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

BEFORE SRI AMIT SHUKLA,JM AND SRI ASHWANI TANEJA,AM

ITA No.9079/Mum/2010 (AY: 2006-07)
ITA No.2065/Mum/2012 (AY: 2007-08)
ITA No.456/Mum/2013 (AY: 2008-09)

Taj TV Ltd., C/o. M/s. Suresh Surana & Associates, Chartered Accountants, 309, Ahura Centre, 82, Mahakali Caves Road, Andheri, Mumbai 400 093 **PAN: AABCJ 6542J**	Vs.	Additional Director of Income Tax(International Taxation), Range-2, Mumbai
Appellant	..	**Respondent**

ITA No.2073/Mum/2012 (AY: 2007-08)
ITA No.391/Mum/2013: (AY: 2008-09)

Asst./Addl. Director of Income Tax(International Taxation),Range-2, Mumbai	Vs.	Taj TV Ltd., C/o. M/s. Suresh Surana & Associates, Chartered Accountants, 309, Ahura Centre, 82, Mahakali Caves Road, Andheri, Mumbai 400 093 **PAN: AABCJ 6542J**
Appellant	..	**Respondent**

Assessee by	..	Shri P. J. Pardiwala Shri Madhur Agarwal, AR
Revenue by	..	Shri Jassbir Chouhan, DR

Date of hearing	..	**01-11-2016**
Date of pronouncement	..	**23-12-2016**

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O R D E R

PER AMIT SHUKLA, JM:

The aforesaid cross appeals have been filed by the assessee as well as by the Revenue against separate impugned orders passed by the learned DRP and the learned CIT (Appeals), Mumbai for quantum of assessment for the assessment years 2006-07, 2007-08 and 2008-09. Since, common issues are involved in all

the appeals arising out of identical set of facts, therefore, same were heard together and are being disposed off by way of this consolidated order.

2. We will first take up assessee's appeal for the assessment year 2006-07, being ITA No.9079/Mum/2010 which has been preferred against the final assessment order dated 18-10-2010 passed u/s 144C (13) read with section 143(3) passed in pursuance of the direction given by the Dispute Resolution Panel-II, Mumbai (in short DRP) vide order dated 30-09-2010. In the grounds of appeal, the assessee has raised following grounds:-

"<u>1.0 Ground -1</u>

"On the facts and in circumstances of the case, the Additional Director of Income Tax (International Taxation) Range-2 [hereinafter referred to as learned ADIT] has erred in law and in facts in concluding that Taz TV Ltd. ('Taz') has income chargeable to tax in India on the ground that it has Permanent Establishment in India and other relevant aspects specified in the assessment order."
Without prejudice to above, on the facts and in circumstances of the case, the ADIT has erred in law and in facts in concluding that Taz TV Ltd. ('Taz') has the income chargeable to tax in India without rebutting the fact that it has remunerated its agent in India at the arms length consideration."

2.0 <u>Ground -2</u>

On the facts and in the circumstances of the case, the learned ADIT has erred in law and in facts in holding that the payments by Taz to various non-residents, towards programming fees of US $ 1,46,31,363 for acquiring telecasting rights, are royalty in nature as defined under Explanation 2 to section 9 (1) (vi) of the Act and as such income deemed to accrue or arise in India. Accordingly, the learned ADIT erred in disallowing said expenses under section 40 (a) (i) of the Act on account of non-deduction of tax under section 195 of the Act.

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3.0 Ground -3

On the facts and in the circumstances of the case, the learned ADIT has erred in law and in facts in holding that the payments made by Tax to various non-residents towards transponder fees of US $ 219,913 and Uplinking charges US $ 595.073 are in the nature of royalty as defined under Explanation 2 to section 9(1) (vi) of the Act and such income deemed to accrue or arise in India. Accordingly, the learned ADIT erred in disallowing said expenses under section 40(a) (i) of the Act on account of non-deduction of tax under section 195 of the Act.

Each of the grounds of Appeal is independent and without prejudice to each other. Your appellants crave to leave, add, alter or modify any of the above grounds of appeal before or at the time of hearing in the matter."

3. The facts in brief are that, assessee company, that is, Taj T V Limited' was registered under the laws of Mauritius and is a tax resident of Mauritius since 12th July, 2002. Prior to that, it was registered as a company in British Virgin Islands in the year 2000. It is engaged in the business of broadcasting of sports channel namely, 'Ten Sports' all across the globe including India. Since it did not had any branch or business premises in India, therefore, it had formed a subsidiary, 'Taj Television India Private Limited' (Taj India) as its advertising sales agent to sell commercial advertisement slot to prospective advertisers and other parties in India, in connection with the business of programming and telecasting sports events and programs on Ten Sports Channel. The "Advertising Sales Agency Agreement" between the assessee and Taj TV (India) was entered into on 04-05-2002, and it was also appointed as exclusive distributor of the TV Channel "Ten Sports", vide agreement dated 20-10-2005 for distributing it to the cable operators and other permitted systems. It has been stated that the said agreements have been entered into on 'principal to principal basis'. For acting as a distributor Taj India is entitled to

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25% share of the total distribution revenue collected by it. Taj India entered into sub-distribution agreement independently with other parties in India under which it shares the distribution revenue with such sub-distributors. For the assessment year 2006-07, the assessee filed its return of income declaring 'NIL' income on the ground that advertisement and distribution revenue earned by it, is not taxable in India. Without prejudice to the said claim, it was stated that the assessee company had prepared books of account pertaining to its Indian Operation and got them audited u/s 44AB. As per the profit & loss account, there was a profit of US $ 6529102. During the course of assessment proceedings, the AO rejected the assessee's claim and assessed the income for the year under consideration at Rs.48,22,36,506/- which has been done after detailed reasoning, the sum and substance of his reasoning are summarized as under:-

(i) In relation to advertising income, he held that Taj India is a Dependent Agent of the assessee, therefore, the assessee has a PE in India within the meaning of Article -5(4) of India – Mauritius DTAA.

(ii) Regarding distribution income, the A O held that distribution agreement involves full/partial transfer of distribution rights and granting of license in respect of trademark, copyright, secret formula or process etc. including films and video tapes. The said agreement involves the use of /right to use the copyright, trademark, etc. owned by the company. The assessee is providing service through Taj India and Taj India could not have rendered any service to the subscribers/cable operators without the trademark, copyright etc. transferred to it by the assessee.

(iii) The AO disallowed the Programming cost paid to various cricket boards and other sports association for acquiring live telecast rights in respect of events taking place outside India under section 40(a) (i) of the Act as no tax was

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deducted at source as according to him, such payments are in the nature of 'Royalty' in respect of such events.

(iv) The AO also disallowed the Transponder fees of $ 2,19,913 paid to PanAmSat International System Inc. for rendering services through Satellite located outside India, in telecasting the sports channel namely 'Ten Sports' to various countries under section 40(a) (i) of the Act as no tax was deducted at source from such payment as according to him, it is in the nature of 'Royalty' and falls under clause (iva) of Explanation -2 to Section 9(1) (vi) of the Act.

