IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI I BENCH, MUMBAI

[Coram: Pramod Kumar VP and Amarjit Singh JM]

ITA No. 2195/Mum/2017
Assessment year: 2015-16

Volkswagen Finance Pvt Ltd **…….....Appellant**
A Wing, 3r floor, Silver Utopia,
Cardinal Gracious Road, Chakala, Andheri East,
Mumbai 400 099 [PAN: ACCV9272G]

Vs

Income Tax Officer
International Taxation Ward 4(3)(2), Mumbai **…….....Respondent**

Appearances by

Nitesh Joshi *along-with* **Manoj Dixit** *for the appellant*
Avanessh Tiwari *for the respondent*

Dates of hearing of the appeal : February 6, 2020
Date of pronouncing this order : March 19, 2020

O R D E R

Per Pramod Kumar, VP:

[1] This appeal challenges correctness of the order dated 8th February 2016, passed by the learned Commissioner (Appeals) in the matter of tax withholding demands raised by the Assessing Officer under section 201 r.w.s. 195 of the Income Tax Act, 1961, for the assessment year 2015-16.

[2] While the assessee has raised a large number of grounds of appeal, core issue requiring our adjudication in this case is whether or not the assessee appellant was required to withhold tax from part payment of US $ 4,40,000, in respect of an appearance made by Nicholas Cage, an Oscar award winning celebrity, for an appearance made by him at Dubai (UAE) in a product launch event for promoting business of the assessee in India.

[3] The relevant material facts, in the light of material on record, appear to be like this. The assessee before us is an Indian company. The assessee had made a payment of US $ 4,40,000, in respect of a celebrity appearance at Dubai, and the assessee did not withhold any tax from the said remittance. The Assessing Officer (TDS) probed the matter in some detail. It was found that an entity by the name of Audi India, a division of Volkswagen Group Sales India Ltd, and the assessee jointly planned an event in Dubai for launch of Audit A8L facelift model (***Dubai Audi A8L launch event***, in short). The purpose of this event was launch of a new model of Audi car, i.e. Audi A-8L, for the Indian market, but the launch event took place, on 3rd May 2014, at the Pavilion, Armani Hotel, Dubai. Kim Productions Inc, a company incorporated in the USA, agreed to facilitate the appearance of Nicholas Cage (hereinafter referred to as ***'the international celebrity'***) for three consecutive hours, and it was a consideration of this appearance, that the assessee paid US $ 4,40,000, plus other incidentals such as costs of two return first class airline tickets from Los Angeles, costs of stay and local transportation in Dubai, and costs of hair and make up of the celebrity. As a part of this appearance, the celebrity was to be driven into the venue as passenger in the new Audi 8L as a part of the unveil process, engage with the Audi India Director in a short Q&A session, join the Audi India director in socializing with the guests at the event, including meet and greet photographs and autographs- as reasonably required, and interact with select members of the Indian media. The assessee and Audi India were, as a part of this arrangement, had full rights to use "**free non-exclusive promotional (e.g, not in connection with paid advertising, including, without limitation, in TV commercials, bill boards, and paid advertising etc) usage of all the event footage/ material/ films/ stills/ interviews etc of the above mentioned launch event capturing celebrity's presence across all platform for below the line publicity on internet, in press releases, news reports, social media,**

Audi Magazine etc for a period of 6 months from the date of launch event, and for an unlimited period of time only for internal usage with the Volkswagen Group". In an undated, though signed, note filed during the course of hearing, the assessee has explained the event as follows:

