आयकर अपीलीय अधिकरण "J" न्यायपीठ मुंबई मे।

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

श्री महावीर सिंह, न्यायिक सदस्य एवं श्री मनोज कुमार अग्रवाल लेखा सदस्य के समक्ष।

BEFORE SRI MAHAVIR SINGH, JM AND SRI MANOJ KUMAR AGGARWAL, AM

आयकर अपील सं./ ITA No. 8406/Mum/2010

(निर्धारण बर्ष / Assessment Year 2005-06)

The Asst. Commissioner of Income Tax-Circle 11(1), Room No. 439, Aayakar Bhavan, M.K. Marg, Mumbai-20	Vs.	M/s Viacom 18 Media Pvt. Ltd. (formerly M/s. MTV Network India Pvt. Ltd.) Viacom 18, Media P. Ltd, Zion Bizworld, Subhash Rd, A Near Garware office, Vile Parle (E), Mumbai-57
(अपीलार्थी / Appellant)	..	**(प्रत्यर्थी / Respondent)**
स्थायी लेखा सं./PAN No. AAACM9164E		

अपीलार्थी की ओर से / **Appellant by** : Shri LKS Dehiya, CIT-DR

प्रत्यर्थी की ओर से / **Respondent by** : Shri Farrokh V. Irani, AR

सुनवाई की तारीख / **Date of hearing:**	**08-01-2019**
घोषणा की तारीख / **Date of pronouncement :**	**08-02-2019**

आदेश / O R D E R

महावीर सिंह, न्यायिक सदस्य/
PER MAHAVIR SINGH, JM:

This appeal filed by the Revenue is arising out of the order of Commissioner of Income Tax (Appeals)-15, Mumbai [in short CIT(A)], in appeals No. CIT(A)-15/IT-197/08-09 vide orders dated 20.09.2010. The Assessments was framed by the Asst. Commissioner of Income Tax, Central Circle 11(1), Mumbai (in short 'ACIT'/ 'ITO'/ AO') for the A.Y. 2005-06 vide order dated 15.12.2008 under section 143(3) of the Income Tax Act, 1961 (hereinafter 'the Act').

2. The first issue in this appeal of Revenue is against the order of CIT(A) holding that the broadcasting companies are not comparables with content producers like assessee and further directing that Creative Eye Limited is to be included in the final list of comparables, while making transfer pricing adjustment. For this Revenue has raised the following ground No. 1: -

> *"1. On the facts and in the circumstances of the case and in law, the IA. CIT(A) Mumbai has erred in directing the A.O to delete the transfer pricing adjustment of Rs. 7,33,23,877/- made to the content segment of the assessee on the ground that broadcasting companies were to be excluded and Creative Eye Ltd is to be included in the TPO set of comparables thus changing the Arm's Length adopted by the AO."*

3. Briefly stated facts are that the assessee company is engaged in the export of entertainment programs/concern, acting as advertising agent in India for MTVA LDC, Singapore (MTVA) and Nickelodeon Asia Pte Ltd., Singapore (NICKA), Distribution of channels of MTVA and NICKA, Licensing and merchandising. In regard to the first issue of export of contents segment and transfer pricing adjustment made by the TPO while computing the Arms Length Price of International transaction of export of contents at ₹ 59,36,86,881/- as against the transaction disclosed by

assessee at ₹ 52,03,63,004/- and thereby made adjustment of ₹ 7,33,23,877/-. The assessee submitted before the AO that it produces the certain contents for its associated enterprises and arose cost plus 10% on the same and had benchmark its transaction under Transaction Net Margin method (TNMM) which given Arithmetic Mean at 11.09% as under:-

Sl No.	Name of Company	OP/TC (%)
1.	BAG Films & Media Ltd.	15.18
2.	Cinevistaas Ltd	8.52
3.	Creative Eye Ltd.	31.67
4.	Pritish Nandy Communications Ltd.	18.49
5.	Randaan Media works India Ltd.	12.06
6.	Goldmine Media Ltd.	16.03
7.	Jain Studios Ltd.	14.43
8.	Ten media Ltd.	5.18
9.	Sri Adhikari Brothers Television network Ltd.	9.90
10.	ETC Networks Limited (merged)	31.27
11.	Television Eighteen India Ltd	40.62
12.	PNC Production	0.32
	Average	11.69

4. The TPO did not accept assessee's analyses and used the mean margin of 25.50%.

"Asianet Communications Ltd.

