit as a percentage of total revenue			*28.17%*

4. The Transfer Pricing Officer after thoroughly verifying the transfer pricing study report of the assessee accepted PSM as the most appropriate method. He also noted that though under PSM there is no need to further benchmark the profitability against the comparables, however, with a view to demonstrate its bona fide and clear all doubts, the assessee had compared its profitability with nine external comparables, whose average margin worded out to 7.28%. The Transfer Pricing Officer after examining the comparables proposed by the assessee found some of them to be non comparable for various reasons. Accordingly, he short listed five companies as comparables with average mean of 23.81%. Since the assessee had shown a margin of 28.17% as against the average margin of 23.81% of the comparable, the Transfer Pricing Officer ultimately concluded that no adjustment is required to be made to the value of the international transaction entered into by the assessee. However, the Transfer Pricing Officer observed that while in the transfer pricing analysis the assessee has determined the arm's length price profit at ₹ 252,59,62,559 under PSM, however, in the computation of income it has offered to tax in India an amount of ₹ 227,80,28,141. Accordingly, he held that the differential amount of ₹ 24,79,34,418, should be treated as adjustment to the arm's length price. In pursuance to the order passed by the Transfer Pricing Officer, the Assessing Officer

proposed the draft assessment order adding the transfer pricing adjustment of ₹ 24,79,34,418, to the income of the assessee. Against the draft assessment order so passed the assessee raised objections before the DRP.

5. Before the DRP, as it appears, it was submitted by the assessee that since the transfer pricing adjustment of ₹ 24,79,34,418, represents agency commission fee towards services provided outside India, it is not chargeable to tax in India. It was submitted by the assessee, not only the services were provided outside India but the payment was also received outside India. Therefore, it cannot be treated as income either under section 7 or section 9 of the Act. In this context, the assessee also relied upon CBDT Circular no.23 dated 23rd July 1969 and Circular no.786, dated 7th February 2000. It was submitted, since the agency commission fee is not an income chargeable to tax under the provisions of the Act, it cannot be considered as an international transaction under section 92B(1) of the Act. Therefore, the Transfer Pricing Officer had no jurisdiction to take cognizance of such transactions and carry out adjustment. The DRP, however, did not find merit in the submissions of the assessee. They observed, though, for the purpose of benchmarking its transaction, the assessee had calculated the arm's length price profit attributable to India at ₹ 252,59,62,559, however, it has offered to tax in India an

amount of ₹ 227,80,28,141. The DRP observed, since the assessee itself has admitted that arm's length price attributable to India is ₹ 252,59,62,559, no fault can be found with the Transfer Pricing Officer in making the adjustment. While holding so, the DRP also rejected assessee's contention that the income does not come within the purview section 9 of the Act. Further, the DRP observed that the CBDT circular cited by the assessee, since, have been withdrawn, no importance can be attached to them. They also observed that in view of Explanation below section 9(2) of the Act, income of a non–resident shall be deemed to accrue or arise in India whether or not the nonresident has a residence or place of business or business connection in India or has rendered services in India. Accordingly, they upheld the adjustment made to the arm's length price by the Transfer Pricing Officer. In terms with the directions issued by the DRP the Assessing Officer passed the impugned assessment order sustaining the addition made on account of transfer pricing adjustment.

6. Shri Porus Kaka, learned Sr. Counsel appearing for the assessee took us through the computation of arm's length price of the international transaction in the transfer pricing study report and submitted that there is no dispute that the most appropriate method for benchmarking the international transaction is PSM. He submitted, the assessee has earned agency commission fee on advertising