> **Audi India launched the 2014 A8L facelift for exclusive Indian customers for special invite in Dubai. The Company had flown about 150 people mostly prospective buyers and some journalists to the launch ceremony.**
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> **Audi A8L is a luxury brand and holds a prestigious status or brand value in the market. Hence the launch was a lavish event which was held in the world's tallest building with Vegas style fountain shows, a world class illusionist and guest appearance by a celebrity. The entire event was designed in a manner to give a feeling of luxury and exclusiveness to Indian customers. Audi India invests significantly in branding through marketing initiatives. It was a marketing strategy to call customers/dealers from India to Dubai for this event and also to call celebrities for the event.**
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> **This model is imported from Germany as a completely built unit with customization in line with customer's requirements. It takes around 4-5 months for cars to be shipped from Germany to India. New model of Audi A8 was available in Dubai and hence the launch event was planned in Dubai for showcasing to potential customers. Majority of the customers were HNI individuals or existing customers already driving a different variant of the Audi car.**
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> **Volkswagen Finance Private Limited (VWFPL) is a captive finance Company. Audi India and VWFPL are part of the same group - Volkswagen group. Such promotional events generate enquires of potential customers who in turn would like to purchase Audi cars and finance the same from VWFPL. In order to support mutual business VWFPL was part of this event.**
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> **The audio visual clips were available for use exclusively for Audi India and VWFPL.**

[4] However, on the ground that the event took place in Dubai, UAE, and the celebrity made his appearance at the event in Dubai, it was claimed that this event did not rise to any tax implications in India so far as the event and the celebrity appearance was concerned. The stand of the assessee was that no tax was deductible from this payment as the celebrity or his agent were not carrying out any activities in India, in relation to the appearance fees received from the assessee, and as such the appearance fee could not be treated as accruing or arising

in India, or deemed to be accruing or arising in India. It was also claimed that as the income was not taxable under the Income Tax Act, 1961, there was no occasion to claim any treaty benefits. The Assessing Officer, unimpressed with these arguments, proceeded to hold that the payment made to the celebrity was taxable in India, more particularly as royalty under section 9(1)(vi) of the Income Tax Act, 1961. He also examined the provisions of article 12 of the India USA Double Taxation Avoidance Agreement [(1991) 187 ITR (Stat) 102]; ***Indo US tax treaty***, in short) and held that even this tax treaty provisions do not come to the rescue of the assessee either. Aggrieved, assessee carried the matter in appeal before the CIT(A) but without any success. Learned CIT(A) not only confirmed the action of the Assessing Officer but also proceeded to hold that the whole purpose of organizing an India centric event at Dubai was to **avoid "attraction of clause regarding income accruing or arising in India"**, and referred to the provisions of Section 9(1)(i). The impugned tax withholding demand under section 201 r.w.s. 195 was thus confirmed. The assessee is aggrieved and is in further appeal before us.

[5] We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of the applicable legal position.

[6] So far as a non-resident taxpayer is concerned, under section 5(2), there are only two situation in which the income can be taxed in India-(a)first, when the income is received or is deemed to be received in India in such year by or on behalf of such person ; and (b) second, when an income accrues or arises or is deemed to accrue or arise to him in India during such year. It is not even the case of the Assessing Officer, nor does it emerge out of the material on record, that the income was received or was deemed to have been received by the celebrity or his agent in India. The case of the Assessing Officer thus hinges on application of Section 5(2)(b), i.e. when an income accrues or arises in India or is deemed to accrue or arise in India.

[7] Section 5(2)(b) provides that subject to the provisions of this Act, the total income of any previous year of a non-resident includes, *inter alia*, all income from whatever source

derived which accrues or arises, or is deemed to accrue or arise, to him in India during such year. So far as first limb of this statutory provision is concerned, it simply refers to income accruing or arising in India. In other words, to trigger taxation under first limb of Section 5(2)(b), as a plain look at the statutory provisions would show, the event resulting in accrual of income must take place in India. That is not the situation before us. What results in an income accruing or arising to the international celebrity is participation in the Dubai Audi 8 L launch event, and this event has taken place outside India. In strict legal sense of the expression 'accrues or arises', therefore, the income to the celebrity cannot thus be said to have accrued or arisen in India, but then, given the broader scheme of the Income Tax Act, even first limit of Section 5(2)(b) needs to be read with, *inter alia*, Section 9(1)(i) of the Act which extends the scope of income accruing or arising in India by including, in the deeming fiction, "**all income accruing or arising, whether directly or indirectly, through or from any business connection in India, or through or from any property in India, or through or from any asset or source of income in India, or through the transfer of a capital asset situate in India**". What essentially follows is that an income which, directly or indirectly, accrues or arises to a non-resident, though or from any business connection in India, is also chargeable to tax in India. Explaining the connotations of expression "through" appearing before the words "or from any business connection in India", Explanation 3 to Section 9(1)(i) clarifies "**that the expression 'through' shall mean and include and shall be deemed to have always meant and included 'by means of', 'in consequence of' or 'by reason of'**." To put it in simple words, when an income accrues or arises to a non-resident outside India but by means of, in consequence of, or by reason of, any business connection in India, it will also be taxable in India under section 5(2).