ETC networks Limited (merged)

Innetwork Entertainment Ltd.

Jain studios Ltd.

Malayallam Communications Ltd.

NDTV Media Ltd.

Raj Television network Ltd.

Television Eighteen India Ltd."

5. The assessee also admitted that it had itself inadvertently selected the following broadcasting companies as comparable, and which should be excluded from the comparables.

(i) Jain studios Ltd.

(ii) ETC Networks Ltd.

(iii) Television Eighteen India Ltd."

6. The assessee before the AO contended that the broadcasting companies taken by assessee as comparables is a mistake and the same should be excluded. Even it was contended that the broadcasting companies taken as comparable should be excluded and cannot be taken as comparables for making adjustment under transfer pricing under the TNMM. But the AO by taking fresh comparables and mean margin of 25.50 % made adjustment of transfer pricing adjustment of ₹ 7,03,23,877/-. Aggrieved, assessee preferred the appeal before CIT(A). The CIT(A) after considering the submissions of the assessee noted that whether the TV broadcasting and Media content are functionally one and the same or different. He held that TV broadcasting and content companies are two different set off of business and accordingly, he directed the AO to exclude all broadcasting companies from comparables while making Transfer pricing adjustment by observing in Para 4.4 to 4.6 as under: -

"4.4 I have considered the TPO's order and the written and submission of the appellant. The core issues which needs to be addressed on this ground are

(I) Whether TV broadcasting and Media Content are functionally one and the same.

(ii) Whether it was fair and proper to exclude Creative Eye Ltd. which is Media Content Company but has suffered a loss this year.

4.5 Broadcasting and content are two different sets of business. Content means production of programs whereas Broadcasting includes up linking and down linking of the channels so that the ultimate viewer is able to watch the content on Television.

The above is also supported from the codes allotted in Prowess database i.e. Broadcasting has been allotted NIC code (NIC code 92200) whereas the NIC code of entertainment content provider is 92490. The appellant is in the content business whereby it produces programs which are sold to its AEs. The AEs are in the broadcasting business whereby they uplink channels and provide down linking facilities so that the programs can be ultimately viewed by the television viewer.

4.6 The Broadcaster incurs much larger investments, employs huge assets and assumes tremendous risk whereas a content provider does not perform same functions and assets employed and risks taken are meagre. As such both cannot be taken as functionally similar though they are part of the Entertainment Industry. FAR is the core of the comparability analysis as it emanates from the fact that it defines risks, responsibilities and risks assumed and examines the economic substance of the transaction and the business of *the company as a whole. It is a fact that in the TP study, the appellant had included a few broadcasting companies in its list of comparable but at the stage of TPO's scrutiny, this mistake was pointed and it sought their exclusion but the TPO refused to entertain it and continued to add his own set of TV Broadcasting Companies. It is an established principle of jurisprudence that there cannot be a vested right to mistake. The Mumbai Tribunal concluded in A M Tod Co. India (P)_ Ltd. Vs. ITO (IT Appeal No. 492 (Mum) of 2006 dt. 24.06.2009 that a taxpayer is entitled to request a correct determination of Arms Length Price where it had inadvertently overstated the price in its transfer pricing audit report. Further in the Quark System (P) Ltd. Case (supra) mentioned earlier the Tribunal held that in accepting or rejecting a comparable, the tax payer should be able to correct a bonafide mistake.*

Accordingly, based on the above legal position and applying the principles of natural justice and FAR, all Broadcasting Companies are excluded from TPO's set of comparables."

Aggrieved, Revenue came in appeal before Tribunal.