services from India as well as outside India. He submitted, arm's length price of the international transaction has to be determined purely on the basis of income sourced from India. Drawing our attention to the transfer pricing study report, he submitted, the consolidated profit of the specified AEs in respect of India / Global Revenue earned by them for the 12 months period of 1st April 2009 to 31st March 2010 were compared to the total of India Revenue earned by SIML / V–Partnership and Global Revenues earned by the overseas merged entity during the 12 month period from 1st April 2009 to 31st March 2010 which reflected an overall profit rate of 28.17%. He submitted, the Transfer Pricing Officer has found the aforesaid profit margin shown by the assessee to be at arm's length price, hence, has not proposed any adjustment to the arm's length price. However, he submitted, the margin of 28.17% represents the global profit ratio of the assessee. He submitted, latching on to a mistake committed in Annexure–1 to the transfer pricing study report while mentioning *"arm's length profit attributable to India"*, the Transfer Pricing Officer has actually considered the global profit of the assessee amounting to ₹ 252,59,62,559. He submitted, the income of ₹ 227,80,28,141, offered by the assessee represents the arm's length price profit attributable to India. In this context, he drew our attention to the computation of taxable income in India and the revised computation of consolidated net profit compared to the total India / Global Revenue earned by the assessee and the channel companies which forms part of the transfer pricing study report placed at Page–75 and 76 of the paper book. The learned Sr. Counsel submitted, the duty of the Transfer Pricing Officer as per the statutory provision is to determine the arm's length price of the international transaction. He submitted, it is not the duty of the Transfer Pricing Officer to see what income is deemed to accrue or arise in to India, which is the job of the Assessing Officer. He submitted, under PSM, profit attributable to the income sourced from India has to be split. He submitted, once the Transfer Pricing Officer has concluded that the margin shown by the assessee @ 28.17% is at arm's length and no adjustment to the arm's length price is required, he should not have recommended any further adjustment on the basis of global income. The learned Sr. Counsel submitted, the observations of the DRP that the assessee has admitted the amount of ₹ 252,59,62,559, as the profit attributable to India is a total misconception of fact and on a wholly wrong reading of the transfer pricing study report. He submitted, the assessee has at no stage admitted that the profit attributable to India is ₹ 252,59,62,559. The learned Sr. Counsel submitted, when the departmental authorities have not disputed the fact that the agency commission of ₹ 24,79,34,418, is towards services rendered outside India and the payment was also received outside India it cannot be brought to tax in India. He submitted, the aforesaid legal position has not only been reiterated in various judicial precedents but also in the CBDT Circular no.786, dated 7th February 2000. He submitted, even the withdrawal of the aforesaid circular w.e.f. 22nd October 2010 will not make much difference since the provisions of section 5(2) and section 9 of the Act have not undergone any change in respect of the cases which directly fall within the situations covered under CBDT Circular no.23 dated 23rd July 1969 and Circular no.786, dated 7th February 2000. In support of the aforesaid contentions, the learned Sr. Counsel relied upon the following decisions:–

i) CIT v/s Toshoku Ltd., [1980] 125 ITR 525 (SC);

ii) UTS SCS (Asia) Ltd. v/s ADIT, [2012] 18 taxmann.com 302 (Mum.);

iii) ITO v/s Indo Industries Ltd., [2018] 94 taxmann.com 180 (Mum.); and

iv) ACIT v/s Nuova Shoes, [2918] 91 taxmann.com 354 (Agra).

7. In support of the proposition that the duty of the Transfer Pricing Officer is to determine the arm's length price only, learned Sr. Counsel relied upon the following decisions:–

i) DCIT v/s Hazaria Cryogenic Engineering and Construction Management Pvt. Ltd., [2018] 89 taxmann.com 344;

ii) Topcon Singapore Positioning Pvt. Ltd. v/s DDIT, [2018] 96 taxmann.com 603;

iii) CIT v/s Cushman and Wakefeild India P. Ltd., [2014] 46 taxmann.com 317; and

iv) Dresser Rand India P. Ltd. v/s ACIT, [2011] 13 taxmann.com 82.

8. The learned Departmental Representative strongly relying upon the observations of the Transfer Pricing Officer and the DRP submitted that the Transfer Pricing Officer has made the adjustment only after considering assessee's own computation and has taken note of all the submissions made by the assessee. He submitted, the Transfer Pricing Officer is empowered under the Act to look into all the aspects for determining the arm's length price of the international transaction.

9. In rejoinder, the learned Sr. Counsel for the assessee submitted, while deciding assessee's appeal in ITA no.8683/Mum./ 2011, dated 2nd February 2016, the Tribunal has held that PSM will apply to India sourced income. Thus, he submitted, income earned / received for services rendered outside India cannot be brought to tax in India.