[8] As to what constitutes "business connection", it has not been defined under the Income Tax Act, 1961, and, rightly so, because as Kanga and Palkhivala, in their oft quoted and well revered work "The Law and Practice of Income Tax" (7th edition; published in 1976) also put it at page 200, "**the categories of business connection are incapable of exhaustive enumeration**". The definition of 'business connection', as set out in Explanation 2 to Section 9(1)(i) introduced by the Finance Act 2003, is also only an inclusive, and not

exhaustive, definition. Whatever are the instances of business connection set out in the available literature, are admittedly only illustrative in nature.

[9] In the landmark case of **CIT Vs R D Aggarwal & Co [(1965) 56 ITR 20 (SC)]**, Hon'ble Supreme Court had an occasion to deal with a situation in which an Indian assessee was representing, as a commission agent, two entities, based in Belgium and Italy respectively, and, based on this association, the Assessing Officer proceeded to bring to tax income, computed @5% on exports to India, of these two foreign entities as, in his view, "there subsisted business connection between the non-resident exporters and the assessee". It was in this context that Hon'ble Supreme Court observed that that the Income Tax Act "**contains no definition of the expression 'business connection' and its precise connotation is vague and indefinite**" and that "**the expression 'business connection' undoubtedly means something more than business**" Their Lordships then made certain observations in the context what a business connection involves in certain situations, but then we are not really concerned about these observations as these observations were made in the respect of business carried on by the non-resident. Their Lordships did specifically observe that "**important cases which have arisen before the courts may briefly be reviewed, not for evolving a definition applicable generally to all cases but with a view to illustrate what relations between the non-resident and activity in the taxable territories which contributed to the earnings of the income may or may not be regarded as business connections**". When such are the views of Hon'ble Supreme Court, it is beyond any dispute or controversy that the elements of business connection, as recognized in this case or, for that purpose, in the similar judicial precedents, cannot fetter what could be considered to be a business connection. Elsewhere in this very judgment, Hon'ble Supreme Court has observed that "**a relation, to be a 'business connection', must be real and intimate, and through or from which income must accrue or arise, whether directly or indirectly, to the non-resident**". What could, therefore, be a business connection is not only a tangible thing like people or businesses, but, as aptly put by Hon'ble Supreme Court, a relationship too, as long as such a relationship, real or intimate, results, directly or indirectly, an income accruing or arising to the non-resident. Explanation 3 to Section 9 (1)(i) further makes it clear that any income accruing or arising through a business connection will include an income accruing or

arising **'by means of', 'in consequence of' or 'by reason of'**' a business connection in India. In other words, therefore, when an income accrues or arises to a non-resident outside India, but by the reason of any business connection in India or in consequence of any business connection in India, such an income shall also be taxable in India under section 5(2)(b).

[10] This takes us to the question whether the income accruing to the international celebrity, on account of participation in Audi A8L launch event hosted in Dubai, has accrued or arisen, whether directly or indirectly, through or from any business connection in India- particularly when this event is specifically targeted for India based customers of a group of Indian entities- namely Audi India and its financing affiliate i.e. the assessee before us, is admittedly for "below the line publicity on internet, in press releases, news reports, social media" for the benefit of these entities, and the costs of the event is borne by these entities as expenditure in furtherance of their business interests in India.