7. Before us, the learned CIT- Departmental Representative, relied on the TPO's order and stated that the assessee itself has chosen broadcasting companies as comparables and the economic activity of

broadcasting and content companies is one and the same and can be compared and according to him, the TPO has rightly compared the broadcasting companies with that of the content producers. On the other hand, the learned Counsel for the assessee relied on the order of CIT(A). The learned Counsel for the assessee made arguments and made distinction on the basis of Functions, Assets and Risk (FAR) Analysis of content producer vis a vis broadcasters. The relevant functional analysis of both content producers and broadcasters companies was pointed out and the assessee also filed a complete chart drawing the difference as under: -

Sl No.	Particulars	Content Producer	Broadcasting Company
1.	Functions	Producing T.V. Programs /TV Content which involves following activities: 1) Develop the show's elements, consisting of the concept the characters, the crew and cast. 2) Get the scripts approved from Broadcaster and then start Pre-production which includes storyboarding, construction of sets, props, and costumes, casting guest stars, budgeting, acquiring resources like lighting, special effects, stunts, etc. 3) Filming of the episodes, adding visual and digital video effects to the film of the TV program and assembling the completed show in digital format. 4) After production, the show is handed over to the broadcaster.	1) Continuous monitoring of the viewing tastes of the audience and aligning the TV programme accordingly. 2) Conceptualizing T.V. programs on the basis of point no.1 above. 3) Directing the content producer to execute the production of the programs conceptualized in 2 above. 4) Broadcasting (i.e. Uplinking/ Downlinking) the content produced by the content producer and making available the service signals to the cable operators via satellite so that the content can be ultimately viewed by the television viewers.
2.	Assts		
A	Tangible assets	Necessary assets required to produce the T.V. Programs like 1) Cameras, 2) Studios, 3) Lights 4) Editing equipments, 5) Video library etc.	1) Transmitting equipments, towers, satellite receivers and remote broadcast vehicles. 2) Transponder facilities for up-linking/ downlinking of TV programs on channels.

			3) Integrated Receiver Decoders (IRD)/ Set top Boxes.
	Capital Investment	Moderate	Significant
B	Intangible Assets	The content producer does not hold any intellectual property The content once sold to the channel owner, the channel owner becomes the owner of the content	Owns the channels Has the right over the content purchases from the content producers.
3.	Risks	1) Risk of cost overruns Being the risks associated with overrun of production cost vis-à-vis the budgeted cost 2) Market risk: Competition with other content producers	1) Failure of content Risk on account of charges in the taste of the viewing public. Thus, if the content fails to appeal to the viewers of the channel the programme loses its popularity resulting in loss of revenues. Eg. One f the popular TV show Kaun Banega Crorepati was a huge hit with Mr. Amitabh Bachchan as the host, however did not do so well with Mr. Sharukh Khan as he could not match the popularity of Mr. Amitabh Bachchan resulting in losses to the channel owner. 2) Other Risk a) change in Government Policy: New regulations being implemented to address the changing markets and multiple regulators. Eg: In January 2010, the Government temporarily suspended giving permission to new channels in India on the grounds of reviewing the transmission of existing channels, assessing the net worth of the channels and checking the availability of spectrum. Change in Censorship (Government bodies could change the censorship guidelines) b) Seasonal Risks: Eg: when IPL is aired, the viewers stop watching the other TV programs resulting in losses to channel owners c) Risk of technology obsolesce: Eg: Regular channels to HD channels d) Risk premium : higher as compared to Content producers 3) Competition risk: Content generation and regulation (increasing need for

			differentiated content due to the increase in the number of channels) 4) Competition with other channel owners for viewership, advertising spots, subscription revenue 5) Product liability risks – Providing all the specifications for the encryption and decoding of the channels thus bearing the risk of loss of goodwill if viewers do not received good picture quality. Continuously reviewing the existing system of operation and has to upgrade any change in technology from time to time. 6) Pricing risk: In many areas some cable operators enjoy a local monopoly status leading to non-standard pricing for the consumers.

8. We have gone through the distinction brought out by the CIT(A) and now assessee's Counsel before us between the broadcasting company and content producer which are functionally different. This is clear from the FAR analysis of content producer and broadcasting companies that functionally these are two different entities. Hence, we are of the view that the media content and TV broadcasting are totally dissimilar activities except the only linkage is that of media content is made only for the purpose of broadcast ng on the TV channels. Production of media content is one of the functions of the assessee while broadcasting is the function of its AE and hence, due to functional divide & due to this aspect, this is the prime reason for entering into international transaction by the assessee with its AE. Hence, the activity of producing content and broadcasting the content is altogether different and not at all comparable. Even investment requires for making same content is very less compared to investment required for carrying out the broadcasting activity. Hence, on economic factor, functional analysis and the activities, these two are entities are dissimilar and cannot be compared. Hence, the CIT(A) has rightly directed the AO/ TPO to exclude the broadcasting companies taken

by Revenue and by assessee while comparing the two. We confirm the order of CIT(A).

