

IN THE INCOME TAX APPELLATE TRIBUNAL
“I” BENCH, MUMBAI
BEFORE SHRI PRAMOD KUMAR, VICE PRESIDENT &
SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER

ITA No. 33/Mum/2021 (A.Y: 2017-18)

Warner Brothers Distributing Inc. 407, 4 th Floor, Windfall, Sahar Plaza Complex, Andheri Kurla Road, JB nagar, Mumbai – 400059	Vs.	ACIT (IT) – 4(3)(2) Room No. 1611, 16 th Floor, Air India Bldg, Nariman Point, Mumbai – 400021
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAACW6559R		
Appellant	..	Respondent

Appellant by :	Mr. Ahmed Jahangir, AR
Respondent by :	Shri. Milind Chavan, DR

Date of Hearing	25.11.2021
Date of Pronouncement	30.11.2021

आदेश / O R D E R

PER PAVAN KUMAR GADALE JM:

The assessee has filed the appeal against the order of the Assessing officer (A.O.) passed u/s 143(3) r.w.s 144C(13) in pursuance to directions of the DRP order u/s 144C(5) of the Act dated 29.10.2020. The assessee has raised the following grounds of appeal

- 1. On the facts and in the circumstances of the case and in law, the Hon'ble DRP erred in approving the draft assessment order proposed by the Ld. AO without appreciating that the same was*

incomplete and passed in contravention of Principles of Natural Justice.

2. *On the facts and in the circumstances of the case and in law, the Ld. AO erred in concluding that just because royalty payable to the appellant (licensor) is dependent upon profits earned by licensee, royalty partakes the character of business income even in the hands of appellant. The Hon'ble DRP erred in further approving the same.*

3. *On the facts and in the circumstances of the case and in law, the Ld. AO erred in holding that the appellant has received revenue from cinema halls/theatres in India without producing any evidence in this regard.*

4. *On the facts and in the circumstances of the case and in law, the Ld. AO erred in concluding that the income has directly accrued and arisen in India without appreciating that the agreement is signed outside India and the legal rights are also enforceable outside India.*

5. *On the facts and in the circumstances of the case and in law, the Ld. AO erred in assessing the royalty received by the appellant from Warner Bros. Pictures (India) Pvt. Ltd. as business income u/s 9(1)(i).*

6. *On the facts and in the circumstances of the case and in law, the learned AO as well as the Hon'ble DRP erred in holding that Warner Bros. Pictures (India) Pvt. Ltd. is a Dependent Agent permanent Establishment of appellant consciously ignoring Hon'ble DRP own directions for A.Y 2010-11 to A.Y 2012-13 and the binding orders of this Hon'ble Tribunal for A.Y 2006-07 in the case of appellant's predecessor company (WBPI) and AN. 2007-08 to 2014-15 in appellant's own case*

7. *On the facts and in the circumstances of the case and in law, the Ld. AO as well as the Hon'ble DRP erred in not giving any clear finding on the alternative objection of appellant that royalty having been paid at arm's length, there cannot be a PE in India under the India-USA Tax Treaty*

8. *On the facts and in the circumstances of the case and in law, the Ld. AO erred in arbitrarily attributing 65% of royalty as*

profits attributable to India. The Hon'ble DRP further erred in confirming the same.

9. On the facts and in the circumstances of the case and in law, the Hon'ble DRP has acted in contempt of this Hon'ble Tribunal's orders of earlier years and thereby, the appellant may be awarded exemplary cost u/s 254(2B) for being forced to file this appeal.

10. On the facts and in the circumstances of the case and in law, the Ld. AO erred in charging interest u/s 234B of the Income Tax Act, 1961. The Hon'ble DRP further erred in absolving itself from hearing the issue citing lack of jurisdiction.

11. The appellant craves leave to add, alter, amend or withdraw all or any of the grounds that may be urged at the time of hearing of the appeal.

2. The Brief facts of the case are that the assessee is a tax resident of USA and is engaged in the distribution of Cinematography films. The Warner Brothers Distribution Inc (WBDI) had entered into an agreement with Warner Brothers. Pictures Ind Pvt Ltd (WPPIPL) in April 2009 granting exclusive rights of distribution of cinematographic film on payment of royalty in terms of the agreement. The assessee has filed the return of income electronically for the A.Y 2017-18 on 23.11.2017 with the total income of Rs. Nil. Subsequently, the case was selected for scrutiny and notice u/s 143(2) and 142(1) of the Act along with questionnaire was issued. The A.O found that the

assessee during the F.Y 2016-17 has received receipts of Rs. 32,33,50,143/- and claimed exempted and refund of tax. The A.O considered the facts and the only issue being the treatment of receipts under the head Business income.