[11] It is an agreed position that the Audi A8L facelift launch event was India-centric and the entire expenses of the launch event were treated as expenses of Indian entities, namely this assessee and Audi India. The event has physically taken place in Dubai, UAE, but, beyond any dispute or controversy, the benefits of this event were to accrue to the assessee and Audi India. Going even by the information furnished by the assessee, the company had flown 150 persons, mostly prospective buyers and some journalists, to Dubai. Whether these persons included prospective buyers or not, these persons did not include Indian socialites and page three personalities, whose association with the event had the significant potential of having subliminal influence on the prospective buyers of this car in India. Obviously, the cost of event was so high, admittedly running into tens of crores of rupees, that this expense could not have been justified for influencing car purchasing decisions of these less than 150 persons. To put a question to ourselves, what were the benefits of this event, held in Dubai, to the Indian assesses. In our humble understanding, and as the MoU with celebrity's agent unambiguously indicates in so many words- as noted earlier in this order, the predominant benefit of this event was "below the line publicity on internet, in press releases, news reports,

social media" for Audi 8L facelift in India. The target audience was in India, the potential customers were in India, the intended benefits were in India, and yet the event was in Dubai UAE. The question then arises whether the income on account of this launch event in Dubai can be said to accrue or arise in India. Let us not forget the fact that the celebrity was to make an appearance in UAE event but admittedly the event was for below the line publicity in India. The expression 'below the line publicity' has been variously described as targeting "a specific group of potential consumers", "highly targeted, with advertisements being created keeping in mind the demographic and psychographic characteristics of particular customer segment", and "an advertising strategy where products are promoted in media other than mainstream radio, television, billboards, print, and film formats". These activities are not in vacuum. These activities have, as their targets, Indian customers- and certainly some more customers than the potential customers if at all included in the contingent of 150 persons flown to Dubai for being present at the launch event. Of course, the scheme of this below the line publicity event seems to be that even the Indian socialites and guests, directly or indirectly, ended up being the instruments of influencing the potential customer behaviour- rather than being potential customers in their own right. It was thus a unique situation in the sense that while the event, in which appearance was made by the celebrity, was held outside India, all the benefits accrued to the assessee in India, and it was on account of these benefits to the assessee that the international celebrity was paid for his participation in the Dubai Audi 8 L facelift event. The income thus cleared accrue and arises, on the facts of this case, by the reason of business connection in India. We find, as the assessee has admitted in so many words in the written note, that the event in Dubai was India centric, that the event was for the purpose of promoting business in India, that such promotional events generate enquires of potential customers in India who in turn would like to purchase Audi cars in India and finance the same from the assessee company, and that it was for this reason that the assessee company was a part of this event. It is also an admitted position that "the audio-visual clips were available for use exclusively for Audi India and VWFPL". When these audio-visual clips were for exclusive use of the assessee and the Audi India, and both of these entities have operations only in India, the use of this event, as a tool of marketing, was only in India. We have also noted that in the terms of MoU signed between the assessee and celebrity's agent, predominant benefit to the assessee was "usage of all the event footage/ material/ films/ stills/ interviews etc of the above mentioned launch event capturing celebrity's presence across all

platform for below the line publicity on internet, in press releases, news reports, social media, Audi Magazine etc". There is also no dispute about the position that all expenses are borne by the assessee, and its associate Audi India, and claimed as a deduction under section 37(1), which essentially implies that the expenses, even by assessee's admission, has been incurred "wholly and exclusively for the purposes of business" of the assessee and the business of the assessee is only in India. Viewed thus, when we examine relation between Indian business and participation in an event by the celebrity at Dubai launch event, we have no doubt that it is because of this relationship between event in Dubai and business of the assessee in India that the income has accrued and arisen to the celebrity making appearance in Dubai launch event. There cannot be any justification for an assessee in India, doing business only in India, paying money to a celebrity to make an appearance in an event in Dubai unless such an appearance benefits the business of the assessee in India, and the fact that it did benefit the business interests of the assessee in India is not even in doubt or controversy. As a matter of fact, there is an inherent dichotomy in the approach of the assessee inasmuch as, on one hand, he claims the expenses in the Dubai launch event as expenses incurred for the purposes of business in India, which is the only geographical location where the assessee does business, and yet he claims that the Dubai launch event does not have business connection in India. Once the expenses for holding this event is in connection with business in India, it is only a natural corollary thereto that income from participation, in this event, to a non-resident has a business connection in India. As we hold so, we need not influenced by the observations in available judicial precedents on what constitutes business connection in India, for the simple reason that none of these judicial precedents deals with a situation like one that we are dealing with, and, as very aptly put by Hon'ble Supreme Court in R D Agarwal's case (supra), that the review of the judicial precedents is "**not for evolving a definition applicable generally to all cases but with a view to illustrate what relations between the non-resident and activity in the taxable territories which contributed to the earnings of the income may or may not be regarded as business connections"**. None of the judicial precedents before us had an occasion to examine an intangible business connection, and, there is thus no guidance available on this issue. The business connection in India, on the facts of the present case, is intangible inasmuch as it is a relationship rather than an object, but it is a significant business connection which has resulted in income accruing and arising