10. We have considered rival submissions and perused material on record. We have also applied our mind to the decisions relied upon. At the outset, it is necessary to observe that the dispute in these grounds is confined to the addition of ₹ 24,79,34,418, towards transfer pricing adjustment made to the international transaction relating to agency commission. It is a fact on record that the assessee has adopted PSM as the most appropriate method to benchmark its international

transaction relating to agency commission and has shown a profit margin of 28.17%. To demonstrate that the profit margin shown is at arm's length the assessee has also offered certain comparables whose average margin worked out to 23.81%. The Transfer Pricing Officer after taking note of the profit margin shown by the assessee and that of the comparable companies has also accepted the arm's length price shown by the assessee to be at arm's length. However, he has made the adjustment on the ground that instead of offering profit of ₹ 252,59,62,559 under the PSM, the assessee has offered profit of ₹ 227,80,28,141. While doing so, the Transfer Pricing Officer has basically relied upon Annexure–1 to the transfer pricing study report wherein revised computation of consolidated net profit compared to the total India / Global Revenues earned by the channel companies and the overall profitability for the period 1st April 2009 to 31st March 2010 has been reflected.

11. Notably, in the said Annexure–1, a copy of which is at Page–76 of the paper book and which has also been reproduced in the orders of the Transfer Pricing Officer and the DRP, an amount of ₹ 252,59,62,559, has been shown as arm's length profit attributable to India in case of the assessee. Prima facie, it appears that solely relying upon this document submitted by the assessee the Transfer Pricing Officer has concluded that the profit attributable to the Indian

Operation of the assessee is ₹ 252,59,62,559, and not ₹ 227,80,28,141, as offered by the assessee in the return of income. Though, before the DRP the assessee has contended that agency commission received outside India for the services rendered outside India is not taxable in India, however, the DRP has rejected assessee's claim firstly on the ground that the assessee itself has admitted that the profit attributable to India is ₹ 252,59,62,559 and secondly, the DRP has held that section 9 of the Act being a deeming provision, it brings to tax any income accruing or arising whether directly or indirectly through or from any business connection in India. In other words, the DRP has held that section 9 of the Act can even bring to tax net income which does not accrue or arise in India but accrues or arises outside India. The DRP has also observed that Explanation to section 9(2) of the Act, inserted by Finance Act 2010, with retrospective effect from 1st June 1976, has widened the scope of section 9 of the Act to the extent that the income of non–resident shall be deemed to accrue or arise in India whether or not the non–resident has a residence or place of business or business connection in India or the non–resident has carried on business operation in India.

12. We are unable to accept the aforesaid reasoning of the DRP. If the provisions of section 9 of the Act is read as a whole, it would be very much clear that as per Explanation 1 to section 9(1)(i) of the Act,

in case of an assessee whose business operations are not exclusively carried out in India, the amount of income which will be deemed to accrue or arise in India shall be only such part of the income as is reasonably attributable to the operations carried out in India. Therefore, the income which is deemed to accrue or arise in India must have a territorial nexus. It is well settled position of law as per the various judicial precedents including the decisions cited before by the learned Sr. Counsel, agency / marketing commission paid to non–residents agent outside India and for services rendered outside India is not taxable in India. Moreover, if one carefully reads the provision contained in Explanation below section 9(2) of the Act, it will be very much clear that it will not be applicable to the agency commission earned by the assessee.

13. Therefore, in principle, we agree with the contention of the learned Sr. Counsel for the assessee that income accruing or arising outside India would not be taxable under the Act. However, it is the case of the Department that the assessee itself has admitted that the profit attributable to India is ₹ ₹ 252,59,62,559. Contesting the aforesaid finding of the Transfer Pricing Officer and the DRP, the learned Sr. Counsel for the assessee has submitted that the profit attributable to India is ₹ 227,80,28,141. For demonstrating such fact, he has heavily relied upon the transfer pricing study report filed before

the Transfer Pricing Officer. However, since the actual profit attributable to India is a purely factual issue which has to be demonstrated by the assessee through proper documentary evidences / books of account, for the limited purpose of verifying this fact, we are inclined to restore the issue to the Assessing Officer to examine assessee's claim. In the event, the claim of the assessee that actual profit attributable to India is ₹ 227,80,28,141, is found to be correct, no further adjustment can be made to the arm's length price since the Transfer Pricing Officer himself has concluded that the profit margin of the international transaction shown by the assessee is higher than the average margin of the comparables.

