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

Judgment reserved on September 26, 2014
Judgment delivered on November 18, 2014

\+ ITA 6/2014

COMMISSIONER OF INCOME TAX – IV ..... Appellant

Through: Mr.Kamal Sawhney,Sr.Standing Counsel with Mr.Sanjay Kumar, Jr.Standing Counsel

Versus

DELHI RACE CLUB (1940) LTD. ..... Respondent

Through: Mr.Satyen Sethi, Advocate with Mr.Arta Trana Panda, Advocate

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COMMISSIONER OF INCOME TAX-IV ..... Appellant

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CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE V.KAMESWAR RAO

V.KAMESWAR RAO, J.

These two appeals under Section 260A of the Income Tax Act ('Act' for short) pertain to assessment years 2007-08 and 2009-10, wherein the challenge is to the orders of the Income Tax Appellate

Tribunal ('Tribunal' in short) whereby the Tribunal allowed the appeals filed by the assessee and held that the payment made for live telecast of horse races is not covered under Section 9(i)(vi) of the Act. As such not being royalty, TDS was not required to be deducted.

2. The relevant facts for the disposal of the appeals are that the Assessing Officer made a disallowance under Section 40(a)(ia) on account of *'royalty paid to other centres'* and on account of *'live telecast royalty'* being royalties covered by Section 194J of the Act as TDS was not deducted on the said expenses.

3. The CIT (Appeals) upheld the finding of the Assessing Officer in respect of expenses incurred after 13.07.2006 i.e. the date when royalty was included in the scope of Section 194J of the Act. The Tribunal allowed the appeal by the assessee relying upon the judgment of Mumbai Bench of the Tribunal in ***DIT vs. Neo Sports Broadcast (P) Ltd. 133 ITD 468 (Mumbai)*** and holding that there was no creation of *'work'* as defined under Section 2(y) of the Copyright Act, 1957.

4. Mr.Kamal Sawhney, learned Senior Standing Counsel for the appellant revenue would submit that Clause (v) to Explanation 2 to clause (vi) of sub section (1) of Section 9 is not restricted to Copyright alone as the commas are used between the words *'Copyright'*, *'literary'* and *'artistic'* and further disjunctive conjunction 'or' is used between the

words *'artistic'* and *'scientific work'*. Had the intention of the legislation being to include only copyright work alone, there was no reason to include other words. The mere fact that *'scientific work'* had been joined in the clause with disjunctive conjunction 'or' manifest the intention of legislation to extend it beyond copyright. According to him, such inference can be drawn because of the inclusion of *'scientific work'* which is not covered by the Copyright Act and inclusion of *'Cinematographic films'*. He would further submit that the use of words *'literary'* and *'artistic'* in Clause (v) cannot be understood to have been used for excluding Copyright in the areas of drama, music etc. In other words, the use of the words *'literary'* and *'artistic'* should not be understood to mean the applicability limited to those works as in that case there would have been the word *'in'* in between 'Copyright' and 'literary', whereas *'Comma'* has been used. He would also state that the joining of *'literary'* and *'artistic'* by coma to 'Copyright' in the said clause is to include every item of determined Copyright irrespective of the category viz. literary, artistic, dramatic, musical works etc. besides including literary and artistic where Copyright is either not yet been determined or is subject matter of contesting claims in litigation or the term of Copyright of which has since been expired. He would state that the word *'royalty'* as defined in Explanation 2 Clause (v) includes

transfer of all or any right:

(a) in any copyright irrespective of their category viz. *'literary'*, *'artistic'*, *'dramatic'*, *'musical'*.

(b) in any *'literary'* and *'artistic'* work irrespective of any *'copyright'* subsisting or not.

(c) in any *'scientific work'* including *'films'* and *'video tapes'* in respect of television and 'tapes' in respect of radio broadcasting.

(d) Clause (v), however, specifically excludes *'cinematographic film'* by way of non-inclusion from the purview of *'royalty'*.

