

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O.O.C.J.**

WRIT PETITION NO. 3508 OF 2018

Sony Pictures Networks India Pvt Ltd .. Petitioner

Versus

Income-Tax Appellate Tribunal, Mumbai & Ors. .. Respondents

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- Mr. Percy Pardiwalla, Sr. Counsel a/w Mr. Hiten Chande i/by PDS Legal for the Petitioner
 - Mr. Akhileshkumar Sharma for Respondent Nos. 1 to 3
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**CORAM : AKIL KURESHI &
M.S. SANKLECHA, JJ.**

DATE : JANUARY 3, 2019.

P.C.:

1. At the request of the learned counsel for the parties, the petition is being disposed of finally at this stage.

2. This petition under Article 226 of the Constitution of India challenges the order dated 13.4.2018 passed by the Income Tax Appellate Tribunal ("**Tribunal**" for short). By the impugned order dated 13.4.2018, the petitioner's application under Section 254(2) of the Income Tax Act, 1961 ("**the Act**" for short) for rectification of order dated 26.7.2017 passed under Section 254(1) of the Act relating to assessment year

2011-12 was rejected.

3. The petitioner is engaged in the business of distributing television channels in India. During the subject assessment year, the petitioner distributed television channels inter alia owned by its Associate Enterprises to Local Cable Operators (LCO), Multi System Operators (MSO) and Direct to Home Operators (DTO). For the aforesaid activity, the petitioner is remunerated 10% of the subscription revenue collected by distributing the television channels to these operators. The balance 90% is paid over to its Associate Enterprises. The Transfer Pricing Officer ("**TPO**" for short) sought to benchmark the international transactions entered into between the petitioners and its Associate Enterprises by comparing it with seven comparable from the royalty data base. Thus, making a transfer pricing adjustment of Rs. 335.69 crores as reflected in the draft assessment order dated 27.2.2015 of the assessing officer (respondent No. 2).

4. The petitioner filed its objections to the draft assessment order to the Disputes Resolution Panel (DRP). By

an order dated 30.11.2015, the DRP disposed of the objections upholding the applications of comparables from royalty database. However, DRP restricted the comparable to only three comparables. This resulted in a lower price adjustment at Rs. 297.62 crores in terms of order dated 30.11.2015 of the DRP.

5. Consequent to the above in terms of the DRP's directions, the assessing officer passed a final order dated 31.12.2015 of assessment.

6. Being aggrieved the petitioner filed an appeal to the Tribunal. It was the petitioner's case that the amounts paid by them as distribution fees to its Associated Enterprises cannot be characterized as royalty. This as the petitioner has no right over the content of the broadcast. In its appeal, the petitioner relied upon the decision of this Court in the case of CIT Vs. SET India Pvt Ltd (ITA NO. 1347 of 2013) wherein it is held that the distribution fee paid is not in the nature of royalty which is taxable under the Act. However, the Tribunal in its order dated 26.7.2017 after having recorded the

petitioner's above basic submission did not deal with the character of distribution fees payment i.e whether it is royalty or not. It proceeded to restore the issue of determining the Arm's Length Price to the assessing officer / TPO to consider the matter afresh.

7. As the order dated 26.7.2017 of the Tribunal passed under Section 254(1) of the Act did not deal with the fundamental dispute viz. that the distribution fee paid by it to its Associate Enterprises are not payments in the nature of royalty. This even after recording the petitioner's submission. This led to the petitioner filing on 5.10.2017, an rectification application under Section 254(2) of the Act. By the above application, the petitioner sought consideration of the basic issue viz. the character of the distribution fee "whether Royalty or not" before restoring the issue to the assessing officer / TPO.

8. Thereafter, by the impugned order dated 13.4.2018, the Tribunal rejected the rectification application made under Section 254(2) of the Act seeking to rectify the order dated

26.7.2017 of the Tribunal. This on the ground that the entire issue had been restored to the departmental authority for fresh adjudication. This fresh adjudication would also include deciding on the characterization of the distribution fee i.e Royalty or not. The impugned order does not dispute that the issue was raised before it during the hearing by the party. However, it holds that non consideration of an argument made by a party would not lead to an rectification, as it would amount to review. In support, reliance is placed on the decision of this Court in **Commissioner of Income Tax Vs. Ramesh Electrical Company Ltd**, (203 ITR 497).

9. The submission on the part of the revenue that no prejudice is caused as the entire issue has been restored to the assessing officer, who would also consider the character of the distribution fee is not correct. It is not the case of the revenue nor the order of the Tribunal that before the characterization of the fee can be decided, certain facts are to be ascertained. Thus, all facts to decide on the question of law was available with the Tribunal. In the above circumstances, the Tribunal ought to have dealt with the

issue itself. By not dealing with an issue which is otherwise ripe for consideration and instead remanding to the TPO, the Tribunal has ensured further litigation and continued uncertainty for both the Revenue and the assessee. This observation of ours with regard to conduct of the Tribunal finds support in the decision of this Court in **Coca-Cola India (P) Ltd Vs. Assistant Registrar representing Income Tax Appellate Tribunal**, [2014] 368 ITR 487. The reliance upon an observation in the decision of this Court in Ramesh Electrical (supra) (without consideration of the context) to conclude that in every case, where a submission / argument is not considered, rectification will not be the remedy available. The Tribunal ignored the fact that the above observation of this Court in Ramesh Electrical (supra) was on the basis that for a rectification application to be maintainable, the mistake should be apparent from the record. In this case, the mistake / error in not dealing with the fundamental submission in appeal is apparent from the record, as the submission that the distribution fee was not royalty was recorded and yet not dealt with in the order. Thus the decision of this Court in the case of Ramesh

Electrical (supra), turned on its own peculiar facts and as held by the Supreme Court that a Judgment of the Court is not to be read as a statute. The factual background of the case is to be considered while applying the judgment and holding oneself bound by the rule of precedents. (Please see **CCE, Calcutta Vs. Alnoori Tobacco Products¹** and **Escorts Ltd Vs. CCE, Delhi-II²**)

10. In view of the above position in facts and law, the Tribunal ought to have decided the issue of the character of distribution fees is royalty or not, as all facts were available before it and submissions also made, rather than remanding the issue to TPO. Besides non-consideration of the above basic submission made at the hearing as recorded, is clearly a mistake apparent from the record. The Tribunal ought to have allowed the rectification application dated 5.10.2017 and recalled the order dated 26.7.2017 for fresh consideration of the appeal.

11. Therefore, we allow the petition and also set aside the

1 2004 (170) ELT 135 (S.C.)

2 2004(173) ELT 113 (S.C.)

order dated 26.7.2017 passed under Section 254(1) of the Act by the Tribunal. The appeal is restored to the Tribunal for fresh disposal in accordance with law.

12. Petition allowed in above terms. No order as to costs.

[M.S. SANKLECHA, J.]

[AKIL KURESHI, J]