(v) The A O also disallowed the Up-linking charges of $ 5,95,973 paid to PanAmSat and various other non-residents for rendering services in the form of up linking the signal in respect of live events, taking place outside India, from the venue of the event to the satellite under section 40(a) (i) of the Act as no tax was deducted at source from such payment as according to him, it is in the nature of 'Royalty' and falls under clause (iva) of Explanation -2 to Section 9(1) (vi).

4. The DRP, by and large updated the order of the A O and restricted 75% of the assessable profits arising from Indian operation to be attributable for the functions performed by the 'independent agent PE' in India which has been held liable for taxable in India.

5. Before us, the learned Sr. Counsel, Shri Percy Pardiwala submitted that in assessee's own case for the assessment years 2003-04 to 2005-06, the Tribunal held that so far as the income from 'distribution activities, is concerned, Taj India does not constitute assessee's PE in India. However, he submitted that even if, it is presumed that Taj India is a PE of the assessee in India, then also, no income can be said to be attributable to India, because the assessee has remunerated its so-called agent (Taj India) in India at 'arm's length' consideration. After referring to the

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transfer pricing order of the TPO for the current assessment year to whom international transaction between the assessee and Taj India was referred to included advertisement and distribution income, which has been found to be at arm's length. The copy of the TPO's order in the case of the assessee as well as Taj India has been filed before us in support. Once, the payment to Taj India has been accepted to be at arm's length, therefore, there cannot be any question of distribution of any further income at the hands of the assessee on account of the alleged/presumed PE in India. In support, he strongly relied upon the said decisions:-

(i) Morgan Stanely & Co. 292 (SC) ITR 416, 162Taxman 165

(ii) Set Satellite (Singapore) Pte Ltd. (Bom) 173 Taxman 475

(iii) B4U International Holdings Ltd. (Bom) 57 taxmann.com 146

(iv) Galileo International Inc. 116 ITD 1 (Delhi/ 19 SOT 257(Delhi.

6. As regards the disallowance u/s 40(a) (i) of 'programming cost' paid to various non-residents and payment made to "PanAMSat" and various other non-residents, he submitted that the same is squarely covered by the decision of the Tribunal in the assessee's own case in the assessment years 2003-04 to 2005-06 in ITA No.4678/Mum/2007, ITA No.412/Mum/2008 and 4176/Mum/2009 dated 05-07-2016. The Tribunal after detail discussion has decided the issue in favour of the assessee and also drew our specific attention to the relevant findings in the said order.

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7. On the other hand, the learned CITDR, on the issue of no further attribution of income in the hands of the assessee because the transaction between the assessee and the PE has been found to be at arm's length, he relied upon the decision of NGC Network Asia Alc. Vs JCIT [2015] 175 TTJ 403. He has also strongly relied upon the relevant findings of the AO and the directions given by the DRP.

8. With regard to the issue raised in ground No.2 and 3, he has given his brief write-up which is reproduced hereunder:-

> *"1. On the issue whether the Amendments/Explanations inserted in the Income Tax Act can be read into the DTAA or not, in my most respectful submissions, the Bombay high court decision in the case of CIT v. Siemens Aktiongesellschaft, 310 ITR 320) (Born HC) rendered in the facts peculiar to that case has not been appreciated in the proper perspective in various decisions of the Delhi high Court and Mumbai Tribunal relied upon by the assessee. While appreciating the Siemens AG, supra, the following facts may kindly be kept in mind:*
>
> > *i) The exact question of law before the Hon'ble High court was NOT that whether Amendments in the l.T.Act can be read into the DTAA or not and therefore, the Hon'ble High Court cannot be said to have answered it as claimed.*
> > *ii) In the said case, old DTAA (1960) between India and Germany was under consideration in which "Royalty" had not been defined.(Para 15).*
> > *iii) "Royalty" under the l.T. Act has been defined in Explanation 2 to S.9(1)(vi), inserted by the Finance Act 1976 w.e.f 01-06-1976.*
> > *iv) The agreements under consideration in the case of Siemens AG, supra which gave rise to the impugned income were entered into before 01-064976 when there was no definition of "Royalty" both under the I.T. Act and under the DTAA. The A.Y. under*

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consideration in Siemens AG, supra was A.Y.1979-80.

V) Section 9(1) (vi) up to and including Explanation 2 are substantive provisions as inserted by Finance Act 1976 and thereafter, Explanation 3 to 6 and explanation below S.9(2) are only clarificatory provisions inserted subsequently.

vi) For the purpose of the present appeal, the definition of "royalty" as applicable has been defined both under the DTAA as well as l.T. Act and the issue is regarding the application of Explanations (clarificatory provisions) inserted in the Act into the DTAA by virtue of article 3(2) of the DTAA.

vii) The said decision in the case of Siemens AG, supra was rendered in 2008 when the only clarificatory provision by way of Explanation in section 9 was the Explanation below S.9(2) inserted by the Finance Act 2007 doing away with the requirement of PE for Royalty etc.

viii) In the case of Siemens AG, supra, the basic question before the Hon'ble HC was whether the definition of "Royalty" as per Explanation 2 to 5.9 inserted by the Finance Act 1976 w.e.f, 01-06-1976 could be imported into the old DTAA (1960) when at the relevant point of time of application of treaty, " Royalty" was not defined both under the then DTAA and the l.T. Act and what was the character of payment under the DTAA.

ix) It is not disputed by the Revenue that the provisions of DTAA, if beneficial to the assessee shall prevail over the provisions of the I.T. Act.

2. In my respectful submissions, a perusal of Bombay HC decision in the case of Siemens AG, supra would reveal that:

i) In the operational part (paras 27 to 31) of the judgement in the case of Siemens AG, supra, nowhere it is mentioned that amendments in the I.T. Act cannot be read into DTAA.

ii) The nature of services rendered in the said case were found to be not Royalty under the DTAA though found to be Royalty under the Act (post 01-06-1976). Those services were found to fall under the

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expression "commercial or industrial profits" as per the then DTAA (Old) and therefore could not be taxed in India in absence of PE. Thus, the provisions of DTAA being more beneficial to the assessee were preferred over the provisions of the I.T. Act.

iii) In paras 13,22 and 28 of its order, the Hon'ble HC has approved the insertion of Explanation below 5.9(2) inserted by the Finance Act 2007, thereby implying that the Clarificatory Explanations could be read into modern DTAAs.

iv) Mumbai Tribunal In the case of Viacom 18 Media (P.) Ltd.(2014) 162 Ui 336 (Mum) has explained the import of Bombay HC decision in right perspective in paras 16 and 17 of its order while rejecting the assessee's argument that the HC has held that amendments in the Act cannot be read into DTAAs.

V) The Bombay HC has approved ambulatory approach (para 22) to interpretation of treaties against Static approach adopted by the Delhi HC. Klaus Vogel in his commentary has also advocated ambulatory approach.