9. The another aspect is that there is no estoppel against the assessee when arguing against the exclusion of its own comparable and this issue is covered by the Special Bench of this Tribunal in the case of DCIT vs. Quark Systems Pvt. Ltd. (2010) 38 SOT 307 (Chandigarh) (SB). Hence, on that account also the CIT(A) has rightly directed/ AO / TPO for exclusion of assessee’s own comparable of broadcasting companies.

10. Another dispute is regarding inclusion of creative Eye Limited as comparables and direction given by CIT(A) accordingly. The TPO while excluding Creative Eye Limited as comparable has noted that this company whose operating profit and operating cost ratio is abnormally low and negative i.e. -37.57%. The TPO gone into the details and noted that this company’s turnover has increased from 1.01 crores in FY 2003-04 to ₹ 17.30 crores in current financial year but the company has suffered huge loss due to the failure of its 3D plus movie namely ‘Abra Ka Dabra’ and hence this company is loss making company and cannot be compared. The TPO also noted that the company was making profit in earlier years as well as subsequent years, but in this very year the company has made huge losses due to failure of its 3D plus movie ‘Abra Ka Dabra’ during the year. Accordingly, he excluded this company Creative Eye Limited from comparables. Aggrieved, assessee preferred the appeal before CIT(A). The CIT(A) included this company because firstly, it passes FAR test and moreover, this is not a consistent loss making company rather the TPO himself admitted that in earlier years and subsequent years, the company has disclosed profits. The CIT(A) directed the AO/ TPO to include this company as comparables by observing in Para 4.7 and 4.8 as under: -

"4.7 Further on CEL, it is evident that 'Abra ka Dabra' is a normal business activity of the company which has unfortunately contributed to the losses of the company. However, rejecting company simply because it is loss making is not the right approach. If a company is functionally similar the outcome of the function, either profit or loss; cannot be used as rejection criteria. CEL is a company which is into similar business as that of the appellant's content segment. It is observed from the Annual Report that its turnover has increased from ₹ 11.01 crores in FY 2003-04 to ₹ 17.30 crores this year. The reason for its loss is failure of its 3D plus movie "Abara Ka Dabra" produced during the year. Otherwise the company was making profits in the earlier years as well as subsequent years. Form the accounts, it is observed that it has positive net worth also. The various judicial pronouncements discussed above, also uphold this position. Further, the rulings (Quark System (P) Ltd./ Sony India) have specifically accepted loss making companies as comparables, if they pass the FAR test. Since, Creative Eye is in the segment of the content provider, it is otherwise eligible to be included. It is utopian to conclude that business always generate profits. Risks are inherent to any enterprise.

4.8 To sum up, the broadcasting companies are excluded and CEL is included in the TPO's set of comparables. As a consequence, the appellant's margin is higher than the mean margin of the comparables and therefore the appellant's transactions of content segment pass the arms's length test. As such the other contentions raised by the appellant need not be adjudicated.

Accordingly, the AO is hereby directed to delete the adjustment of ₹ 7,33,23,877/ made to the content segment of the appellant and as a consequential effect of this order, the arm's length price of the international transaction of content segment is considered to be at ₹ 52,03,63,004/-."

Aggrieved, now Revenue is in appeal before Tribunal.

11. We have heard rival contentions and gone through the facts and circumstances of the case. Admittedly, this company is making profit in earlier years and subsequent years as noted by CIT(A) as well as TPO in their orders. The loss incurred in this year is on account of failure of 'Abra Ka Dabra' 3D movie produced by it during the year, is only a part of the reason along with competitive pressure for the loss incurred by this company. The assessee place the evidence in its paper book, wherein director's report of the company for the FY 2004-05, wherein it was mentioned that loss of volume because of competitive pressure coupled with a low pricing took a toll on operating margin. For this the learned Counsel for the assessee argued that merely because comparable is

making loss in one year but making profits in earlier years and subsequent years, it cannot be excluded from the list of comparables and for this he relied on the following two case laws: -

