

## **Consideration paid for purchase of advertisement space does not amount to royalty: ITAT Chennai**

ESPN Digital Media (India) Pvt. Ltd. (ITA Nos.: 1070, 1071, 1072 & 1073/CHNY/2018)

Facts:

1. ESPN India purchased advertising space on websites owned and hosted by ESPN UK on servers outside India. Thereafter, ESPN India sold the advertisement space to advertisers. ESPN India was required to make payments to ESPN UK as per the Re-seller Agreement.
2. The AO contended that ESPN India was conferred a right to upload advertisements on ESPN UK's website, thus the payment made by ESPN India to ESPN UK amounted to royalty on which the assessee should have deducted TDS under Section 195 of the Income Tax Act.
3. As per clause (iva) of Explanation 2 to Section 9(1)(vi) of the Income Tax Act and Article 13 of the India-UK DTAA, the term 'royalty' means consideration for the use or the right to use any industrial, commercial or scientific equipment.
4. ESPN India contended that no right, property or information was transferred from ESPN UK to ESPN India and thus the requirements of Section 9(1)(vi) of the Income Tax Act were not satisfied.

The Chennai ITAT held as below:

1. The Re-seller agreement did not provide ESPN India any "right to use" any industrial, commercial, or scientific equipment nor was the website or the server under the control of the assessee ESPN India.

2. The Hon SC in the case of Engineering Analysis Centre for Excellence versus CIT (2021), had held that, unilateral amendments that expand the definition of royalty under domestic law cannot be applied to the Tax Treaties.

3. Provisions of the Equalisation Levy were introduced on online advertisements by the Finance Act, 2016, as a stand-alone enactment outside the Income Tax Act. This was done, since online advertisements were not chargeable to tax.

4. Thus, the consideration paid by ESPN India for purchase of advertisement space did not amount to 'royalty' and, therefore, was not taxable.