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9. We have considered the rival submissions, perused the relevant findings in the impugned order, specifically in the context of arguments placed before us. From a perusal of the Tribunal order for the earlier years (supra), we find that so far as the issue relating to PE regarding “distribution revenue/income is concerned, “which was raked up in Revenue’s appeal, it has been held that Taz India does not constitute “agency PE” in terms of India Mauritius DTAA. However, on the issue of “advertisement revenue/income” the finding was left open, because that issue was in assessee’s appeal and the assessee’s appeal was dismissed on the ground of limitation. Before us, only limited point which has been argued before us is that, even if for the argument sake, it is presumed that Taj India constitutes a PE of the assessee in India, then no further income can be attributed in the hands of the assessee, because the transaction between the assessee and Taj

India has been found to be at arm's length and in support the TPO's order u/s 92CA (3) dated 30-09-2009 has been filed in the case of Taj TV India Pvt. Ltd. as well as Taj TV Ltd. (India Operation). Application of arm's length principle on the attribution of income in the case of a PE was first clarified and adjudicated by the Hon'ble Supreme Court in the case of DIT Vs Morgan Stanley & Co. reported in [207] 292 ITR 416, wherein the Hon'ble Supreme Court after analyzing the provisions of Article 7 and the provisions dealing with Transfer Pricing, observed and held in Para 31 and 32 in the following manner:-

> *"31. Article 7 of the UN Model Convention inter alia provides that only that portion of business profits is taxable in the source country which is attributable to the PE. It specifies how such business profits should be ascertained. Under the said article, a PE is treated as if it is an independent enterprise (profit centre) dehors the head office and which deals with the head office at arm's length. Therefore, its profits are determined on the basis as if it is an independent enterprise. The profits of the PE are determined on the basis of what an independent enterprise under similar circumstances might be expected to derive on its own. Article 7(2) of the UN Model Convention advocates the arm's length approach for attribution of profits to a PE.*
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> *32. The object behind enactment of transfer pricing regulations is to prevent shifting of profits outside India. Under art. 7(2) not all profits of MSCo would be taxable in India but only those which have economic nexus with PE in India. A foreign enterprise is liable to be taxed in India on so much of its business profit as is attributable to the PE in India. The quantum of taxable income is to be determined in accordance with*

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the provisions of IT Act. All provisions of IT Act are applicable, including provisions relating to depreciation, investment losses, deductible expenses, carry forward and set off losses etc. However, deviations are made by DTAA in cases of royalty, interest etc. Such deviations are also made under the IT Act (for example: ss. 44BB, 44B8A etc.). Under the impugned ruling delivered by the AAR, remuneration to MSAS was justified by a transfer pricing analysis and, therefore, no further income could be attributed to the PE (MSAS). In other words, the said ruling equates an arm's length analysis (ALA) with attribution of profits. It holds that once a transfer pricing analysis is undertaken; there is no further need to attribute profits to a PE. The impugned ruling is correct in principle insofar as an associated enterprise, that also constitutes a PE, has been remunerated on an arm's length basis taking into account all the risk-taking functions of the enterprise. In such cases nothing further would be left to be attributed to the PE. The situation would be different if transfer pricing analysis does not adequately reflect the functions performed and the risks assumed by the enterprise. In such a situation, there would be a need to attribute profits to the PE for those functions/risks that have not been considered. Therefore, in each case the data placed by the taxpayer has to be examined as to whether the transfer pricing analysis placed by the taxpayer is exhaustive of attribution of profits and that would depend on the functional and factual analysis to be undertaken in each case. Lastly, it may be added that taxing corporates on the basis of the concept of economic nexus is an important feature of attributable profits (profits attributable to the PE).”

The aforesaid principle laid down by the Hon’ble Supreme Court has been reiterated and applied by the Hon’ble Bombay High Court in the case of ‘Set Satellite (Singapore) Pte Ltd. reported in

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[2008] 307 ITR 205. In this case, the Hon'ble High Court was dealing with Article 5(8) and 5 (9) of India-Singapore DTAA which deals with Agency PE and after analyzing Article 7,observed in Para 10, 11 and 12 as under:-

> *10. From a reading of art. 7(1) of the DTAA it is clear that the profits of an enterprise of a "Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a PE situated therein. The profits of the enterprise may be taxed in the other State but only so much of them as is directly or indirectly attributable to that PE. In para 2 while determining the profits attributable to the PE the expression used is "estimated on a reasonable basis". The DTAA does not refer to arm's length payment. The principles contained in the matter of income from international transaction on an arm's length price are contained in s. 92 of the IT Act. The principles have been clarified by the Finance Act, 2001 as also Finance Act, 2002. From the order of the CIT which has been accepted it is clear that the appellant herein has paid, to its PE on arm's length principle. It recorded a finding of fact that the appellant had paid service fees at the rate of 15 per cent of gross ad revenue to its agent, SET India, for procuring advertisements during the period April, 1998 to October, 1998. The fact that 15 per cent service fee is an arm's length remuneration is supported by Circular No. 742 which recognizes that the Indian agents of foreign telecasting companies generally retain 15 per cent of the advertisement revenues as service charges. Effective November, 1998, a revised arrangement was entered into between the parties whereby the aforesaid amount was reduced to 12.5 per cent of net ad revenue (i.e. gross ad revenues less agency commission). Simultaneously, the appellant also entered into an arrangement entitling SET India to enter into agreements, collect and retain all subscription revenues. Considering all these aspects and the fact that the agent has a good profitability record, it held that the appellant has remunerated the agent on an arm's length basis.*

This finding of the Tribunal has not been disputed by the Revenue. The entire contention of the Revenue is that the advertisement revenue pertaining to its own channel and AXN channel are also taxable in India.

11. We may firstly point out that CIT(A) has dealt

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with the issue as to why the- advertisements received by the appellant were not liable for being taxed in India based on the CBDT Circular No. 23, dt. 23rd July, 1969 which clearly sets out that where a non-resident's sales to Indian customers are secured through the services of an agent in India, the assessment in India of the income arising out of the transaction will be limited to the amount of profit which is attributable to the agent's services; provided that (i) the nonresident principal's business activities in India are wholly channelled through his agent; (ii) the contracts to sell are made outside India and (iii) the sales are made on a principal-to-principal basis. The CIT(A) had recorded a specific finding in favour of the appellant in the affirmative on all three counts. It is in these circumstances that it was held that the advertisement revenue received by the appellant may be from the customers in India is not liable for tax in India.