> *"1. DCIT vs. Quark System Pvt. Ltd. (2020) 38 SOT 307 (Chandigarh) (SB)*
>
> *2. Capgemini India P. Ltd. vs. ACIT (2013) 33 taxmann.com 5 (Mumbai- Trib.)"*

12. We find that the Creative Eye Limited is functionally similar to the assessee company reason being it is also engaged in production of film production that is why is functionally same with the assessee. Even otherwise, in this year only, the loss is made by Creative Eye Limited due to loss of volume because of competitive pressure on account of production of 3D film 'Abra Ka Dabra' Hence, we find no infirmity in the order of CIT(A) and the same is confirmed. This issue of Revenue's appeal is dismissed.

13. The next issue in this appeal of Revenue is against the order of CIT(A) deleting the ransfer Pricing adjustment made by TPO / AO on account of income from distribution i.e. distribution Revenue (payment segment). For this Revenue has raised the following ground No. 2: -

> *"2. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in directing the A.O. to delete the adjustment of Rs. 4,47,43,612/- made to the distribution revenue (payment) segment of the assessee by holding that CUP method has been rightly adopted by the assessee and the TPO erred in adopting TNMM method."*

14. Briefly stated facts are that the assessee has adopted the CUP method in regard to distribution of Revenue (payments to the AEs'), for comparing between assessee's share of Revenue with that of AE and with that of Sub distributors. The AO / TPO while computing the Arms Length Price of the International Transaction for distribution of revenue, computed the ALP at ₹ 25,43,149/- as against determined by assessee at ₹ 4,72,86,761/-. Thereby, the TPO made adjustment of ALP at ₹ 4,47,43,612/-. The TPO adopted the TNMM as against the CUP applied by assessee for making this TP adjustment. Aggrieved, assessee preferred the appeal before CIT(A).

15. The CIT(A) after considering the submission of the assessee, deleted the addition by observing in para 5.10 to 5.15 as under: -

> *"5.10. I have perused the TPO's order and the written submissions There is force in appellant's argument that viewership is higher amongst news/ general entertainment channels where as the appellants channels belong to the music and cartoon geners which are yet to be registered in the mind set of an emerging market population.*
>
> *5.11. It is also a fact that the initial years involve investments which become profitable over a cycle. The expenses incurred in the Distribution segment was justified on commercial reasons and are incurred in order to get a stronghold in the market space and in anticipation that the initial loss arising from such higher costs would be made good by realizing more profits in later years.*

5.12 Transfer Pricing scrutiny is not confined to financials only but also involve the underlying Economics and cannot be judged from the costs and revenues of a single year and should be viewed as a cycle, in its entirety, over the expected term. Economists direct their attention towhat may happen in the future – the present value of future income whereas accountants are more concerned with what has happened in the past – revenue less expenses. The appellant in its case has showed that how expectations of better revenue in future has been proved to be a rational business decision from the following table on the revenue and Op/TC percentage over a period of 4 years as below:

AY	*2005-06*	*2006-07*	*2007-08*	*2008-09*
Segment Revenue (₹)	*1,95,09,098*	*4,05,36,903*	*6,35,18,095*	*7,15,84,768*
Operating Profit/ Total Costs (%)	*75.01%*	*37.85%*	*5.81%*	*6.46%*

5.13 the appellant has made detailed submission regarding business reasons/ strategies adopted by it for distribution business. This aspect has been validated by providing OP/ TC of future years. The appellant, during the course of hearing has also submitted that its arrangement with the AEs (50.50) has remained the same though it has incurred losses in the initial year and earned profit in the future years.

This provides evidence that the transactions between the appellant and its AEs are not the reasons for the appellant's losses in the distribution segment. Conclusions regarding comparability in Transfer Pricing are subject to the analysis of the five "factors determining comparability" described in the OECD guidelines in respect of the Arms Length Principle. These are characteristics of property or services.

- Functional Analysis
- Contractual Analysis
- Economic circumstances
- Business Strategies

The TPO has ignored the famous relating to Economic Circumstances and Business strategies The fact that the appellant is showing better results every subsequent year makes these facts extremely relevant.