14. Since, there is no dispute between the parties with regard to the most appropriate method selected by the assessee as well as profit margin shown and the dispute is only with regard to the factual issue relating to the actual profit attributable to India under PSM, we do not found it necessary to deal with the contention raised by the learned Sr. Counsel regarding the power of the Transfer Pricing Officer to determine the profit attributable to India. With the aforesaid observations, these grounds are allowed for statistical purposes.

15. In ground no.4, the assessee has challenged the decision of the departmental authorities in bringing the royalty income to tax @ 42.23% instead of 21.115%.

16. Before the Assessing Officer, the assessee had contended that the royalty income being in the nature of other income cannot be taxed @ 42.23% by treating it as business profit. However, the Assessing Officer did not accept the claim of the assessee and taxed the royalty income @ 42.23%.

17. Challenging the aforesaid decision of the Assessing Officer though the assessee raised objections before the DRP, however, the DRP upheld the decision of the Assessing Officer.

18. The learned Sr. Counsel for the assessee submitted, while deciding identical issue in assessee's own case for assessment year 2007–08, the Tribunal in ITA no.8683/Mum./2011 & Ors. dated 2nd February 2016, has restored the issue to the Assessing Officer with certain directions. He submitted, the issue may be restored to the Assessing Officer with similar direction.

19. The learned Departmental Representative has not opposed the aforesaid submissions of the learned Sr. Counsel for the assessee.

20. Having considered rival submissions and perused the material on record, we find that while dealing with identical issue in assessee's own case in assessment year 2007–08 (supra), the Tribunal has restored the issue to the Assessing Officer with the following direction:–

> *"26. So far as issue raised vide ground 7 and 8, the assessee has challenged the taxation of service fee income @ 41.82% on the gross basis as against applicable @ 10.455% on gross basis. We direct the AO to apply the correct tax rate in accordance with section 115A and examine the contention of the assessee that tax rate of 10.45% and 20.91% should be applied."*

21. Facts being identical, we direct the Assessing Officer to decide the aforesaid issue following the directions of the Tribunal as referred to herein above. This ground is allowed for statistical purposes.

22. In ground no.5, the assessee has raised the issue of short grant of TDS credit amounting to ₹ 7,84,041.

23. After considering the rival submissions, we direct the Assessing Officer to verify assessee's claim and grant credit for actual TDS.

24. In ground no.6, the assessee has challenged levy of interest under section 234C of the Act.

25. We have considered rival submissions and perused material on record. It is the contention of the learned Sr. Counsel for the assessee that since the assessee is a non–resident and liability was cast upon the payer to deduct tax at source while making the payment, interest cannot be charged under section 234C of the Act for failure to pay installments of advance tax. In this context, he has relied upon the decision of the Hon'ble Jurisdictional High Court in DIT v/s NGC Network Asia LLC, [2009] 313 ITR 187 (Bom.). We find substantial

merit in the aforesaid submissions of learned Sr. Counsel. Accordingly, we direct the Assessing Officer to decide the issue of levy of interest under section 234C of the Act by following the ratio laid down by the Hon'ble Jurisdictional High Court in NGC Network Asia LLC (supra), this ground is allowed for statistical purposes.

26. Grounds no.7, 8 and 9, challenging the initiation of penalty proceedings being premature do not require adjudication at this stage, hence, dismissed.

27. In the result, appeal is partly allowed for statistical purposes.

Order pronounced in the open Court on 15.02.2019

Sd/- **RAJESH KUMAR** **ACCOUNTANT MEMBER**	**Sd/-** **SAKTIJIT DEY** **JUDICIAL MEMBER**

MUMBAI, DATED: 15.02.2019

<u>Copy of the order forwarded to</u>:

(1) The Assessee;
(2) The Revenue;
(3) The CIT(A);
(4) The CIT, Mumbai City concerned;
(5) The DR, ITAT, Mumbai;
(6) Guard file.

True Copy
By Order

Pradeep J. Chowdhury
Sr. Private Secretary

(Sr. Private Secretary)
ITAT, Mumbai