The Tribunal in its judgment has not considered the effect of the finding recorded by the CIT A) based on the circular and which circular was relevant for the purpose of deciding the controversy in issue. This circular read with art. 7(1) of the DTAA would result in holding that the income from advertisement if neither directly nor indirectly attributable to that of the PE, would not be taxable in India. The Tribunal in fact in para 10 has recorded a finding that art. 7(2) provides that the arm's length price is the criterion for computation of these hypothetical profits. In our opinion the entire rational or reasoning given by the Tribunal has to be set aside. In matters of tax what has to be considered and more so in international transactions if there be a treaty, the provisions of the treaty and if the provisions of the treaty are more advantageous to an assessee, then the construction will have to be given which is advantageous to the assessee. At this stage we may note that on behalf of the assessee learned counsel has produced an order passed by the Addl. CIT (Transfer Pricing- II), Mumbai in the matter of determination of arm's length price with reference to all the transactions reported in Form No. 3CEB filed by the assessee. The assessee is SET India, the depending agent. The order records that the assessee is engaged in the business of providing audio-visual television content and also acts as an advertising agent of SET Satellite Singapore (P) Ltd. The assessee distributes these channels to the Indian cable operators and that the assessee has applied the TNM method to determine the arm's length price for its international transaction. It, however, clarified that the order is in respect of reference received for asst. yr. 2002-03 and not for subsequent assessment years.

12. We may now consider the judgment in Director of IT (International Taxation) vs. Morgan Stanley & Co. Inc. (supra). The appeals dealt with the DTAA between India and United States That treaty advocated application of the arm's length principle or provided a mechanism for

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avoiding double taxation on income. The issue involved, Morgan Stanley and Company (for short, "MSCo") and one of the group companies of Morgan Stanley, Morgan Stanley. Advantages Services (P) Ltd. (for short "MSAS"). An agreement was entered into for providing certain support services to MSC0. MSC0. outsourced some of its activities to MSAS. MSAS was set up to support the main office functions in equity and fixed income research, account reconciliation and providing income-tax enabled services such as back office operations, data processing and support centre to MSCo. On 5th May, 2005 MSC0 filed its advance ruling application. The basic question related to the transaction between the MSCo and MSAS. The advance ruling was sought on two counts (I) whether the applicant was having PE in India under art. 5(1) of the DTAA on account of the services rendered by MSAS under the services agreement dt. 14th April, 2005 and if so (ii) the amount of income attributable to such PE. It was ruled that MSAS should be regarded as constituting a service PE under art. 5(2)(1). On the second question the AAR ruled that the transactional net margin method (TNMM) was the most appropriate method for the determination of the arm's length price in respect of the service agreement dt. 14th April, 2005 and it meets the test of arm's length as prescribed under s. 92C of the 1961 Act, and no further income was attributable in the hands of MSAS in India. The said ruling of AAR on the question of income attributable to the PE was the subject-matter of challenge by the Department. Insofar as the issue of PE is concerned the Supreme Court was pleased to hold that it agreed with the ruling of the AAR that stewardship activities would fall under art. 5(2)(1). Dealing with the question of deputation, the Court held that on the facts that there is a service PE under art. 5(2)(1) and as such held that the Department was right in its contention that there exists a PE in India. Considering art. 7 of that treaty the Court observed that what is to be taxed under art. 7 is income of the MNE attributable to the PE in India and what is taxable under art. 7 is profits earned by the MNE. Under the IT Act the taxable unit is the foreign company, though the quantum of income taxable is income attributable to the PE of the said foreign company in India. The Court observed that the important question which arises for determination is whether the AAR is right in its ruling when it says that once the transfer pricing analysis is undertaken there is no further need to attribute profits to a PE. The Court further noted that the computation of income arising from international transactions has to be done keeping in mind the principle of arm's length price. The Court further reiterated that the

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main point for determination is whether the MR was right in ruling that as long as MSAS was remunerated for its services at arm's length, there should be no additional profits attributable to the applicant or to MSAS in India. After considering the various methods by which arm's length price can be determined the Court observed as under:

'As regards determination of profits attributable to a PE in India (MSAS) is concerned on the basis of arm's length principle we have quoted art. 7(2) of the DTAA. According to the AAR where there is an international transaction under which a non-resident compensates a PF at arm's length price, no further profits would be attributable in India. In this connection, the AAR has relied upon Circular No. 23 of 1969 issued by the CBDT. This is the key question which arises for determination in these civil appeals."

After discussing the various issues the Court in its conclusion held as under

"As regards attribution of further profits to the PE of MSCo. where the transaction, between the two are held to be at arm's length, we hold that the ruling is correct in principle provided that an associated enterprise (that also constitutes a PE) is remunerated on arm's length basis taking into account all the risk-taking functions of the multinational enterprise. In such a case nothing further would be left to attribute to the PE. The situation would be different if the transfer of pricing analysis does not adequately reflect the functions performed and the risks assumed by the enterprise. In such a case, there would be need to attribute profits to the PE for those functions/risks that have not been considered. The entire exercise ultimately is to ascertain whether the service charges payable or paid to the service provider (MSAS in this case) fully represent the value of the profit attributable to his service. In this connection, the Department has also to examine whether the PE has obtained services from the multinational enterprise at lower than the arm's length cost."

In our opinion considering the judgment, if the correct arm's length price is applied and paid then nothing further would be left to be taxed in the hands of the foreign enterprise."

This principle was again reiterated by the Hon'ble Bombay High Court in the case of "DIT Vs B4U International", reported in [2015]

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374 ITR 453 (Bom.) which was recorded in the context of India-Mauritius DTAA only. The relevant observations and findings of the Hon'ble Bombay High Court reads as under:-

> *8· After hearing both the sides and perusing with their assistance all the appeal paper-books, we e inclined to agree with Mr. Mistri. The Tribunal had before it the order passed on 8th November, 2004 by the Commissioner of Income Tax (Appeals). As far as that order is concerned, it is subject matter of the Revenue's Income Tax Appeal No. 1599 of 2013. There, the Revenue raised the ground that the assessee was having a dependent agent viz. B4U and that the Commissioner erred in holding that it cannot be treated as such. Further, even if the B4U is held to be a dependent agent, it is being paid remuneration at arm's length. Therefore, further profits cannot be taxed in India. Insofar as these grounds are concerned, the admitted facts are that the assessee is a foreign company incorporated in Mauritius. As noted, it had filed its residency certificate and pointed out that its business is of telecasting of TV channels such as B4U Music, MCM etc. During the assessment year under consideration, its revenue from India consisted of collections from time slots given to advertisers from India. The details filed by the assessee revealed that there is a general permission granted by the Reserve Bank of India to act as advertisement collecting agents of the assessee. The permissions were granted to M/s. B4U Multimedia International Limited and M/s. B4LJ Broadband Limited. In the computation of income filed along with the return, the assessee claimed that as it did not have a permanent establishment in India, it is not liable to tax in India under Article 7 of the DTAA between India and Mauritius. The argument further was that the agents of the assessee have marked the ad-time slots of the channels broadcasted by the assessee for which they have received remuneration on arm's length basis. Thus, in the light of the Central Board of Direct Taxes Circular No.23 of 1969, the income of the assessee is not taxable in India. The conditions of Circular 23 are fulfilled. Therefore, Explanation (a) to section 9(1)(i) of the IT Act will have no application.*
>
> *9. The Assessing Officer did not accept the contentions of the assessee. He did not agree on both counts but the Tribunal noted that the DTAA and particularly paragraph 5 of Article 5 indicates that an enterprise of a contracting State shall not be deemed to*

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have a permanent establishment in the other contracting State merely because it carries on business in that State through a broker, general commission agent, or any other agent of independent status, where such persons are acting in the ordinary course of their business. However, when the activities of such an agent are devoted exclusively or almost exclusively on behalf of that enterprise, he will not be considered an agent of an independent status within the meaning of this paragraph. The Tribunal noted the findings of the Assessing Officer and found that the Commissioner held that the assessee carries out the entire activities from Mauritius and all the contracts were concluded in Mauritius. The only activity which is carried out in India is incidental or auxiliary / preparatory in nature which is carried out in a routine manner as per the direction of the principal without application of mind and hence B4U is not an dependent agent. Nearly 4.69% of the total income of B4U India is commission / service income received from the assessee company and, therefore, also it cannot be termed as an dependent agent. As far as the alternate contentions are concerned, the First Appellate Authority held that the assessee and B4U India were dealing with each other on arm's length basis. 15% fee is supported by Circular No.742. Thus it was held that no further profits should be taxed in the hands of the assessee.