5. He would further submit that the live telecast of an event is the outcome of *'scientific work'* which makes the telecast of the event possible at a distant place over television and the transaction in the present case is covered under the definition of *'royalty'*. He would also submit that the rights of broadcasting are akin to *'copyright'* and in that regard he refer to Sections 37, 39A and other sections of the Copyright Act including Sections 2(dd) and 2(ff). In this regard he would state that broadcast would encompass in itself communication to the public. In the alternative, placing reliance on para 22 of the judgment of this Court in ***ESPN Star Sports vs. Global Broadcast News Ltd. & Ors. reported as 2012 2 RAF 430 (Delhi),*** it is his submission that the analysis, commentary and use of technology to the live feed make the broadcast a

subject matter of the distinct copyright from the copyright of the live feed. In other words, even if the live feed of the horse race may not have been the subject matter of any copyright but the commentaries and analysis are definitely subject matter of *'copyright'* and therefore would be covered within the definition of *'royalty'*.

6. On the other hand, Mr.Satyen Sethi would submit that the right to broadcast/telecast is a special right distinct and different from *'copyright'* and the payment for live telecast was not a payment for transfer of any *'copyright'*. According to him, the broadcast/telecast, except labour, skill and capital, does not have any underlying creativity. A sports event is a performance and not a work. It is not copyrightable. According to him, a sporting event is meant for public viewing and payment made for live telecast cannot be said to be a payment for transfer of *'copyright'*. He would also state that Section 40(a) (ia) is required to be strictly construed and no disallowance under the said Section is called for as payment made to other clubs for live telecast was not a royalty. He would also point out that the Direct Tax Code Bill, 2010 wherein a proposal has been made to include payment for live coverage in the definition of *'royalty'*, which according to him would show that the present definition of *'royalty'* does not include it. He would rely upon the following judgments:-

(a) ESPN Star Sports vs. Global Broadcast News Ltd. & Ors. 2008 (38) PTC 477 (Del.)

(b) Akuate Internet Services Pvt. Ltd. & Anr. Vs. Star India Pvt. Ltd. & Anr. [FAO(OS) 153/2013].

(c) National Basketball Assoc. Vs. Motorola, Inc. 105 F. 3d. 841 (1997).

(d) CIT vs. Calcutta Knitwears (2014) 362 ITR 673 (SC).

(e) Dr. Manikchand R.Ranga vs. CIT (1991) 190 ITR 336 (Karn.)

(f) Vodafone International Holding BV vs. UOI (2012) 341 ITR 1 @ 40 (SC).

7. Having considered the rival submissions of the learned counsel for the parties, the issue which arises for consideration is whether payment for live telecast of horse race is a payment for transfer of any *'copyright'* and as such *'royalty'* or in the alternative whether the live telecast of the horse race would be termed as a *'scientific work'* and payment thereof would be *'royalty'*. It is not in dispute that the payment has been made by the respondent assessee to other clubs/centres on account of live telecast of races. The payment of '*royalty*' is covered under Section 194J which was inserted with effect from 13.07.2006. The said Section contemplates that in the eventuality a payment is made towards '*royalty*', an amount equal to 10% of such sum needs to be deducted as income tax on income comprised therein. Explanation (ba) to the Section stipulates '*royalty*' shall have the same meaning as in

explanation 2 to clause (vi) of sub section (1) of Section 9. Clauses (v) and (vi) to explanation 2 to Section 9 stipulate as under:-

> *(v) the transfer of all or any rights (including the granting of a licence) in respect of any copyright, literary, artistic or scientific work including films or video tapes for use in connection with television or tapes for use in connection with radio broadcasting, but not including consideration for the sale, distribution or exhibition of cinematographic films; or*
>
> *(vi) the rendering of any services in connection with the activities referred to in sub-clauses (i) to (iv), (iva) and (v).*

8. A perusal of clause (v) as reproduced above would reveal that consideration for transfer of all or any rights in respect of any *'copyright'* and the word *'copyright'* is followed by the words *'literary'*, *'artistic'* or *'scientific work'*. It also exists in other works like dramatic, musical etc. It is not in dispute that *'copyright'* exists in literary and artistic work. It also exists in other works like dramatic, musical etc. If the intention of the legislature was to include other works like dramatic, musical etc. the legislature would have said so or would not have qualified the word *'copyright'* with the words *'literary'* and *'artistic'* as the word *'copyright'* encompasses in itself all the categories of work. Having not done, it is a case of '*Expressio Unis*'. *(*The mention of one

thing is the exclusion of the other). We also note that the word *'copyright'* does not synchronize with the word *'literary'*, *'artistic'* as they are the works in which *'copyright'* exists. The provision if read as suggested by the revenue to that extent would be meaningless. We, are thus of the view that the provision would be more meaningful if the word *'in'* is read by implication in between the words *'copyright'* and *'literary'*.

