



Taxability of Receipts from Live Transmission Rights as Royalty under the Domestic Law: A Critique of the Tax Tribunal Decision in the Fox Network Group Case

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ABSTRACT

The recent ruling of an Indian tax tribunal in the Fox Networks Group case seeks to undo the 2012 amendment by India, which retrospectively clarifies that the term 'process' in India's domestic law would include transmission by satellite, cable, optic-fiber or by any other similar technology, irrespective of whether such process is secret or not. This article intends to examine and review the law on the subject and jurisprudentially critique the Fox Networks Group decision in the light of the principles evolved to interpret the concept and context of royalty, both internationally as well as at the domestic level, post amendment.

Keywords: *Royalty; Indian tax law; Transmission rights; Transmission by satellite; Cable; Optic-fiber; Fox networks case.*

1.0 Introduction

1. Media rights to live telecast various events, including rights to rebroadcast, and the consideration paid for these rights, assume significance for its taxability under the royalty provisions of India's domestic law. Courts in India,¹ however, took the view that the consideration for transfer of live transmission rights cannot constitute a 'work' in which copyright can subsist. These views reverberated the OECD treaty reasoning and the approaches of international tax law scholarship on the subject. Contextually, the OECD Model Convention contains a restrictive phraseology to define royalty as consideration for the 'use of, or the right to use any copyright of literary, artistic or scientific work including cinematograph films or a secret formula or process.'² This

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OECD view of 'royalty' being interpreted in the context of copyrights laws continued to colour judicial reasoning all over the world. A Federal Court of Australia, for instance, declared that while determining taxability in Australia on royalty earned by a Switzerland resident, the meaning under the copyright law of Australia will apply.³

2. The Indian courts, too, fell for the same view, despite the domestic law incorporating a wider prescription for royalty, which included any consideration paid for transfer of any rights through any 'process' within the ambit of 'royalty'. A legislative intervention in India in 2012, therefore, had to clarify that the expression 'process' in Section 9 of the Income Tax Act, 1961 would include transmission by satellite, cable, optic-fiber or by any other similar technology, whether or not such process is secret. Despite the clarificatory amendment, the tax tribunal,⁴ in *Fox Networks Group Singapore Pte Ltd v ACIT*⁵ proceeded on the basis that a live feed cannot constitute a 'work' in which copyright can subsist and based its reasoning on the earlier decisions⁶ referred *supra*. The object of this article is to jurisprudentially critique the *Fox Networks Group* decision in the light of the principles evolved to interpret the concept and context of royalty, post amendment.

2.0 Meaning of 'Royalty'

2. A royalty, received by a non-resident, could be taxable in India under the source rule contained in section 9 of the Income Tax Act, 1961 ('the Act' for short). Additionally, the payer may be obligated to withhold tax at source, despite there being a tax treaty between the source country and the resident country. Under section 9(1)(vi) of the Act, read with Explanation 2(i), 'royalty' has been defined as any consideration for transfer of all or any rights (including the granting of a license) in respect of patent, invention, model, design, secret, formula, process, trademark or similar property.

3.0 The 2012 Amendment

3. A retrospective amendment, effected *vide* the Finance Act, 2012, specifically inserted Explanation 6 in order to clarify that the expression 'process' used in Explanation 2 would include and should be deemed to have always included transmission by satellite (including up-linking, amplification, conversion for down-linking of any signal), cable, optic-fiber or by any other similar technology whether or not such process is secret⁷. Thus, this clarificatory explanation is intended to embrace within its ambit, the license fee paid for transfer of any rights for transmission by satellite by any process, whether secret or not. Thus, under the amended law, any consideration or licence fees

received for transfer of rights of transmission would, *ipso facto*, partake the character of royalty in terms of the domestic law of India referred to above.