10. This conclusion of the Commissioner has been upheld by the Tribunal. It noted the rival contentions and in great details. The Tribunal concluded that after referring to the clauses in the agreement between the assessee and B4U that 1341J India is not a decision maker nor it has the authority to conclude contracts (see paragraph 29). Further, the Revenue has not brought anything on record to prove that agent has such powers and from the agreement any such conclusion could not have been drawn. Barring this agreement, there is no material or evidence with the Assessing Officer to disprove the claim of the assessee that the agent has no power to conclude the contract. This finding is rendered on a complete reading of the agreement. Thereafter Indo-Mauritius DTAA has been referred to and particularly paragraphs 5.4 and 5.5. and the Tribunal concludes that the requirement that the first enterprise in the first mentioned State has and habitually exercised in that State an authority to conclude contracts in the name of the enterprise unless his activities are limited to the purchase of goods or merchandise for the enterprise

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is a condition which is not satisfied. Therefore, this is not a case of B4U India being an agent with an independent status. This finding is rendered in paragraph 29 and 30 of the order under challenge. We do not find that the Tribunal's order and which also refers to the Hon'ble Supreme Court decision in Morgan Stanley & Co. (supra) can raise any substantial questions of law.

11. We are not agreement with Mr. Tejveer Singh when he submits that the Supreme Court judgment in the case of Morgan Stanley & Co. will not apply. In that regard he relies upon the conclusion rendered by the Hon'ble Supreme Court. That conclusion is that there being no need for attribution of further profits to the permanent establishment of the foreign company where the transaction between the two was held to be at arm's length but this was only provided that the associate enterprise was remunerated at arm's length basis taking into account all the risk taking functions of the multinational enterprise. Thus, Mr. Tejveer Singh's reliance on these observations in the Supreme Court judgment are strictly on the alternate argument canvassed by the assessee. That alternate argument was that assuming that B4U India is a dependent agent of the assessee in India it has been remunerated at arm's length price and, therefore, no profits can be attributed to the assessee. Mr. Tejveer Singh would submit that the Tribunal failed to note that the situation would be different if the transfer price analysis did not adequately reflect the functions performed and the risks assumed by the enterprise. In such a case, there would be need to attribute profits to the permanent establishment for those functions / risks that had not been considered. Mr. Tejveer Singh's argument is that the assessee had not subjected itself to the transfer price regime. Therefore, no assistance can be derived by it from this judgment.

12. In this regard, Mr. Mistri has rightly pointed out that the requirement and in relation to computation of income from international transactions having regard to arm's length price has been put in place in Chapter-X listing special provisions relating to avoidance of tax by substituting section 92 to 92F by the Finance Act of 2001 with effect from 1st April, 2002. Therefore, such compliance has to be made with effect from assessment years 2002-03 relevant to which is the previous year commencing from 1st April, 2002. In any event, we find

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that the Tribunal has rightly dealt with the alternate argument by referring to the Revenue Circular 742. There, 15% is taken to be the basis for the arm's length price. Nothing contrary to the same having been brought on record by the Revenue before the Commissioner as also the Tribunal, it rightly concluded that the judgment of the Hon'ble Supreme Court in Morgan Stanley & Co. and the principle therein would apply. Similarly, the Division Bench judgment of this Court in the case of Set Satellite (Singapore) Pte Ltd. vs. Deputy Director of Income Tax (IT) & Anr. (2008) 307 ITR 265 would conclude this aspect. Therefore, we are of the opinion that the Tribunal's conclusions and which are consistent with the factual materials and the principles of law laid down above are neither perverse nor vitiated by any error of law apparent on the face of the record."

Thus, if admittedly Taj India is being remunerated at arm's length, then, no further income/profit can be said to be attributable to the assessee in India from PE. It is an undisputed fact that the TPO has accepted the transaction between the assessee and Taj India at an arm's length price. Hence, respectfully following the law laid down by the Hon'ble Apex Court and followed by the Hon'ble jurisdictional High Court, we also hold that if the arm's length price of the transaction has been accepted, between the assessee and Taj India, then nothing further should be attributable to the assessee which is to be taxed in India. Thus, on this reasoning we allow the assessee's ground No.1. We are making it clear that, so far as the issue of PE qua the advertisement revenue is concerned, same is kept open.

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10. As regards the allowance u/s 40 (a) (i), raised vide ground Nos. 2 and 3, we find that the Tribunal has discussed this issue in assessment year 2003-04, 2004-05 and 2005-06 in the following manner:-

18. Now, coming to the issue of disallowance of various expenses under section 40(a)(i) like, 'transponder charges' and 'uplinking charges' as raised in ground No.2(i) and 2(u), it is seen that these, payments has been paid to PanAmSat International Systems Inc. USA for providing facility of 29 transponder for telecasting 'Ten Sports' channel in various countries including India. The assessee entered into an agreement with PanAmSat to utilize the transponder facility providing by the said US based company for telecasting its sports channel which are on the footprint of transponder of PanAmSat. The Revenue's case before us is that, firstly, it is taxable under section 9(1)(vi) as 'royalty' and also under Article 12(3)(b) of Indo-US-DTAA. Similarly, the up linking charges paid for up linking the channels to PanAmSat Satellite for delay in transmission and for up linking signals for live events from the venue of the events to the satellite have been treated to be 'royalty'. Since, the assessee had not deducted TDS under section 195, disallowance under section 40(a)(i) has been made. The assessee's case before us is that, firstly, PanAmSat is a USA based company, therefore, Indo-US IDTAA is applicable and since it does not have any PE or business connection in India, therefore, the payment made to a non-resident outside India for availing service of equipment placed outside India cannot be taxed in India. In support of such a contention decision of Hon'ble Bombay High Court in the case of DIT vs. Set Satellite (supra) has been relied upon. In any case, it has been submitted that, even otherwise also the definition of "royalty" under Article 12(3) of Indo-US-DTAA is also not applicable, because transponder charges is only use of facility and it is not an equipment and does not amount to use of any copyright effecting work, secret formula, process etc or any other term described in para 3 of Article 12. The Ld. CIT(A) has held that it is not a 'royalty' and secondly, even otherwise also by virtue of Article 12(7) such a royalty cannot be taxed in India, because it is not borne by PE or fixed place of the US company in India. The Ld. DR has strongly relied upon amended definition of the 'royalty' under the Act, wherein, the scope and definition of 'royalty' has been enlarged by the newly inserted Explanation (vi) and (vi) by the Finance Act, 2012 with retrospective effect from 01.06.1976 and has contended that the said definition is to be read into DTAA also, that is, the definition of 'royalty' has to be taken from the Domestic Law. In support, Ld. DR has strongly relied upon the decision of Madras High Court in the case of Verizon Communications Singapore Pte Ltd. (supra) and the ITAT decision in the case of Viacom 18 Media Pvt. Ltd.