9. We know the limitation of the Court in adding and rejecting a word in the provision and the statute. Presumption is there that the legislature inserted every part of the statute for a purpose with an intention that every part thereof should have effect. At the same time, it is also a settled law that a construction which attracts redundancy, will not be accepted except for compelling reasons. Where alternative lies between either supplying by implication, words which appear to have been accidentally omitted or adopting a construction depriving certain existing words of all meaning, it is permissible to supply the words ***[Ref. M.J Exports Limited vs. CEGAT AIR 1992 SC 2014 (at page 2024)].*** It is also settled position of law that a purposive construction may also enable reading of words by implication when there is doubt about the meaning and ambiguity persists. In such circumstances, we should examine the purpose which the Parliament intended to achieve. Justice

G.P.Singh in his principles of Statutory Interpretation, 11th Edition at Page 75 has stated as under:

> "*In discharging its interpretative function, the Court can correct obvious errors and so in suitable case the Court will add words or omit words or substitute words. But before interpreting statute in this way, the Court must abundantly sure of three matters: (i) the intended purpose of statute or provision in question; (ii) that by inadvertence the Draftsman and Parliament failed to give effect to that purpose in the provision in question; and (iii) the substance of the provision Parliament would have made although not necessarily the precise words Parliament would have used had the error in the bill being noticed.*"

10. Keeping in view the aforesaid parameters, and also as Justice G.P.Singh in his principles of Statutory Interpretation, 11th Edition at Page 75-76 has stated that a departure from the rule of literal interpretation may be legitimate so as to avoid any part of the statute becoming meaningless. ***[Ref.: Siraj-ul-Haq Vs. Sunni Central Board of Waqf, U.P., AIR 1959 SC 198].*** Before any words are read to repair omission in the act, it should be possible to state with certainty that these are certain words would have been inserted by the draftsman and

approved by the Parliament had their attention been drawn to the omission before the bill was passed into law. ***[Ref.: Union of India Vs. Hansoli Devi, AIR 2002 SC 3240, p. 3246].***

11. We also note, in ***Siraj-ul-haq case (supra),*** wherein, Section 5(2) of the U.P Muslims Waqf Act, 1936 which provides mutwalli of a waqf or any person interested in a waqf or a central board may bring suit in a Civil Suit of competent jurisdiction for a declaration that any transaction held by the Commissioner of Waqfs to be a waqf is not a waqf, the Supreme Court interpreted the words 'any person interested in a Waqf' as meaning 'any person interested in what is held to be a waqf'. The Supreme Court in this judgment further held that, "*[W]here literal meaning of the words used in a statutory provision would defeat its object by making a part of it meaningless and ineffective, it is legitimate and even necessary to adopt the rule of liberal construction so as to give meaning to all parts of the provision and to make the whole of it effective and operative.*"

12. Further the Supreme Court in its opinion reported as ***State Bank of Tranvancore vs. Mohammad, AIR 1981 SC 1744*** construed the words '*any debt due before the commencement of this Act to any banking company'* as occurring in Section 4(1) of the Kerala Agriculturist Debt Relief Act, 1970 to mean '*any debt due at and before the commencement*

of this Act'. The Supreme Court here held, "*[w]e would have normally hesitated to fashion the clause by so construing it but we see no escape from that course since that is the only rationale manner by which we can give meaning and content to it so as to further object of the Act.*"

13. Similarly the Supreme Court in the case reported as ***Champa Kumar Singhi vs. Board of Revenue West Bengal, AIR 1970 SC 1108*** supplied the words '*be reckoned*' which were inadvertently omitted in Section 46(7)(iv) of the Income Tax Act, 1922, so as to prevent the provision from becoming meaningless.

14. We accordingly read in provision (v) the words *'in respect of any copyright in literary, artistic or scientific work'* to, inter-alia, hold that *'royalty'* is payable only on "*transfer of all or any rights (including granting of licence) in respect of any copyright in literary, artistic or scientific work including films or video tapes for use in connection with television or tapes were used in connection with radio broadcasting but not including consideration for the sale, distribution or exhibition of cinematographic films*".

15. Now the question which arises is whether live telecast of horse race is a work to have a *'copyright'*. To answer the aforesaid question, it is necessary to note some of the provisions of the Copyright Act, 1957.