4.0 The Verizon Communications Case

4. The effect of this amendment came to be explicated by the Madras High Court in *Verizon Communications Singapore (P) Ltd v ITO*⁸ in the following terms:

“33. Faced with the decisions of the Authority for Advance Ruling, Explanations 4 and 5 were inserted under Finance Act, 2012, with effect from 01.06.1976. Under Explanation 5, the Legislature sought to clarify the definition of 'royalty' to include the consideration in respect of any right, property or information whether or not possession or control of such right, property or information is with the payer; such right, property or information is used directly by the payer; the location of such right, property or information is in India. *Explanation 6 further clarifies that the expression 'process' included transmission by satellite (including up-linking, amplification, conversion for down-linking of any signal), cable, optic fibre or by any other similar technology, whether or not such process is secret.* Thus, after the amendment introduced in the year 2012, with effect from 01.06.1976, irrespective of possession, control with the payer or use by the payer or the location in India, the consideration would nevertheless be treated as 'royalty'. The decisions cited, hence, cannot be pressed into service to understand the scope of the expression 'royalty'.”

[Emphasis Supplied]

5.0 The Viacom 18 Media Case

5. This amendment, once again, came in for consideration before the Mumbai Bench of the ITAT in *Viacom 18 Media (P) Ltd v ADIT*,⁹ where a question arose whether transmission by satellite by transponder, including uplinking, amplification, conversion by downlinking of signals was covered within definition of 'process' and payments made for use/right to use of 'process' is 'royalty' under the Act and the India-US Treaty. Following the judgment of the Madras High Court in *Verizon Communications*, the ITAT expounded the law on royalty in terms of Explanation 6 in the following words:

“12. *The introduction of Explanation 6 with retrospective effect w.e.f 1.6.1976 is an expression as intended by the legislature of the meaning of term process in the context of transmission by satellite is clarificatory in nature and, therefore, it does not amend the definition of royalty per se.* There is no quarrel on the point that any payment for use or right to use of process is in the nature of royalty as per the provisions of Article 12(3) of DTAA as well as the Explanation 2 of section 9(1)(vi) of the Act. Since the term process is not defined under the DTAA, therefore, by virtue of Article 3(2) of the Indo-US DTAA, the meaning of term process as defined in the Act would apply for this purpose. We say so as a word 'process' is a term of wide import and, accordingly, has to be construed in a generic sense. The same has in fact been the subject matter of elucidation by the Hon'ble apex court in a number of cases, viz. *Chillies Exports Ltd. v. CIT* [1997] 225 ITR 814/92 Taxman 68 (SC); *Ujagar Prints v. Union of India* [1989] 179 ITR 317 (SC); *Dy. CST, Board of Revenue (Taxes) v. Pio Food Packers* [1980] 46 STC 63 (SC), explaining the same in the context of processing of goods, which though would apply and hold. There is nothing in the language of the relevant provision/s of either the Act or of the DTAA constricting or restricting the scope of the term, which has thus to be examined and considered contextually. *As such, even de hors Explanation 6 to section 9(1)(vi), which only abundantly clarifies matters, a process could only reasonably be regarded as including a process/es as specified in Explanation 6 (supra). The same must, therefore, be regarded as within the contemplation of the said term and, thus, the term 'royalty' as defined by Explanation 2 to section 9(1)(vi) and Article 12(3) of the Indo-US DTAA. The foregoing, however, does not detract from the fact that the term 'process' being not defined, the extant definition of the same, i.e., as per the domestic law, shall apply in terms of Article 3(2) of the said treaty. The Hon'ble Madras High Court in the case of Verizon Communications Singapore (P.) Ltd (supra) while considering an identical issue has observed in para 33 as under:*

‘33. *Faced with the decisions of the Authority for Advance Ruling, Explanations 4 and 5 were inserted under Finance Act, 2012, with effect from 01.06.1976. Under Explanation 5, the Legislature sought to clarify the definition of 'royalty' to include the consideration in respect of any right, property or information whether or not possession or control of*

such right, property or information is with the payer; such right, property or information is used directly by the payer; the location of such right, property or information is in India. Explanation 6 further clarifies that the expression 'process' included transmission by satellite (including up-linking, amplification, conversion for down-linking of any signal), cable, optic fibre or by any other similar technology, whether or not such process is secret. Thus, after the amendment introduced in the year 2012, with effect from 01.06.1976, irrespective of possession, control with the payer or use by the payer or the location in India, the consideration would nevertheless be treated as 'royalty'. The decisions cited, hence, cannot be pressed into service to understand the scope of the expression 'royalty'.