19. First of all, let us examine the definition of "royalty" as

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been defined under Article 12 of the Indo-US-DTAA, which has been defined in the following manner:

"3. The term "royalties" as used in this Article means:

a) 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, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience, including gains derived from the alienation of any such right or property which are contingent on the productivity, use, or disposition thereof; and

b) payments of any kind received as consideration for the use of or the right to use, any industrial, commercial, or scientific equipment, other than payments derived by an enterprise described in paragraph 1 of Article 8 (Shipping and Air Transport) from activities described in paragraph 2(c) or 3 of Article 8".

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The article gives exhaustive definition of the term 'royalty' and therefore, the definition and scope of 'royalty' is to be seen from the Article alone and no definition under the domestic Act or law is required to be considered or seen or any amendment made in such definition whether retrospective or prospective which can be read in a manner so as to extend any operation to the terms as defined or understood in the Treaty. The Legislature or Parliament while carrying out amendment to interpret or define a given provision under the Domestic Law of the country cannot supersede or control the meaning of the word which has been expressly defined in a Treaty negotiated between executives of two sovereign nations. The payment of transponder charges to PanAmSat and up linking charges cannot be treated as a consideration for 'use' or 'right to use' any copyright of various terms used in para 3(a) like 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 or in any manner relates to any patent or trademark, design, secret formula or process. It is also not use or right to use any industrial, commercial, or scientific equipment. There is no such kind of right to use which is given by Pan Am Sat to assessee. Thus, the said payment does not fall within the ambit of the

terms used in para 3 of Article 12. So far as the reading of amended definition of 'royalty' as given in section 9(1)(vi) into treaty, Hon'ble Delhi High Court in its latest judgment in the case of DIT vs. New Skies Satellite (supra), wherein it has considered Hon'ble Madras High Court decision in the case of Verizon Communications Singapore Pte Ltd. (supra) also, have discussed the issue threadbare and came to the conclusion in the following manner:-

> *"60. Consequently, since we have held that the Finance Act, 2012 will not affect Article 12 of the DTAAs, it would follow that the first determinative interpretation given to the word "royalty" in Asia Satellite, supra note 1, when the definitions were in fact pari material (in the absence of any contouring explanations), will continue to hold the pled for the purpose of assessment years preceding the Finance Act, 2012 and in all cases which involve a Double Tax Avoidance Agreement, unless the said DTAAs are amended jointly by both partners to incorporate income from data transmission services as partaking of the nature of royalty, or amend the definition in a manner so that such income automatically becomes royalty. It is reiterated that the Court has not returned a finding on whether the amendment is in fact retrospective and applicable to cases preceding the Finance Act of 2012 where there exists no Double Tax Avoidance Agreement".*

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The aforesaid decision takes care of all the arguments relied upon by the Id. DR including that of the Verizon Communications Singapore Pte Ltd's. The Hon'ble High Court has specifically clarified as to why the said decision of Madras High Court cannot be applied in such cases after observing as under:-

> *"31. In a judgment by the Madras High Court in Verizon Communications Singapore Pte Ltd. V. The Income Tax Officer, International Taxation j, [2014] 361 ITR 575 (Mad), the Court held the Explanations to be applicable to not only the domestic definition but also carried them to influence the meaning of royalty under Article 12. Notably, in both cases, the clarificatory nature of the amendment was not questioned, but was instead applied squarely to assessment years predating the amendment. The*

> *crucial difference between the judgments however lies in the application of the amendments to the DTAA. While TV Today, supra note 22 recognizes that the question will have to be decided and the submission argued, Verizon, supra note 23 cites no reason for the extension of the amendments to the DTAA.*

enlarged by Finance Act, 2012 with retrospective effect will not have any affect in Article 12 of DTAA.

20. Otherwise also, now it is quite trite position that, at the time of making the payment when there is no amendment in the statute, then assessee cannot be expected to withhold the tax, especially when under the old provision or by virtue of any judicial precedent such payment does not fall or has been held to be not falling within the ambit and scope of 'royalty'. In these kinds of cases there were various decisions including that of the Hon'ble Bombay High Court in the case of CIT vs. Set Satellite that payment made to the non-resident outside India for rendering the services of equipment outside India is not taxable in India. Hon'ble Delhi High Court in the case of Asia Satellite Telecommunications vs. DIT, reported in (2011) 332 ITR 340 later on reiterated that there is no royalty payment in such cases under the domestic law, that is, section 9(l)(vi), prior to amendment. Thus judicial precedents supported the case of the assessee. Here, the maxim of "lex non cogit ad impossplia, that is, the law of the possibly compelling a person to do something which is impossible, that is, when there is no provision for taxing an amount in India then how it can be expected that a tax should be deducted on such a payment. This view has been upheld by in catena of decisions including the ITAT Mumbai Benches in the case of Channel Guide India Ltd (supra) wherein, it has been held that, assessee cannot held to be liable for deducting TDS in view of the retrospective amendment which has come at a much later date. Thus, we hold that assessee was not liable to deduct TDS at the time of making the payments. Accordingly, disallowance under section 40(a)(i) could not have been made by the AO and the order of the CIT(A) is affirmed. Ground No.2(a) & (b) raised by the revenue are dismissed.

21. So far as ground No.3 is concerned, that the distribution of income should be taxable as 'royalty' under section 9(1)(vi) up to 12th July, 2002, we are unable to

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concur with the divergent stand taken by the AO that for three months the payment will constitute 'royalty' and for balance nine months, the payment will constitute 'business income'. It has also been brought to our knowledge that in the subsequent years the AO has treated 'distribution income' as business income and not as royalty. Thus, prior to period 12th July, 2002, also when assessee was not registered under the Laws of Mauritius then also it will not affect the nature of income. In any case, as stated earlier, under the distribution agreement, the assessee company has not granted any license to use any copyright to the distributor or to the cable operators. The assessee only makes available the content to the cable operators which are transmitted by them to the ultimate customer/ viewers. Further, rights over the content at all times lies with the Assessee Company and are never made available with the distributors or cable operators. Thus, the finding of the CIT(A) on this score is also confirmed that even for the first period 01.04.2002 to 12th July, 2002 the said income will not constitute 'royalty'.