Section 2(y) of the Copyright Act defines the word '*work*' to

mean:-

(i) A literary, dramatic or artistic work;

(ii) A cinematographic film;

(iii) A record

Section 2(dd) of the Copyright Act defines the word '*broadcast*' to mean communication to the public-

(i) By any means of wireless diffusion, whether in anyone or more of the forms of science, sounds or visual images or

(ii) By wire and includes a rebroadcast.

Section 2(ff) of the Copyright Act defines communication to the public to mean *"making any work available for being seen or heard or otherwise enjoyed by the public directly or by any means of display or diffusion other than by issuing copies of such work regardless of whether any member of the public actually sees, hear or otherwise enjoys the work so made available".*

Explanation:- For the purpose of this clause, communication through satellite or cable or any other means of simultaneous communication to more than one household or place of residence including residential rooms of any hotel or hostel shall be deemed to be communication to the public.

Section 13 of the Copyright Act stipulates the work in which

'copyright' subsist. The said provision is reproduced as under:- `

> *"**13. Works in which copyright subsists.**—(1) Subject to the provisions of this section and the other provisions of this Act, copyright shall subsist throughout India in the following classes of works, that is to say,-*
>
> *(a) original literary, dramatic, musical and artistic works;*
>
> *(b) cinematograph films; and*
>
> *(c) *[sound recording].*
>
> *(2) Copyright shall not subsist in any work specified in sub-section (1), other than a work to which the provisions of Section 40 or Section 41 apply, unless,-*
>
> > *(i) in the case of a published work, the work is first published in India, or where the work is first published outside India, the author is at the date of such publication, or in a case where the author was dead at that date, was at the time of his death, a citizen of India;*
> >
> > *(ii) in the case of an unpublished work other than *[work of architecture], the author is at the date of the making of the work a citizen of India or domiciled in India; and*
> >
> > *(iii) In the case of *[work of architecture], the work is located in India."*

Similarly Section 14 of the Copyright Act defines the meaning of *'copyright'* and the said provision is reproduced as under:-

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

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

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

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

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

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

(v) to make any translation of the work;

(vi) to make any adaptation of the work;

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

(b) in the case of a computer programme.—

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

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

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

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

(i) to reproduce the work in any material form including depiction in three dimensions of a two dimensional work or in two dimensions of a three dimensional work;

(ii) to communicate the work to the public;

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

(iv) to include the work in any cinematographic film;

(v) to make any adaptation of the work;

(vi) to do in relation to an adaptation of the work any of the acts specified in relation to the work in sub-clauses (i) to (iv);

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

(i) to make a copy of the film including a photograph of any image forming part thereof;

(ii) to sell or give on hire or offer for sale of hire, any copy of the film, regardless of whether such copy has been sold or given on hire on earlier occasions;

(iii) to communicate the film to the public;

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

(i) to make any other sound recording embodying it;

(ii) to sell or give on hire, or offer for sale or hire, any copy of the sound recording, regardless of whether such copy has been sold or given on hire on earlier occasions;

(iii) to communicate the sound recording to the public.

Explanation.—For the purposes of this section, a copy which has been sold once shall be deemed to be a copy already in circulation.]"

16. A live T.V coverage of any event is a communication of visual images to the public and would fall within the definition of the word *'broadcast'* in Section 2(dd). That apart we note that Section 13 does not contemplate broadcast as a work in which *'copyright'* subsists as the said Section contemplates *'copyright'* to subsist in literary, dramatic, musical and artistic work, cinematograph films and sound recording.

Similar is the provision of Section 14 of the Copyright Act which stipulates the exclusive right to do certain acts. A reading of Section 14 would reveal that *'copyright'* means exclusive right to reproduce, issue copies, translate, adapt etc. of a work which is already existing.