to the non-resident, but for which there would not have been any business expediency in making the impugned payment to the non-resident celebrity.

[12] Learned counsel for the assessee has relied upon a series of judgments by Hon'ble Courts above, and all these judgments are said to support the proposition that in order to be taxable in India, the assessee must carry out the economic activity in India or render the related services in India. We do not think this line of reasoning has much relevance to the issue before us, and that issue is whether participation in an India centric event, carried out at the instance of Indian entities for furtherance of their business interests in India and specifically targeted for the Indian customers by way of below the line publicity such as on internet, social media, press releasee and news reports etc, can be said to be taxable in the hands of a non-resident under section 5(2)(b). While we have highest respects for the judicial precedents, we do not think given the peculiar question that we are dealing, these judicial precedents will have any application. The business models were always constantly changing, but post the internet and social media revolution, the business models have changed so drastically that the very fundamental rules of game have changed. The very concept of 'below the line publicity' is something quite fundamentally new, and, beyond any dispute or controversy, none of the judicial precedents cited before us has anything to do with such contemporary instruments influencing customer behaviour. Given the peculiar situation that we are dealing with, and finding that the principles laid down in the context of rather primitive trade, commerce or services are not of much relevance in the present context, we are not inclined to deal with these judicial precedents in any detail. In any case, as observed by Hon'ble Supreme Court in the oft quoted case of **CIT Vs Sun Engineering Works Pvt Ltd [(1992) 198 ITR 297 (SC)]**, "**It is neither desirable nor permissible to pick out a word or a sentence from the judgment of this Court, divorced from the context of the question under consideration and treat it to be the complete 'law' declared by this Court. The judgment must be read as a whole and the observations from the judgment have to be considered in the light of the questions which were before this Court**". We have carefully perused judicial precedents on this issue, and we do not find any decision which deals with, directly or indirectly, the issue that we are dealing with or something even closely similar to it. In our humble understanding, the issue requiring our adjudication, is a

new issue and it is required to be dealt with us on the first principles, and that is exactly what we have done.

[13] Learned counsel has then pointed out that the case of the Assessing Officer was confined to taxability as royalties under section 9(1)(vi) and it was not open to us to go beyond the case made out by the Assessing Officer. This plea, however, proceeds on the misconception of facts and the legal position. Undoubtedly, our powers are restricted to dealing with the issues raised before us. While on this aspect of the matter, it is useful to remember, as was held by the Hon'ble Guwahati High Court in the case of **Jeypore Timber & Veneer Mills (P.) Ltd. v. CIT [(1982) 137 ITR 415 (Gau)]** as follows:

> "Parliament in its wisdom has conferred upon the Tribunal broad and sweeping powers but at the same time controlled the powers by requisite constriction. The provision of section 254 of the Act is an enabling as well as disabling provision. A passing glance creates an impression that the Tribunal has been endowed with plenary power under section 254 of the Act to pass any order as it thinks fit. However, it is not so, as it will appear in the expression 'such orders thereon as it thinks fit', in section 254. The word 'thereon' in the expression is a serious constriction on the exercise of power by the Tribunal. **It can decide only the points or grounds raised before it** whereas the IT authorities can travel beyond the grounds and consider the entire assessment. **The Tribunal has no power for the enhancement of any penalty or assessment nor can it remand a case with the object of such enhancement**."
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> *[Emphasis, by underling, supplied by us now]*