3. The assessee has submitted that it has received the royalty income from Indian company on account of distribution of films. The assessee company claimed that the royalty received from WBPIPL is not taxable under the income tax Act or India-USA DTAA (treaty). The assessee company has mentioned that the Hon'ble ITAT in assessee's own case for the A.Y 2007-08 to 2013-14 has allowed in favour of the assessee and the Hon'ble DRP in favour of the assessee for A.Y 2010-11, 2011-12 and 2012-13. But the A.O has issued show cause notice referring to the various points dated 18.11.2019 in respect of amount to be treated as business income following the precedence. The assessee has filed a letter referred at Para 4 of the assessment order. The A.O has dealt on the nature of income received by the assessee and the various facts which are emerging in the case. The A.O.

observed that the revenue is contesting the decisions of ITAT for earlier years before the Honble Bombay High Court. Finally, the A.O has treated the receipts as business income considering the facts and various clauses on the issue at page 33 Para 22 as under:

“21.1 Having decided that there is a DAPE in existence through which all distribution activities are carried out in India, the next stage is to determine the extent of profit attribution. The same would have to be determined in accordance with the provisions of Rule 10 of the IT Rules to estimate the profit attributable to the PE in the absence of global accounts.

21.2 It is seen that almost all the functions relating to the distribution of films in India are carried out by the DAPE in India and thus the entire revenue of Rs. 33,15,80,568/- would actually represent the profits arising from the Indian business activities. As has already been stated in the preceding paragraphs, the amount of Rs. 33,15,80,568/- is a net figure representing only profit since all expenses have already been deducted to arrive at the same. However, it may only be reasonable to allocate a certain percentage of this amount for activities/functions performed by the assessee company directly, although no details of the same have been provided by the assessee in the course of these proceedings. Even so, it would be more than fair and reasonable to allocate 35% of the Indian revenues to outside India activities. Accordingly, 65% would be the profits attributable to the DAPE in India which amounts to Rs. 21,55,27,369/- and which would be taxable as business profits at the rates prescribed in the Act. Penalty proceedings will be initiated separately for furnishing of inaccurate particulars of income at the time of final order u/s 271(1)(c) of the Act.

22. The total income of the assessee is computed as follows

*1. Gross receipts Rs. 33,15,80,568/-
(Relating to the distribution*

<i>Of films in India)</i>	
<i>65% thereof</i>	<i>Rs. 21,55,27,369/-</i>
<i>Total taxable income</i>	<i>Rs. 21,55,27,370/-</i>

The A.O has passed the Draft assessment order u/s 143(3) r.w.s 144C of the Act dated 26.11.2019.

4. Against the draft assessment order, the assessee has filed the objections before the DRP in form 35A. The DRP considered the assessee submissions, findings of the scrutiny assessment and the draft assessment and dealt on the submissions in respect of treatment of the income under the India-USA(DTTA).The A.O has applied the provisions and the DRP has accepted these facts and passed the order u/s 144C(5) of the Act dated 29.10.2020. The A.O as per the directions of the DRP has determined the taxable income of Rs. 21,55,27,370/- and passed the order u/s 143(3) r.w.s 144C(13) of the Act on 24.11.2020. Aggrieved by the final assessment order, the assessee has filed an appeal before the Honble Tribunal.

5. At the time of hearing, the Ld. AR submitted that the Hon'ble Tribunal in assessee's own case for earlier

A.Ys has considered all the facts in respect of DTTA, India and US relations and granted the relief. The A.O has not accepted the decision of Honble Tribunal for the earlier assessment years as the revenue has filed the appeal before the Hon'ble Bombay High Court. The Ld.AR supported the submissions with the decisions of Hon'ble ITAT and prayed for allowing the appeal. Contra, the Ld.DR relied on the orders of the Lower authorities.

6. We heard the rival submissions and perused the material on record. The sole crux of the disputed issue is with respect to taxability of income generated in India. The Ld. AR has substantiated the arguments with voluminous paper book and the facts that the income cannot be taxed in India. The Ld. AR referred to the provisions of international taxation and the sequence of transactions. We find the Hon'ble Tribunal in assessee's own case for the earlier years has allowed the claim in favour of the assessee. At this juncture, we considered it appropriate to refer to the orders of the Hon'ble Tribunal in assessee's own case from A.Y 2006-07 to 2014-15 as under:

1. *ITA No. 3160/Mum2010, A.Y 2006-07*
2. *ITA No. 8734/Mum/2010, A.Y 2007-08*
3. *ITA No. 8627/Mum/2011, A.Y 2008-09*
4. *ITA No. 7553/Mum/2012, A.Y 2009-10*
5. *ITA No. 1405/Mum/2014, A.Y 2010-11*
6. *ITA No. 1615/Mum/2015, A.Y 2011-12*
7. *ITA No. 4877/Mum/2015, A.Y 2012-13*
8. *ITA No. 7635/Mum/2016, A.Y 2013-14*
9. *ITA No. 6479/Mum/2018, A.Y 2014-15*

7. We considered the decision of the Coordinate Bench of this Honble Tribunal for the A.Y 2014-15 in ITA No. 6479/Mum/2018 at page 5 Para 5 as under:

5. As noted in the opening paragraphs, it is an admitted position that the issues stood squarely covered in assessee's favor by the lead decision of this Tribunal in assessee's own case for AY 2006-07, ITA No. 3160/Mum/2010 & Co.No.17/Mum/2011 dated 30/12/2011 wherein the bench has concluded the matter by observing as under: -

9) We have considered the rival contentions and examined the facts on record. There is no dispute with reference to the fact that the assessee has entered into agreement with Warner Brothers Pictures India (P) Ltd outside India and the amounts were also received outside India. There is also no dispute with reference to the fact that the definition of royalty under section 9(1)(vi) Explanation 2 to (v) excludes the payment received with reference to sale, distribution and exhibition of cinematographic films. There is also no dispute with reference to the provisions of DTAA entered into by India with USA, notified on 20th December, 1990, that the term royalty used in the Article 12 does not include payment of any gain received

as consideration for the use of any copyright or literary, artistic or scientific work including cinematographic films or work on films, tape or other means of production for use in connection with Radio or T.V. broadcasting. In view of this specific provisions, the amount received by the assessee cannot be considered as royalty as was done by the Assessing Officer while invoking the Article 12(2) of the DTAA for taxing the amounts. To that extent the findings of the CIT (A) are correct and there is no need to deviate from such findings. In view of this the amount received by the assessee cannot be considered as royalty within the meaning of Indian Income Tax Act or under the DTAA.

10) The issue can be examined in another dimension whether the amount is taxable under the Indian Income Tax Act in India if not as royalty, but as business income. The CIT (A) finding is that assessee has a business connection in India. However, he considered that there is no PE to the assessee, the fact of which was also accepted by the Assessing Officer as he has invoked only Article 12(2) and not considered the amounts business income as per PE proviso. It was the contention of the learned Departmental Representative that the assessee having business connection, the findings of which was given by the CIT (A), the amount cannot be excluded without examining 'PE proviso' provisions of the DTAA. In this regard the learned Counsel's submission that under the Income Tax Act as well as under the provisions of DTAA the transaction between the assessee and Indian Company to whom license was granted by virtue of the agreement cannot be considered as Agency PE as the Indian assessee is not exclusively dealing with the assessee and referred to the receipts from another company 20th Century Fox to submit that the assessee is also dealing with the other Non Resident Companies, so assessee cannot be considered as Agency PE within the definition of Permanent Establishment.

11) We have examined this aspect also. As rightly held by the CIT (A) even if income arises to the Non-Resident due to the business connection in India, the income accruing or arising

out of such business connection can only be taxed to the extent of the activities attributed to permanent establishment. In this case, the assessee does not have any permanent establishment in India. Since the Indian company who obtained the rights is acting independently, Agency PE provisions are not applicable to the assessee company. The assessee relied on the decision of *Ishikawajma-Harima Heavy Industries Ltd vs. Director of Income Tax 2007-(158)-TAXMAN 0259-SC* that incomes arising to a Non-Resident cannot be taxed as business income in India, without a PE. As the assessee does not have any permanent establishment in India, the incomes arising outside Indian Territories cannot be brought to tax. Therefore, there is no need to differ from the findings of the CIT (A) and accordingly the Revenue Appeal is dismissed.

12) In the cross objection, the assessee is contesting about the findings of the CIT (A) that the general principles of section 9(1)(i) will apply in the absence of inclusion under section 9(1)(vi) and relied on the two decisions of the Gujarat and Madras High Courts referred (*supra*). Even though the cross objection was raised on findings of CIT(A), in view of the observations given above, we are of the opinion that the issue is only academic and does not require any specific adjudication.

This decision has subsequently been followed by various co-ordinate benches of the Tribunal in assessee's own case in subsequent years as tabulated above. Further, it is quite evident that Ld. DRP has dismissed assessee's objections only in view of the fact that the department, in earlier years, was in further appeal before Hon'ble Bombay High Court. However, nothing has been brought on record to establish that the aforesaid rulings of Tribunal, at present, are not applicable to the year under consideration. No distinguishing facts or features could be pointed out by revenue before us. The terms of the agreement are flowing from earlier years. Therefore, respectfully following the consistent view of the Tribunal, we delete the impugned additions and allow assessee's appeal.

6. Resultantly, the appeal stands allowed.

8. Whereas, in the present case there is no variation in facts except the figures and the provisions are equally applicable. The Ld.DR could not controvert the observations on the Hon'ble Tribunal for the earlier assessment years except mentioning that the revenue has challenged the earlier orders before the Hon'ble Bombay High Court. We respectfully follow the judicial precedence and delete the addition made by the Assessing officer and allow the grounds of appeal in favour of the assessee.

9. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open court on 30.11.2021.

Sd/-
(PRAMOD KUMAR)
VICE PRESIDENT

Sd/-
(PAVAN KUMAR GADALE)
JUDICIAL MEMBER

Mumbai, Dated 30.11.2021

KRK, PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant

2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / The CIT(A)
4. आयकर आयुक्त(अपील) / Concerned CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

1.

(Asst. Registrar)
ITAT, Mumbai