5.14 I have also analysed the submission made by the appellant and am of the view that since CUP, a direct method was available in the case of the appellant the TPO should have used the same instead of applying the TNMM method. Further, conducting a search on the internet based on the words 'Cable TV Operator' while testing the distribution segment of the appellant *is, not a correct approach. The appellant has established that its transactions with AEs are at arms' length by relyingon CUP method and has also justified its losses in the distributions business.*

5.15 Accordingly, the AO is hereby directed to delete the adjustment of ₹ 4,47,43,612/- made to the distribution revenue segment of the appellant and as a consequential effect of this order the arms length price of the international transaction of distribution revenue segment is considered to be at ₹ 4,72,86,761/-."

Aggrieved, now Revenue is in appeal before Tribunal.

16. We have heard rival contentions and gone through the facts and circumstances of the case. The facts are that the assessee as a distribution segment and earning revenue under distribution payment segment entered into agreement and to distribute the rights with MTV, VH1 and Nickelodeon channel and a sharing arrangement with its AE at 50:50. The distribution of Revenue flows as under: -

Revenue split between MTV India, MTVA/ NICKA and set discovery

MTV India 50%	Set Discovery 31.6%
	MTV India 18.5%
MTV Aisa/ Nickk Asia 50%	MTV Asia/ Nick Asia 50%

Revenue Split between MTV India, MTVA and Zee Turner

MTV India 50%	Zee Turner 37.5%
	MTV India 12.5%
MTV Asia 50%	MTV Asia 50%

17. The assessee has benchmarked its transaction under the control price (Cup Method) by comparing the transactions with third party distributors but the TPO rejected the TP study of the assessee and adopted the TNMM as against Cup Method employed by assessee. The TPO conducted a search on Google by the word capital TV operator and arrived at a set of three comparables, the data of one of the companies was not available for the relevant assessment year out of these three. We find from the arguments of the learned Counsel that the assessee is consistently determining the Arms Length Price for distribution revenue by employing Cup from AY 2004-05 till date. The assessee's Counsel contended that the Cup Method used by assessee has also been used by Revenue consistently as the most appropriate method and no adjustment has been made. On account of consistency, the learned Counsel for the assessee stated that no adjustment should have been made. Further, on merits also the learned Counsel for the assessee stated that as per the distribution agreement i.e. agreement with Sub-Distributor Set Discovery Limited and Zee Turner Limited, the same is relating to granting of rights but distribute the channels are similar to the terms of distribution agreement. As per the terms of distribution agreement of the assessee that MTV, VH1 channel and Nickelodeon, the assessee has remitted 50% of distribution revenue calculated by it from the cable operators or the subscribers as their share of revenue. For the 50% of the Revenue is the share of the assessee from which it has to incur various distribution costs in India. There are two type of sharing of distribution revenue i.e. the first set of sub distributors i.e. Set Discovery Limited and assessee is in the ratio of 31.60 and 68.40. Similarly, the distribution ratio between Zee Turner Limited and the assessee is 37.50 and 62.50 respectively. Whereas, as per distribution agreement sharing arrangement with distribution i.e. between the assessee and MTV and Nickelodeon i.e. broadcasters 5:50 which is remained the same. We find that the assessee

while making transfer pricing study under Cup Method, which is direct method available to the assessee and assessee has used the proper and scientific data which is available for comparison. But the TPO applied TNMM method for computing Arms Length Price without any basis just on the basis of search conducted on Google and comparing the data with cable TV operators. In our view, the assessee is consistently following the CUP method for benchmarking the transaction with its AE's and for which scientific and correct data is available. The TPO or the AO has not pointed out any ambiguity in the data supplied by the assessee for benchmarking the Cup Method in the TP study. The AO applied TNMM method which is without any data or any basis. Hence, we are of the view that the CIT(A) has rightly deleted the adjustment and we confirm the same. This issue of Revenue's appeal is dismissed.