13. *The expression process has been understood by the Hon'ble High Court in the light of Explanation 6 inserted by the Finance Act 2012 w.e.f 1.6.1976 and it was observed that the decision relied upon by the assessee cannot be pressed into service to understand the scope of expression royalty while distinguishing the decision of Hon'ble Delhi High Court in the case of Asia Satellite Communication Co. Ltd (supra),*

15. *Turning to the facts of the assessee's case the undisputed facts are that the payments in question was payable to the Intelsat is for user of transponder capacity by the assessee for telecasting/broadcasting of its various programmes on television channels including marketing and advertising airtime etc. The Hon'ble Delhi High Court in the case of Asia Satellite Communication Co. Ltd (supra) ousted the application of the term 'royalty' to the said transaction on the premise of territorial jurisdiction in-as-much as the said 'process' was not being used in India. However, the said decision endorses the conceptual understanding of term 'process', i.e., as explained by us at para 12 of this order. Even, the same, if at all, impinges on Explanation 5 to section 9(1)(vi), has nothing to do with Explanation 6 thereto. In fact, to our mind, it is not the situs of the property or the process, but of the rights therein, that is relevant. Without doubt, the rights in or for the use of the process vesting in the assessee are, thus, located in India, where at the signals are downlinked as also uplinked from. Again, the same has to be read in conjunction with Explanation below section 9(2), inserted on the statute by Finance Act, 2007 w.r.e.f 01.06.1976. The decision in the case of Asia Satellite*

Communication Co. Ltd (supra) is thus completely inapplicable in the given facts and circumstances of the case, even as clarified by the Hon'ble Madras High Court in the case of Verizon Communications Singapore (P.) Ltd. (supra). The use of transponder by the assessee for telecasting/broadcasting the programme involves the transmission by the satellite including uplinking, amplification, conversion for downlinking of signals which falls in the expression "Process" as per Explanation 6 of section 9(1)(vi). Hence the payments made for use/ right to use of process falls in the ambit of expression "royalty" as per DTAA as well as provisions of Income Tax Act."

[Emphasis Supplied]

5.1 Thus, it is manifest that consideration for transfer of right to transmission by satellite by any cable, optic fibre or any other similar technology would constitute 'royalty' in terms of Explanation 6 of section 9(1)(vi) of the Act.

6.0 The Fox Networks Group Case

6. Despite this retrospective legislative intervention in 2012, the Delhi Bench of the tax tribunal, in *Fox Networks Group*,¹⁰ came to hold that receipts from the sub-licensing of sports broadcasting rights in relation to live feeds would not be taxable as royalty. In doing so, the tribunal merely proceeded on the basis that a live feed cannot constitute a 'work' in which copyright can subsist and based its reasoning on the decision of the Delhi High Court in *Delhi Race Club*,¹¹ which came to be subsequently followed by the tribunal in *Neo Sports Broadcast (P) Ltd*¹² and *Nimbus Communications Ltd*,¹³ without adverting to the effect of Explanation 6 as elucidated by the Madras High Court in *Verizon Communications Singapore*¹⁴ and the Mumbai tribunal in *Viacom 18 Media*¹⁵ cited *supra*. This is evident from the following observations of the tribunal in *Fox Networks Group* cited *supra*:

"18. Any payment falling within the scope of 'royalty', there has to be some kind of transfer of right as defined in *Explanation 2*, It is not a case where any patent, invention, model, design, secret formula or process or trademark or similar property or imparting of any information or use of any patent invention *etc.* as defined in clauses (i) to (iva) has been transferred. *Here we have to examine, whether it is a transfer of a right in respect of any copyright, literary, artistic or scientific work including films or videotapes for use in connection with television or tapes for use in connection with radio broadcasting, etc, as defined in clause (v). Since*

these terms have not been defined in the Income-tax Act, therefore, reference has to be made to 'Indian Copyright Act, 1957'. Section 14 of Copyright Act defines copyright as the exclusive right to do or authorize a doing of specified Acts; and Section 13 provides that copyright shall subsist in work. Relevant portions of Sections 13 and 14 of the Copyright Act are reproduced herein below.