[14] Clearly, there cannot be any dispute that once an issue is raised before the Tribunal, in accordance with the law, the Tribunal is duty bound to adjudicate upon the same. Of course, it should not result in the enhancement of assessment or it should not be decided without affording due opportunity of hearing to the assessee. The matter was heard at length on 29th January 2020, 31st January 2020 and 6th February 2020, and it was specifically put to the assessee as to why, in the light of intimate business connection with India, the income to the international celebrity should not be brought to tax under section 5(2)(b). We may also

mention that this issue was raised by the assessee itself, in the second ground of appeal which is reproduced below for ready reference:

> **GROUND II: NON TAXABILITY OF APPEARANCE FEED PAID TO THE CELEBRITY UNDER THE ACT**
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> **2.1 Based on the facts and circumstances of the case and in law, the learned CIT(A) has erred in not appreciating that the appearance fees paid to the celebrity by the appellant was in the nature of business income of the celebrity not liable to tax in India under section 5 read with section 9(1)(i) of the Act, in the absence of celebrity's connections/ operations in India.**
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> **2.2 Without prejudice to Ground no. 2.1 above, the learned CIT(A) has erred in incorrectly presuming that the event was held by the appellant outside India only to take position of not applying WHT on payment of appearance fees to the celebrity on the premises that the appearance of the celebrity was outside India.**
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> **2.3 The appellant prays Hon'ble Tribunal to direct the learned ITO to treat the payment of appearance fees paid to the celebrity as not taxable in India under the Act.**

[15] The assessee has thus himself raised this issue and we have adjudicated upon the same. Whether it was raised by the Assessing Officer or by the CIT(A) does not make any difference. The subject matter of the dispute is the same, i.e. the tax withholding obligations in respect of payments made to an international celebrity in a product launch event outside India is the same, and the assessee has been heard at length, spread over three sessions, in respect of the same. Once we hold that the income in question was taxable in India under section 5(2) read with section 9(1)(i), it is not really necessary to deal with taxability under the other provisions of the Act. Suffice to say that under the provisions of the Act, the payment in question is taxable in India in the hands of the non-resident. It is nobody's case, nor can it be anyone's case, that the decision of the Tribunal resulted in an enhancement. What has been done is to adjudicate upon the question whether the assessee had the liability to withhold the tax from the payment in question. The assessee has not been saddled with a new tax withholding liability. In any case, while examining powers of the Tribunal to deal

with an aspect of the matter which has not been raised by the Assessing Officer, we may usefully refer to the following observations made by a Special Bench of this Tribunal, in the case of **Tata Communications Ltd Vs JCIT [(2009) 121 ITD SB 384 (Mum)]**:

> ……. The issue before the Tribunal was whether the assessee was entitled to relief under the above provision. It was bounden duty of the Tribunal to consider and decide the above issue and to examine that each of the condition specified by the section is satisfied. The question relating to satisfiction of the conditions could even be raised by the respondent (Department) in appeal before the Tribunal and it was so raised. The position on this question, relating to power and jurisdiction of the Tribunal is more than clear as per decision of Allahabad High Court in the case of *Phool Chand Gajanand* v. *CIT* [1966] 62 ITR 232 which has been applied by Full Bench of jurisdictional High Court in the case of *Ahmedabad Electricity Co. Ltd.* v. *CIT* [1993] 199 ITR 351 (Bom.). Their Lordships have discussed in detail, as to how powers of the Tribunal are to be exercised.
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> In the case of *Hukumchand Mills Ltd.* v. *CIT* [1967] 63 ITR 232 (SC), which has been followed by the Hon'ble Bombay High Court's Full Bench judgment in the case of *Ahmedabad Electricity Co. Ltd.* (*supra*). Their Lordships of Hon'ble Supreme Court were in seisin of a situation in which it was argued before Their Lordships that "the Tribunal was not competent to go into the question whether the provisions of paragraph 2 of Taxation Laws Order were applicable to the present case and the respondent (*i.e.*, the revenue) should be allowed to raise this contention for the first time before the Tribunal". In essence, therefore, one of the qualifying condition, which was not considered by the Assessing Officer or Appellate Commissioner, was disputed for the first time before the Tribunal. It was in this background, and dealing with the powers of the Tribunal under section 33(4) of the 1922 Act, which are exactly the same as under section 254(1) of the present Income-tax Act, 1961, Hon'ble Supreme Court, *inter alia*, observed as follows :—
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> > "8. ...Tribunal had jurisdiction to permit the question to be raised before it for the first time in appeal. The power of the Tribunal, in dealing with the appeals are expressed in section 33(4) in the widest possible manner....
> >
> > 9. The word 'thereon' in section 33(4) of the 1922 Act, of course, restricts the jurisdiction of the Tribunal to the subject-matter of appeal. The words 'pass such orders as the Tribunal think fit' include all the powers (except possibly enhancement) which are conferred on AAC under section 31. ...
> >
> > 10. In the present case, the subject-matter of appeal before the Tribunal was the question as to what should be the proper written down value of the building, machinery etc. of the assessee for calculating depreciation under section 10(2)(*vi*) of the Act. It was certainly open to the Department, in the appeal filed by the assessee before the Tribunal, to support the findings of the AAC with regard to written down value on any of the grounds decided against it.... We are accordingly of the view that the Tribunal had jurisdiction to entertain the argument of the Department in this case and direct the ITO to find out whether any depreciation was actually allowed.... and whether such depreciation should be taken into account for computing the written down value."