17. Adverting to the facts of this case we note that the assessee was engaged in the business of conducting horse races and derived income from betting, commission, entry fee etc. and had made payment to other centres whose races were displayed in Delhi. It is not known whether such races had any commentary or analysis of the event simultaneously. It is not the case of the Revenue that the live broadcast recorded for rebroadcast purposes. Having held that the broadcast/live telecast is not a work within the definition of 2(y) of the Copyright Act and also that broadcast/ live telecast doesn't fall within the ambit of Section 13 of the Copyright Act, it would suffice to state that a live telecast/broadcast would have no *'copyright'*. This issue is well settled in view of the position of law as laid down by this Court in ***ESPN Star Sports case (supra),*** wherein this Court after analysing the provisions of the Copyright Act was of the view that legislature itself by terming broadcast rights as those akin to *'copyright'* clearly brought out the distinction between two rights in Copyright Act, 1957. According to the Court, it was a clear manifestation of legislative intent to treat copyright

and broadcasting reproduction rights as distinct and separate rights. It also held that the amendment of the Act in 1994 not only extended such rights to all broadcasting organizations but also clearly crystallized the nature of such rights. The Court did not accept the contention of the respondent that the two rights are not mutually exclusive by holding that the two rights though akin are nevertheless separate and distinct.

18. In view of the aforesaid position of law which brought out a distinction between a copyright and broadcast right, suffice would it be to state that the broadcast or the live coverage does not have a *'copyright.'* The aforesaid would meet the submission of Mr.Sawhney that the word '*Copyright*' would encompass all categories of work including musical, dramatic, etc. and also his submission that the Copyright Act acknowledges the broadcast right as a right similar to *'copyright'*. In view of the conclusion of this Court in ***ESPN Star Sports case (supra),*** such a submission need to be rejected.

In this regard we also quote for benefit the judgment of this Court in the case of ***Akuate Internet Services (P) Ltd. & Anr. vs. Star India (P) Ltd. & Anr. FA(OS) 153/2013*** as relied upon by learned counsel for the respondent assessee wherein a Division Bench of this Court has applied the test of 'minimum requirement of creativity' for claiming a right under the Copyright Act, which is absent in a '*live telecast of an*

event'.

We note for benefit that the United States Court of Appeal Second Circuit Ruling in ***National Basket Ball Association and NBA Properties NIC vs. Motorola INC 105 F3d 841 (1997)*** held that a sports event is a performance and not a work. It is not copyrightable.

19. Insofar as the submission of Mr.Sawhney that the live telecast of an event is the outcome of *'scientific work'* and payment thereof would be covered under the definition of *'royalty'* is concerned, the said submission is also liable to be rejected first it runs contrary to his earlier submission and also for the simple reason the clause (v) to explanation 2 to clause (vi) or sub section 1 of Section 9 would relate to work which includes films or video tapes for use in connection with television or tapes for use in connection with radio broadcasting. It is to be seen whether consideration for transfer of all or any rights of *'scientific work'* including films or video tapes would include a live telecast. The clause is an inclusive provision for films or video tapes for use in connection with television or tapes for use in connection with radio broadcasting. We note such a case was not set up by the appellant revenue before the authorities below. It was held by the Assessing Officer that when any person pays any amount for getting rights/licence to telecast any event (which is a copyright of particular person i.e. no one can copy it for

direct telecast or deferred telecast) then amount so paid is to be treated as *'royalty'* and very much covered under Section 9(1)(vi). In other words, the ground of the Revenue was limited to the aspect of copyright. That apart we find, no such ground has been taken by the appellant/Revenue even in this appeal. The *'scientific work'* has not been defined in the Act nor in the Copyright Act. It is not necessary that because the live telecast of an event is being done at a distant place, the same would be a *'scientific work'*. Even otherwise, even by stretching this meaning, it is difficult to include a live broadcast within 'scientific work'. Clause (v) expressly uses the words *'including films or video tapes for use in connection with television or tapes for use in connection with radio broadcasting'*. These words become relevant to understand the scope of this part of the provision. Suffice to state, when reference is made to films or video tapes, then the intent of the provision is related to work of visual recording on any medium or video tape and can be seen on the television. Surely such a work does not include a live telecast. This submission is also need to be rejected. Insofar as the submission of Mr.Sawhney that analysis, commentary and use of technology to live feed make the broadcast a subject matter of distant copyright is concerned, again neither such a case was set up before the authorities, nor in this appeal. In fact it is not known nor pleaded that the live

telecast, in this case, was accompanied by commentary, analysis etc. It is an issue of fact, which cannot be gone into or raised at this stage.

20. In view of our discussion above, we are of the view that no question of law arises in the present appeals. We dismiss the appeals filed by the appellant Revenue.

21. No costs.

(V.KAMESWAR RAO)
JUDGE

(SANJIV KHANNA)
JUDGE

NOVEMBER 18, 2014
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