22. So far as the reliance placed by the Ld. DR on the decision of ITAT Mumbai Bench in the case of NGC Network (supra), we find that in that case the issue of distribution income was set aside to the file of the AO to examine whether it falls within the ambit of 'royalty' as defined under the Income-tax Act or not. Here in this case, as pointed out by the Ld. Sr. Counsel, the AO himself has treated the income from distribution activity as business income for the period of 9 months and in the subsequent years. The same income cannot have two treatments, one as royalty and other as business income. Thus, the said decision will not apply on facts of the present case."

In view of the findings given above, we hold that no disallowance u/s 40 (a) (i) can be made on account of "programming cost" paid to various non-residents and also payments made to *PanAmSat* and other non-residents. Thus, ground No.2 and 3 are also treated as allowed.

11. Now, we take up the cross appeals for assessment year 2007-08, wherein the grounds taken by the assessee as well as by the Revenue are as under:-

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Assessee's appeal in ITA No.2065/Mum/2012

"1.0 Ground -1

1.1 "On the facts and in circumstances of the case, the "Commissioner of Income Tax Appeals-11 [hereinafter referred to as learned CIT (A)] has erred in law and in facts in concluding that Taz TV has a Permanent Establishment in India in respect of advertisement revenue and considering the income chargeable to tax in India.

1.2 "Without prejudice to above, on the facts and in circumstances of the case, the learned CIT (A) has erred in law and in facts in concluding that Tax has the income chargeable to tax in India without rebutting the fact that it has remunerated its agent at the arms length consideration in respect of Advertising Revenue."

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Revenue's appeal in ITA No.2073/Mum/2012

"1. On the facts and in the circumstances of the case and in law, the CIT (A) erred in holding that Taj TV Ltd. does not constitute an agency PE of the assessee within the meaning of Article 5(4) of the DTAA with regard to the distribution income received by it.

2(i) On the facts and in the circumstances of the case and in law, the CIT (A) erred in deleting disallowance made by the Assessing Officer under section 40a(i) of the Income-tax Act in respect of claims of transponder charge expenses amounting to USD 3,,21,870 and uplinking charges of USD 2,64,285.

(ii) On the facts and in the circumstances of the case and in law, the CIT (A) failed to appreciate that the income received from the assessee by the M/s. PanAmSat being in the nature of transponder charges and received by other non-resident4s being in the nature of up-linking charges have arisen in India and accordingly tax should have been deducted at source on such expenses.

3.(i) On the facts and in the circumstances of the case and in law, the CIT (A) erred in holding that payment of programming fees in respect of live programmes does not constitute "Royalty" as provided under Article 12 of the DTAA between India and Mauritius.

(ii) On the facts and in the circumstances of the case and in law, the CIT (A) erred in law in holding that programming fees in respect of live programming even if taken as royalty would not be deemed to accrue or arise in India as per Article 12 (7) of the relevant treaty and accordingly would not be taxable in India."

12. As regards the grounds raised in assessee's appeal, it is seen that the same is similar to ground No.1 as raised in assessee's appeal for assessment year 2006-07. The finding given therein will apply mutatis mutandis here also. For this year also, the learned Counsel has filed the copy of the orders of the TPO passed in the case of the assessee as well as Taj India which have been placed on record. Thus, we hold that no further income can be held to be attributable to the assessee once, the transaction between the assessee and Taj India has been found at arm's length price. Thus, the assessee's grounds are allowed.

13. As regards grounds of appeal raised by the Revenue, we find that so far as, the issue relating to PE in respect of "distribution income" is concerned, the same have become purely academic in view of the findings given in assessee's appeal that, the PE has been remunerated at arm's length price and, therefore, no further income should be attributable to the assessee. However, in assessment year 2003-04 to 2005-06, the Tribunal has decided the issue of PE qua distribution income in favour of the assessee after observing and holding as under:-

"17. We have carefully considered the entire gamut of facts as discussed in the impugned orders, rival submissions made before us, materials relied upon and the decisions relied upon. The assessee company is incorporated and registered under the Mauritius Law and is also the Tax Resident of Mauritius, therefore, qua its various streams of income, India-Mauritius DTAA has to be seen. The assessee is engaged in the business of telecasting sports channel called "Ten Sports" and for generating revenue, it has

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been collecting advertisement revenue and distribution of channel in India. It has appointed Taj India as its advertising sales agent to sell commercial slot/spot to the prospective advertisers and other parties in India in connection with the business of programming and telecasting of 'Ten Sports' Channel. As per the agreement, commission @ 10% of the advertisement revenue was paid to Taj India. The assessee has claimed that, such an income is not taxable in India, because there is no PE in India as Taj India is not a dependent agent of the assessee within the terms of Article 5(4). This contention of the assessee has been negated by the Ld. CTT(A) after discussing the issue in detail and holding that, there is no agency relationship between the assessee and the Taj India qua the advertisement income within the scope of Article 5(4). However, in the revenue's appeal, the main issue involved in ground no.1 is with regard to taxability of distribution revenue in terms of "Distribution Agreement" dated 1st March, 2002. Under the terms of the distribution agreement, the assessee has appointed Taj India as exclusive distributor in India and prohibits the assessee for entering into distribution agreement with anybody else. The Ld. CIT(A) after taking note of the 'Distribution Agreement' and examining various terms and clauses used therein and also taking into consideration the conduct of the parties, came to the conclusion that, Taj India is not acting as agent of the assessee but it had obtained the right of distribution of channel for itself and subsequently it is entering into contract with other parties in its own name in which the assessee is not party. The distribution of the revenue between the assessee and Taj India has been allocated in the ratio of 60:40 and the entire relationship is principal to principal basis. The Ld. CIT(A) has also noted that, there is no evidences on record to show that, Taj India was acting as agent of the assessee for the distribution business in any manner. This finding of fact of the Ld. CIT(A) is corroborated by the terms and conditions of the distribution agreement as well as sub-distributor agreement as placed in the paper book. Thus, such a finding of fact by the Ld. CIT(A) without there being any rebuttal by way of any contrary material, is affirmed. Even if we independently examine the facts of the case vis-a-vis the provisions contained in Article 5(4) to 5(6) which deals with the agency PE, it can be seen that there is no agency PE of the Assessee in India. Relevant Article 5 dealing with the agency PE is reproduced here under:-

"4. Notwithstanding the provisions of paragraphs 1

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and 2 of this Article, a person acting in a Contracting State for or on behalf of an enterprise of the other Contracting State (other than an agent of an independent status to whom the provisions of paragraph 5 apply) shall be deemed to be a permanent establishment of that enterprise in the first-mentioned State if:

i. he has and habitually exercises in that first mentioned State, an authority to conclude contracts in limited to the purchase of goods or merchandise for the enterprise; or

ii. he habitually maintains in that first-mentioned State a stock of goods or merchandise belonging to the enterprise from which he regularly fulfils orders on behalf of the enterprise.