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20. *This precise issue had come up for consideration before the Hon'ble Jurisdictional High Court in the case of Delhi Race Club (supra) that, whether any payment for broadcast or live coverage will constitute copyright, and therefore, is taxable under the ambit of royalty in terms of, Explanation 2 to Section (1)(vi). The fact of that case was that assessee had made payment to other clubs/centers on account of live telecast of horse racing. The Assessing Officer has made the disallowance u/s. 40(a)(ia) on account of royalty paid to other centers for live telecast. According to him, the same was covered under section 194J. The contention of the Revenue before the Hon'ble High Court was:*

(i) clause (v) to Explanation 2 to clause (vi) of sub-section (1) of section 9 is not restricted to Copyright and the use of the words 'literary' and artistic' under clause (v) of Explanation 2 could not have been used for excluding 'copyrights' in areas of drama, music, etc,

(ii) Further, the live telecast of an event is outcome of 'scientific work' which makes telecast of event possible at a distant place over television and the transaction in the instant case covered.

(iii) The 'rights of broadcasting' was akin to 'copyright'.

The substantial question of law involved before the Hon'ble High Court was; "Whether payment for live telecast of horse race is a payment for transfer of any 'copyright' and as such 'royalty' or in the alternative whether the live telecast of the horse race would be termed as a 'scientific work' and payment thereof would be 'royalty.'

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22. The aforesaid principle and sequitur of the judgment of the Hon'ble Jurisdictional High Court clearly clinches the issue in favour of the assessee, wherein it has been categorically held that there is a clear distinction between a copyright and a broadcasting right, broadcast or live coverage which does not have a copyright, and therefore, payment for live telecast is neither payment for transfer of any copyright nor any scientific work so as to fall under the ambit of royalty under *Explanation 2* to Section 9(1)(vi).

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24. Further, on similar set of issues on live broadcast of sporting and cricket events, *ITAT Mumbai Bench in the case of Neo Sports Broadcast (P.) Ltd. (supra) and Nimbus Communication Ltd. (supra)* have held that there is no copyright on live events, and therefore, it is not taxable as 'royalty' Thus, we hold that the fee received towards live transmission cannot be taxed as 'royalty' in terms of Section 9(1)(vi) as held by the Hon'ble Jurisdictional High Court and also by the Co-ordinate Bench of *ITAT*. Accordingly, we decide this issue in favour of the assessee."

[Emphasis Supplied]

7.0 The Delhi Race Club Case

7. It may, however, be noted that the judgment of the Delhi High Court in *Delhi Race Club*¹⁶ is a decision relating to the assessment years 2007-08 and 2009-10 and the court did not consider the amended provision of royalty vide the Finance Act, 2012 and it, therefore, merely confined itself to the examination of whether the provisions of the Copyright Act contemplated 'broadcast' as a work in which 'copyright' subsists as the said provisions contemplate 'copyright' to subsist in literary, dramatic, musical and artistic work, cinematograph films and sound recording. The effect of the amended provisions was never brought to the notice of the High Court. The judgment in *Delhi Race Club*, therefore, is no authority for the proposition that license fees received from transfer of rights, including a process of transmission by satellite, would not constitute 'royalty' under the amended provisions contained in *Explanation 6* to section 9(1)(vi) of the Act. The tribunal in *Fox Networks Group*,¹⁷ therefore, erroneously placed reliance on the *Delhi Race Club* case.

8.0 The Neo Sports Broadcast Case

8. Likewise, *Neo Sports Broadcast*¹⁸ was a case prior to the 2012 amendment and, therefore, the tribunal did not have an occasion to examine Explanation 6 and merely proceeded to examine the issue from the perspective of the Copy Right Act. The following observations of RS Syal, AM, is illuminating in this regard:

“10. A bare perusal of the meaning of copyright as defined above transpires that it refers to exclusive right to do or authorize the doing of the specified acts in respect of "a work" or any substantial part thereof. The case of the learned Departmental Representative is that the consideration for live broadcasting falls within the sub-clause (iii) of section 14(a) of the Copyright Act, 1957 being 'to perform the work in public, or communicate it to the public'. The learned Departmental Representative contended that the playing of cricket match is akin to performing the work in public and hence the consideration for live broadcasting would amount to consideration for transfer of copyright of a work which is in the nature of performing the same in public. We are unable to accept this contention. The obvious reason is that the above sub-clauses (i) to (vii) of clause (a) need to be seen in conjunction with the section 14(1), which means that falling under any of the sub-clauses will make it copyright only if the prescription of the main provision of section 14(1) is satisfied. Looking at various sub clauses sans the sub-section (1) of section 14 itself is meaningless. It is only when the main mandate of section 14(1) is satisfied qua any of the sub-clauses (i) to (vii), that it assumes the character of copyright. When we read section 14 in entirety it emerges that doing of the acts specified in sub-clauses in respect of a 'work' amounts to copyright. The word "work" has been defined in section 2(y) of the Copyright Act, 1957 as under:

"work" means any of the following words, namely: -

- (i) a literary, dramatic, musical or artistic work;*
- (ii) a cinematograph film;*
- (iii) a sound recording;*

11. From the above definition of 'work' it is clear that the instant case does not fall either under clause (i) or in clause (iii) as the cricket match cannot be equated with either literary, dramatic, musical or artistic work on one hand or a sound recording on the other. Now we are left with

clause (ii) of section 2(y), according to which 'work' means "a cinematograph film".

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13. Adverting to the facts of the instant case it is noticed that the dispute has arisen on the consideration for live broadcasting of matches, which has been categorized by the DDIT as synonymous with the granting of copyright in such work. *The learned Departmental Representative has accentuated on the point that the live telecasting itself involves the transfer of copyright.* In support of this contention, he referred to para 16.4 of the impugned order as per which the assessee itself submitted that for live telecasting, images of the matches have to be captured which are transferred to control room by different cameras. The director then chooses the best image out of those received from different angles to be telecasted so that viewers can enjoy the same from the best possible angles. We are unable to appreciate as to how this procedure of live telecasting results into transfer of copyright of cricket match. The relevant criteria is not capturing of different images and sending them to the control room, but telecasting the final image. It is only when a particular image is finally chosen out of different options available before the director which is telecasted that gives birth to a 'work' as per section 2(y) of the Copyright Act, 1957 capable of copyright. In our considered opinion the live telecast of a match or any other event cannot be considered as transfer of copyright in such match. It is only when the live telecast of a match is done that the question of creation of copyright in such match arises. The second or later telecasting of the such event shall be considered as use of the "work" and consideration for the broadcasting of such recorded matches shall be considered as payment for the use of copyright in such event. It is for this reason and rightly so that the assessee volunteered to include the consideration for the license of the recorded broadcast as royalty while making application u/s 195(2) of the Act.”

[Emphasis Supplied]

8.1 It is, therefore, clear that the *Neo Sports Broadcast* case, too, cannot be taken as an authority for the proposition that license fees received from transfer of rights,

including a process of transmission by satellite, would not constitute ‘royalty’ under the domestic law of India as amended vide the Finance Act, 2012.

9.0 The Nimbus Communications Case

9. Similarly, in *Nimbus Communications Ltd.*,¹⁹ the issue related to an assessment year (AY) prior to the 2012 amendment, i.e., AY 2009-10. The tribunal, therefore, simply followed its earlier decision rendered in *Neo Sports Broadcast* and merely examined the issue from the point of view of the Copy Right Act. The following observations of the Tribunal make this point abundantly clear:

“7. We have heard the arguments of both the sides and also perused the relevant material on record. The learned counsel for the assessee has submitted that the solitary issue involved in the appeal of the Revenue is squarely covered in favour of the assessee by the decision of the Tribunal in the case of *Asstt. DIT, (International Taxation) v. Neo Sports Broadcast (P.) Ltd.* [2011] 133 ITD 468/15 taxmann.com 175 (Mum.) rendered vide order dated 9th Nov., 2011 passed in ITA No. 99/Mum/2009. A copy of the said order is placed on record before us and perusal of the same shows that similar issues have been decided by the Tribunal in favour of the assessee. As regards the nature of payment for live broadcasting of matches, the Tribunal has discussed the issue in the light of the relevant facts in paragraph No. 13
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8. The Tribunal then referred to a book titled ‘*Law of Copyright and Industrial Designs*’ by P. Narayanan wherein it was stated in paragraph No. 17.02 that a cinematograph film depicting live events like sporting events, horse race, etc. cannot infringe any copyright because there is no copyright in live events. The Tribunal held that there is thus no copyright in the live events and depicting the same cannot infringe any copyright. The Tribunal also referred to the proposed Direct Tax Code Bill wherein ‘live coverage of any event’ is proposed to be included in the definition of ‘royalty’ and held that if ‘live coverage’ had been a part of copyright of any work as was sought to be contended on behalf of the Revenue, then there was no need to classify live coverage as a separate item. It was held by the Tribunal that the definition of royalty under the Income-tax

Act, 1961 thus does not include any consideration for live coverage of any event which is now sought to be included in the definition of royalty by the Direct Tax Code, 2010. *The Tribunal, therefore, held that any consideration for live broadcasting cannot be considered as royalty for the transfer of copyright so as to fall within the domine of Explanation 2 to section 9(1)(vi). Respectfully following the said decision of the coordinate bench of this Tribunal rendered in the case of Neo Sports Broadcast (P.) Ltd (supra), we uphold the impugned order of the learned CIT (Appeals) holding that the amount paid by the assessee for live coverage of cricket matches to NSI is not taxable in the hands of NSI and the assessee was not required to deduct tax at source from the said amount. The appeal of the Revenue is accordingly dismissed.*”

[Emphasis Supplied]

9.1. This case, too, therefore, is an authority only to the effect that any consideration for live broadcasting cannot be considered as royalty for the transfer of copyright so as to fall within terms of Explanation 2 to section 9(1)(vi). It does not deal with the amended provisions of royalty vide Explanation 6 to section 9(1)(vi) of the Act, whereby any consideration for transfer of rights through the process of transmission by satellite (including up-linking, amplification, conversion for down-linking of any signal), cable, optic fibre or by any other similar technology), irrespective of whether the process is secret or not, has been specifically brought within the ambit of royalty under the Act.

10.0 Conclusion

10. From the above, it is clear that in *Fox Networks Group*,²⁰ the tribunal, even after the amendment in law, clearly erred in following the decisions of the Delhi High Court in *Delhi Race Club* and other decisions cited²¹ *supra*, while examining this issue only from the angle of the Copy Right Act. The tribunal curiously sought to oust the application of Explanation 6 on the nebulous assumption that since the Indian company was making the transmission, there was no transfer of process. The following observations in para 23 of the tribunals order brings out this assumption:

“23. In so far as reference of phrase 'process' in *Explanation 6* the same will not be applicable in the case of the assessee because admittedly it is SIPL which is doing the transmission and makes the payment to Asia Satellite and it is not a case of transfer of process.”

10.1 Thus, the tribunal did not, in terms, examine the question of transfer of process in *Fox Networks Group*. A bare look at para 5.3 of Master Licence Agreement

(MRA), which the tribunal has recorded in para 5 of its order itself, brings out that the transmission or broadcasting rights (whether terrestrial, cable, satellite, DSL, broadband, Internet, wireless or wireline, or any other technology which may be known now or may come into existence in the future), were transferred to the Indian company. The said para of MRA is extracted here for easy reference:

5.3 The term “Media Rights” used in the definition of “Sports Media Rights” and “Cricket & Hockey Media Rights” is defined as below in the MRA.