18. The next issue in this appeal of Revenue is against the order of CIT(A) directing the AO to delete the adjustment made to the reimbursement of advertisement and sale promotion expenses. For this Revenue has raised the following ground No.3:-

> *"3. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in directing the A.O. to delete the adjustment of Rs.8,64,348/- made to the reimbursement of advertisement and sales promotion expenses without considering the reasonable mark-up adopted by the TPO."*

19. We have heard the rival contentions on this issue and gone through the facts and circumstances of the case. Brief facts are that the TPO determine the Arm's Length Price (ALP) of the International Taxation for reimbursement of advertisement and sale promotion expenses by adding

a markup of 10% and then computed the Arm's Length Price of the International Taxation and made adjustment of Rs. 8,64,348/-. Aggrieved, assessee preferred the appeal before CIT(A), who deleted the adjustment by observing in Para 6.6 and 6.7 as under:-

> *"6.6 I have examined the argument of the appellant and also reviewed the average balance of MTVA and NICKA during the financial year 2004-05 from the appellant's submissions. It is noticed that both MTVA and NICKA have credit balance of ₹ 37,94,79,005/- credit and ₹ 2,21,03, 123/- credit respectively during the financial year 2004-05. This shows that the appellant has not rendered any financial services. I also concur with the appellant that the nature of reimbursement are normal to the business of the appellant and the same is incidental activity and the appellant itself is being benefited by that activity.*
>
> *6.7 Accordingly, the AO is hereby directed to delete the adjustment of ₹ 8,64,348/- made to the reimbursement of advertisement and sales promotion expenses and as a consequential effect of this order the arm's length price of the international transaction of reimbursement of advertisement and sales promotion expense is considered to be at ₹ 86,43,476/-."*

Aggrieved, Revenue came in appeal before Tribunal.

20. We find that as per agreement between the assessee and his AE in respect of advertising sale agency, it keeps 15% of gross sale revenue and for this income, the assessee bears the normal advertising and sales promotion costs. Further, in case of certain major marketing costs incurred by it at the instances of its AE it is entitled to reimbursement of the same. During the financial year, the assessee incurred certain major advertisement and sales promotion costs amounting to Rs. 86,43,476/- on behalf of its AE Nickelodeon the same was reimbursed by Nickelodeon as per terms of agreement. In regard to export of contents to its AE, the assessee receives advance payment from the associate enterprises based on estimates and final payment was received based on invoices within 30 days. For the advertisement and distribution, the assessee gives credit period of around 30 to 90 days to its customers and the payment to be made to the AE which made only after the same are received from the customers. But the assessee has not availed any specific manpower for this purpose and existing manpower of the assessee has carried out for the incidental activity. In this process, the assessee also received indirect benefit in the shape of increased market development, as a result of major advertisement and sales promotion costs. Such costs will increase the viewership of the channel which will in turn result in higher income for the assessee in term of increase sales and distribution of adds receipt on the channels. Hence, according to us, no further expenditure has been incurred by assessee and consequently no further reimbursement was made by the assessee and hence, no markup can be added. Hence, we confirm the order of CIT(A) deleting the addition. This appeal of Revenue is dismissed.

21. The next issue in Revenue's appeal is against the order of CIT(A) deleting the disallowing of advertisement and sale promotion expenses as

incurred for assessee's own business. For this Revenue has raised the following ground No. 4:-

> *"4. On the facts and in the circumstances of the case and in law, the Ld. CIT(A)-15, Mumbai erred in deleting disallowance of Rs.2,79,26,769/- made on account of advertisement and sales promotion expenses which is not incurred by the assessee for the purpose of own business.."*

22. Briefly stated facts are that the assessee has debited a sum of Rs. 11,79,10,056/- to its profit and loss accounts towards advertisement and sales promotion expenses. The AO allowed the expenses towards advertisement and sales promotion at Rs. 8,76,24,004/- being amount which was recover by the assessee as part of direct costs of production on MTV and Nickelodeon with 10% markup. The balance expenditure of Rs. 3,02,86,052/- was considered by the AO and out of the same disallowed 92.21% by considering the foreign operation income at Rs. 2,79,26,769/-. Aggrieved assessee preferred the appeal before CIT(A). The CIT(A) deleted the addition by observing in Para 8.6 to 8.7 as under:-

> *"8.6 I have considered the submissions made by the assessee. From the assessment order, it is evident that the genuineness of the advertisement expenditure being incurred by the Appellant has not at all been doubted by the Assessing Officer.*
>
> *8.7 It is also observed that the claim for deductibility of such advertisement expenditure*

> *has been decided by the Hon'ble jurisdictional Mumbai Tribunal (ITA No. 5057/Mum/07) in the assessee's own case for AY 2003-04 wherein too the assessee was amongst other business activities was engaged in program export business and learned AO had disallowed some portion of advertisement expense. The Mumbai Tribunal has upheld the claim of assessee company and allowed entire expenditure incurred by the assessee company for advertisement and sales promotion."*

Aggrieved, now Revenue came in appeal before Tribunal.