5. An enterprise of a Contracting State shall not be deemed to have a permanent establishment in the other Contracting State merely because it carries on business in that other State through a broker, general commission agent or any other agent of an independent status, where such persons are acting in the ordinary course of their business. However, when the activities of such an agent are devoted exclusively or almost exclusively on behalf of that enterprise, he will not be considered an agent of an independent status within the meaning of this paragraph.

6. The fact that a company, which is a resident of a Contracting State controls or is controlled by a company which is a resident of the other Contracting State, or which carries on business in that other Contracting State (whether through a permanent establishment or otherwise) shall not, of itself, constitute either company a permanent establishment of the other".

Thus, an agent is deemed to be a PE of a foreign enterprise, if he is not independent and has habitually exercises an authority to conclude contracts in the name of the enterprise unless the activities of such person are limited to those mentioned in paragraph 4 that is, to the purchase of goods or merchandise for the enterprise; or if he has no such authority, but habitually maintains a stock of goods or merchandise from which he regularly delivers goods or merchandise on behalf of the enterprise.

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Thus, the character of an agent, who can be said to be a dependent only if, firstly, the commercial activity for the enterprise is subject to instructions or comprehensive control and secondly, he does not bear the entrepreneur risk. It is sufficient for the establishment of an agency PE that the agent has sufficient authority to bind the enterprise's participation in the business activity. Here in this case, none of the conditions as stipulated in Article 5(4) is applicable because Taj India is acting independently qua its distribution rights and the entire agreement ostensibly is on principal to principal basis as analyzed and found by id. CIT (A). When the entire relationship qua the distribution revenue is that of principal to principal basis and the Taj India is acting independently, then it moves out from the conditions laid down in Article 5(4). Thus the distribution income by the assessee cannot be taxed in India, because Taj India does not constitute an agency PE under the terms of Article 5(4). Thus, the order of the CIT (A) is upheld and ground No.1 as raised by the revenue is dismissed.

In view of the above, ground No.1 raised by the Revenue is dismissed.

14. As regards ground Nos. 2 and 3 are concerned, admittedly they are similar to the issue involved in assessee's own case for the assessment year 2003-04 to 2005-06. Therefore, in view of the findings given therein, ground Nos. 2 and 3 of the Revenue are dismissed.

15. In the result, the assessee's appeal is allowed and that of the Revenue is dismissed.

16. Now, we will take up cross appeals for the assessment year 2008-09, which are reproduced hereunder:-

<u>Assessee's appeal in ITA No.456/Mum/2013 (AY: 2008-09)</u>:

"1.0 <u>Ground -1</u>

1.1 "On the facts and in circumstances of the case, the "Commissioner of Income Tax Appeals-11 [hereinafter

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referred to as learned CIT (A)] has erred in law and in facts in concluding that Taj TV has the income chargeable to tax in India without rebutting the fact that it has remunerated its agent at the arms length consideration in respect of Advertising Revenue."

2.0 Ground - 2

2.1 "On the facts and in circumstances of the case, the Commissioner of Income Tax Appeals-11 [hereinafter referred to as learned CIT (A)] has erred in law and in facts in holding that the payments by Taj to various non-residents, towards programming fees for acquiring telecasting rights to be disallowed under section 40(a) (i) of the Income Tax Act, 1961 in respect of parties for which Tax residency certificates has not been furnished."

Revenue's appeal in ITA No.391/Mum/2013 (AY:2008-09)

"1. On the facts and in the circumstances of the case and in law, the CIT (A) erred in holding that Taj TV Ltd. does not constitute an agency PE of the assessee within the meaning of Article 5(4) of the DTAA with regard to the distribution income received by it.

2 On the facts and in the circumstances of the case and in law, the CIT (A) erred in holding that the payments by Taj to various noon-residents towards programming cost of US$ 3,376,562 for acquiring telecasting rights are royalty in the nature as defined under Explanation 2 to section 9(1) (vi) of the IT Act and such income deemed to accrue or arise in India without appreciating the fact that disallowance of said expenses u/s. 40(a) (i) of the IT Act on account of non-deduction of tax under section 195 of the IT Act.

3. On the facts and in the circumstances of the case and in law, the CIT (A) failed to appreciate that the income received from the assessee by the M/s. PanAmSat being in the nature of transponder charges and received by other non-residents being in the nature of up-linking charges have arisen in India and accordingly tax should have been deducted at source on such expenses.

3.(i) On the facts and in the circumstances of the case and in law, the Ld CIT (A) erred in holding that payment of programming fees in respect of live programmes does not constitute "Royalty" as provided under Article 12 of the DTAA between India and Mauritius.

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3.(ii) On the facts and in the circumstances of the case and in law, the Ld. CIT (A) erred in holding that programming fee in respect of live programming even if taken as royalty would not be deemed to accrue or arise in India as per Article 12 (7) of the relevant treaty and accordingly would not be taxable in India."

17. The grounds raised in assessee's appeal are similar to those raised in the assessment years 2006-07 and 2007-08. Similar facts are permeating in this year also; therefore, finding given therein shall apply mutatis mutandis in this year also. Accordingly, ground Nos. 1 and 2 are allowed.

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18. As regards ground No.1 of the Revenue's appeal, it is admitted fact that, similar to ground which has been decided in the assessment year 2007-08. Therefore, in view of the finding given there in, we hold that no further income chargeable to tax in India can be said to be attributable to the assessee for the reasons that the transaction between the assessee and PE has been found at arm's length price and for this year also the TPO's order in case of the assessee and Taj India has been placed on record wherein the transaction has been accepted at arm's length price. Thus, ground No.1 is dismissed.

19. As regards disallowance u/s 40(a) (i) raised in ground No.2, this issue is again covered by the Tribunal Order for assessment years 2003-04 to 2005-06 and in view of the findings given therein, we hold that no disallowance u/s 40(a) (i) can be made. Accordingly, this ground is also dismissed.

20. As regards the issue raised in ground No.3 of the Revenue's appeal, it is seen that, it is similar to ground No.1 of the assessee's appeal for the assessment year 2007-08 and, therefore, the finding

given therein will apply mutatis mutandis in this year also. Thus, this ground is also dismissed.

21. In the result, the appeals of the assessee are allowed and that of the Revenue are dismissed.

Order pronounced in the open court on 23-12-2016.

Sd/-	Sd/-
(ASWANI TANEJA)	(AMIT SHUKLA)
ACCONTANT MEMBER	JUDICIAL MEMBER

Mumbai, Dated: 23-12-2016
Lakshmikanta Deka/Sr.PS

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

1. The Appellant
2. The Respondent.
3. The CIT (A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file. //True Copy//

BY ORDER,

Assistant Registrar
ITAT, MUMBAI

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Sr. No.	Particulars	Date	Initials	Member concerned
1	Dictation given on	20.12.16	LK Deka	JM
2	Draft placed before author	23.12.16		
3	Draft proposed/placed before the second Member			
4	Draft discussed/approved by second member			
5	Approved Draft comes to the Sr.PS	23.12.16		
6	Kept for pronouncement on	-		
7	File sent to the Bench Clerk	23.11.16		
8	Date on which file goes to the Head Clerk			
9	Date of dispatch of Order			