> **16.** The facts of the case before us are materially similar to the above case before the Hon'ble Supreme Court. In the present case also, the condition regarding providing eligible telecommunication services was not discussed by the Assessing Officer and the Commissioner (Appeals) and yet this issue was taken up by the Departmental Representative before us. The same was the situation in *Hukumch and Mills Ltd.'s* case (*supra*) wherein, as noted by the Hon'ble Supreme Court in paragraph 4 of their judgment, "it was urged before the Tribunal by the department that although the ITO had not considered the provisions of paragraph 2 of section 2 of Taxation Laws Order, the said provisions were applicable in the present case and certain amounts of depreciation, which are allowed under the Industrial Tax Rules, which had the force of law in Indore State, were required to be deducted in arriving at written down value of the assets of the assessee". This plea was accepted by the Tribunal and the Hon'ble Supreme Court confirmed the action of the Tribunal in doing so. In this view of the matter, not only that admitting the plea regarding the assessee not rendering eligible telecommunication services does not suffer from any mistake apparent on record, but it does not suffer from any mistake at all. The stand so taken by the Tribunal is clearly in conformity with the law laid down by the Hon'ble Supreme Court. Once the Tribunal is called upon to examine as to whether or not the assessee is entitled to a claim of deduction, there is no escape from its duty to ensure that the requirements of section are fully complied with and the Tribunal cannot shun away from its duty to examine all the eligible conditions merely on the ground that some of these conditions are not specifically rejected by the authorities below. As is clearly evident from the observations made by the Assessing Officer, which have been extracted hereinbefore, the claim is rejected on one ground but such a rejection cannot be construed to mean that all other conditions are taken as complied with.

[16] Quite clearly, therefore, where Assessing Officer has held the taxability of an income, on ground ‘A’ at the assessment stage and the same taxability is sought to be justified on ground ‘B’ at the appellate stage, there is no infirmity in the stand so taken. In any case, once a specific ground of appeal is taken, and the assessee fails in that ground, the other issues are rendered academic inasmuch as whether these are decided against the assessee or not, that would not make any difference to the ultimate outcome of the appeal. However, this aspect of the matter is not even relevant in the present context inasmuch as the assessee had raised a specific ground of appeal which was disposed of by us. Once the taxability is upheld on this ground, all other aspects of taxability under the domestic law are academic and need not be adjudicated upon.

[17] Learned counsel has also laid lot of emphasis on the scheme of Section 115 BBA which provides for taxation “an entertainer, who is not a citizen of India and is a non-resident, includes any income received or receivable from his performance in India”. It is

submitted that this refers to the "performance in India" implying thereby that performance outside India is outside the ambit of taxation in India. Having heard the rival contentions on this plea and having considered material on record, we are unable to share this perception. Section 115 BBA deals with the mode and rate of taxation in the hands of non-resident sportsmen, non-resident sports associations and institutions, and non-resident entertainers. These modalities of taxation, in our considered view, cannot be treated restrictions on chargeability to tax under section 5(2)(b). In case an income is not eligible to specified treatment under section 115BBA, on account of not fulfilling the criterion set out therein, such an income is at best taxable in the normal course in the hands of the non-resident entertainer in India. We reject this plea as well.