23. Before us, the learned Counsel for the assessee stated that the issue is squarely covered by Tribunal's decision in assessee's own case vide order in ITA No. 5057/Mum/07 for AY 2003-04 dated 04.12.2010, wherein Tribunal vide Para 8 observed as under:-

> *"8. We have considered rival submissions. It is not in dispute that expenditures disallowed by the Assessing Officer were expenses incurred for promoting MTV channel. Thus, nature of expenditure being one for promoting MTV channel is not disputed. It is also not in dispute that as per the terms of the agreement between the assessee and MTVA and NICK, the assessee will not get any reimbursement of advertisement and sales promotion cost. The stand of the assessee is that by promoting brand MTV, there will be increased viewership, which*

will result in increase in advertising revenue. If the advertisement revenue increases, the assessee will directly benefit in terms of increase in commission income. The Revenue authorities have disallowed claim for deduction on the ground that there was no necessity for the assessee to incur these expenses under the agreement by which, they were appointed as advertising sales agent. Another reason was that these expenses ultimately benefit only MTV not the assessee. In our view, this approach of the revenue authorities is not legally correct. Law is well settled regarding deductibility of such expenses. In the case of Saoon J. David & Co. Pvt. Ltd. Vs. CIT, 118 ITR 261 (SC); it has been laid down that no disallowance could be made on the ground that incurring of expenditure was not necessary for the assessee or that it benefitted a third party. The only relevant factor to be seen as to whether incurring of the expenditure was for the purpose of assessee's business. In the present case, it is not in dispute that the assessee was in the business of acting as advertising sales agent in India. The assessee received percentage of advertising revenue generated in India as its commission. It was therefore in the business interest of the assessee to promote brand name of the MTV so that there is increased viewership which in turn will led to increase advertisement revenue. The assessee *will therefore get increased income in the form of commission; it cannot therefore be said that expenditure was not for the purpose of assessee's business. The fact that the assessee was to under legal obligation to incur these expenses as per the agreement with MTVA and NICK is not relevant consideration. In the case of Star India Pvt. Ltd (supra) on identical facts this Tribunal was pleased to hold that no disallowance of advertisement and sales promotion can be made. Similar view has been expressed by the Delhi Bench of the ITAT in the case of Nestle India Ltd. (supra). We are of the view that disallowance made deserves to be deleted and the same is di ected to be deleted."*

24. It was contended by the learned counsel that this order of Tribunal was affirmed by Hon'ble Bombay High Court in the case of CIT vs. Viacom 18 Media Pr vate Limited in Income Tax appeal No. 4599 of 2010 vide order dated 25 11.2011, wherein it is held as under:-

"4. The Income Tax Appellate Tribunal relying upon its decision in the case of Star India Private Limited, held that the assessee was in the business of acting as advertising sales agent in India and as the assessee was to receive a percentage of advertising revenue received in India as its commission, it was in the business interests of the assessee to incur advertisement and sales promotion expenditure so that there is

> *increased advertisement revenue which in turn would entitle the assessee to receive increased commission. Accordingly, the expenditure claimed by the assessee was allowed as business expenditure. It is brought to our notice that the appeal filed by the Revenue against the decision of the Income Tax Appellate Tribunal in the case of Star India Private Limited being Income Tax Appeal No.165 of 2009 has been dismissed by this Court on 24th March 2009.*

25. We find that the facts are identical and respectfully following the Bombay High Court, we confirmed the order of CIT(A) and dismiss this issue of Revenue's appeal.

26. **In the result, the appeal of Revenue is dismissed.**

Order pronounced in the open court on 08-02-2019.

Sd/-	Sd/-
(मनोज कुमार अग्रवाल / MANOJ KUMAR AGGARWAL)	(महावीर सिंह /MAHAVIR SINGH)
(लेखा सदस्य / ACCOUNTANT MEMBER)	(न्यायिक सदस्य/ JUDICIAL MEMBER)

Mumbai, Dated: 08-02-2019.

Sudip Sarkar /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