[18] So far as treaty protection is concerned, limited plea of the learned counsel is that since the income on account of participation in a product launch event outside India, as in this case, is not covered by any specific provisions- including article 18 dealing with income of the entertainers, under article 23(1) of Indo US tax treaty, it can only be taxed in the residence state. Our attention is invited to the wordings of article 23(1) to the effect "**Subject to the provisions of paragraph 2, items of income of a resident of a Contracting State, wherever arising, which are not expressly dealt with in the foregoing Articles of this Convention shall be taxable only in that Contracting State**". This plea is fit to be only noted and rejected for the simple reason that article 23(3), which is a *non obstante* clause vis-à-vis article 23(1), provides that "**notwithstanding the provisions of paragraphs 1 and 2, items of income of a resident of a Contracting State not dealt with in the foregoing articles of this Convention and arising in the other Contracting State may also be taxed in that other State**". What essentially follows is that article 23(3) allows the country in which the income arises, to tax such income if its law so provides. The scheme of the treaty is thus unambiguous inasmuch as the treaty protection from source taxation is not available to an income which is not covered by the specific articles of the treaty in question. We, therefore, reject the claim of the assessee on treaty protection under article 23(1) against source taxation of income in question.

[19] In the light of the above discussion, we are of the considered view that the income embedded in payment to the international celebrity, for participation in Dubai A8L launch event, was taxable in India. As a corollary to these findings, in our considered view, the assessee had the liability to withhold taxes from payment made for appearance made by the celebrity at Dubai A8L launch event, and the CIT(A) was justified in upholding impugned demands raised under section 201 r.w.s 195 of the Income Tax Act,1961. We, therefore, confirm the orders of the authorities below and decline to interfere in the matter.

[20] As we part with the matter, we may only add that as the business models are constantly evolving, and as the rapid communication modes such as internet and social media have completely transformed the way businesses communicate, it is time that the law is seen in tandem with the ground realities of the business world, rather than in the strict confines of what was decided in the judicial precedents, in the context of a different business world when these ground realities did not exist. Today, virtual and intangible business connections are perhaps far more critical, important and commonplace than the conventional brick and mortar business connections half a century ago, and, therefore, to disregard these business connections as a real and intimate business connection leading to earning of income by the non-residents, only because Hon'ble Courts, while delivering judgments several decades ago, could not visualize the same and hedge their observations about such possibilities, will certainly be travesty of justice. Let us, in this respect, not lose sight of Hon'ble Supreme Court's guidance in **Mumbai Kamgar Sabha v. Abdulbahi Faizullabhai AIR 1976 SC 1455** wherein Their Lordships have, in their inimitable and felicitous words observed thus, "**It is trite, going by Anglophonic principles that a ruling of a superior court is binding law. It is not of scriptural sanctity but of ratio-wise luminosity within the edifice of facts where the judicial lamp plays the legal flame. Beyond those walls and *de hors* the milieu we cannot impart eternal vernal value to the decisions, exalting the precedents into a prison house of bigotry, regardless of the varying circumstances and myriad developments. Realism dictates that a judgment has to be read, subject to the facts directly presented for consideration and not affecting the matters which may lurk in the dark**." We have highest respects for the rulings by the higher judicial forums, but it would indeed be inappropriate to use the words and expressions employed in these rulings, in

isolation, as complete exposition of law and as a blind man's walking stick, rather than luminosity of judicial knowledge with the benefit of which we have to perform our duties of office.

[21] In the result, the appeal is dismissed. Pronounced in the open court today on the 19th day of March, 2020.

Sd/xx ***Sd/xx***
Amarjit Singh **Pramod Kumar**
(Judicial Member) (Vice President)

Mumbai, Dated the 19th day of March, 2020

Copies to:	*(1)*	*The appellant*	*(2)*	*The respondent*
	(3)	*CIT*	*(4)*	*CIT(A)*
	(5)	*DR*	*(6)*	*Guard File*

By order

Assistant Registrar
Income Tax Appellate Tribunal
Mumbai benches, Mumbai