“Media Rights” shall mean any or all of the following rights of exploitation with respect to Sporting Events,,: Including but not limited to, broadcasting rights (whether terrestrial, cable, satellite, DSL, broadband, Internet, wireless or wireline, or any other technology which may be known now or may come into existence in the future), theatrical and public screening rights, home video rights, exhibition rights reproduction rights, interactive gaming rights, licensing and sub-licensing rights, syndication rights, sponsorship rights, right to sell advertisement time, distribution rights, publishing rights, promotional and merchandising rights, right to attend venues, and other subsidiary, incidental and ancillary rights;’ (ref page 4 of MRA)’

[Emphasis Supplied]

10.2 Further the tribunal clearly stated in para 19 of the order that the right was transferred to the Indian company (SIPL) which was a right to transfer of live feed of events through satellite and the Indian company carried out the transmission. Despite recording of this factual finding, the tribunal assumed that there was no transfer of process to the Indian company. The following observations in *Fox Networks Group* clearly bring out these facts:

“19. Now, whether the live feed of event can be regarded as ‘work’ as defined above, because live feed or transmission to get cover under the terms cinematograph films or sound recording, presupposes some kind of recording, i.e., the images must be reduced to some tangible form whereupon the work would enjoy copyright protection. Here, in this case, the right has been granted by the assessee to SIPL which is mere a transfer of live feed through satellite, the entire transmission otherwise is done by SIPL. There is neither a recording by way of cinematography nor by way of sound recording is involved in live broadcast. Further there is no artistic work which is being created when the events are captured on cameras for the live mission because the right granted by

the assessee is only to broadcast the event. Further; no film or tape/CDs/ or any right therein has been given by the assessee to SIPL for live broadcast or events. The nature of right acquired is purely in respect of live feeds (in so far as 95% of the consideration of the receipt is concerned)."

[Emphasis Supplied]

10.3 As evident from the facts recorded in the earlier part of this decision, the Singaporean company had sub-licensed sports broadcasting rights in relation to live feeds to the Indian company and had obtained the license fee for transfer of this right to transmission of live feeds, which would attract the mischief of the amended law. Thus, there was a clear transfer of process of transmission to the Indian company. The tribunal, thus, erroneously assumed that since there was no transfer of process, Explanation 6 would not apply.

11 Further, the Tribunal, in *Fox Networks Group*, also did not have any opportunity to consider the coordinate bench decision in *Viacom 18 Media*²² cited *supra* and the Madras High Court decision²³ relied upon by the Tribunal in *Viacom 18 Media*.

12. It is important to flag it here that even in the 2017 OECD Commentary, the view has been reiterated that payment received from the customer of the satellite operator, under transponder leasing agreements, to transmit events over large geographical areas would not constitute royalty.²⁴ India, however, has specifically rejected this notion which has been incorporated in para 20 of the Commentary as follows:²⁵

"20. India does not agree with the interpretation in paragraph 9.1 of the Commentary on Article 12 according to which a payment for transponder leasing will not constitute royalty. This notion is contrary to the Indian position that income from transponder leasing constitutes an equipment royalty taxable both under India's domestic law and its treaties with many countries. It is also contrary to India's position that a payment for the use of a transponder is a payment for the use of a process resulting in a royalty under Article 12. India also does not agree with the conclusion included in the paragraph concerning undersea cables and pipelines as it considers that undersea cables and pipelines are industrial, commercial or scientific equipment and that payments made for their use constitute equipment royalties."

[Emphasis supplied]

The *Fox Networks Group*²⁶ case was, therefore, not correctly decided.

13. Thus, consideration received for transfer of right to transmission by satellite, any cable, optic fibre or any other similar technology would constitute ‘royalty’ in terms of Explanation 6 of section 9(1)(vi) of the Act, and there remains no ambiguity on this count, post amendment. Any contrary construction would negate the effect of the 2012 legislative intervention.

Endnotes

1. See *CIT v Delhi Race Club (1940) Ltd* [2014] 51 taxmann.com 550 (Del); *ADIT v Neo Sports Broadcast (P) Ltd* [2011] 15 taxmann.com 175 (Mum) and *DDIT v Nimbus Communications Ltd* [2013] 32 taxmann.com 53 (Mum).
2. See para 2, art 12 Model Tax Convention on Income and Capital (OECD 2017), hereafter called ‘MTC 2017’.
3. *Seven Networks Limited v Commissioner of Taxation* [2014] FCA 1411.
4. The Income Tax Appellate Tribunal.
5. [2020] 121 taxmann.com 330 (Del).
6. n 1.
7. The Explanation reads as follows:
“Explanation 6: For the removal of doubts, it is hereby clarified that the expression ‘process’ includes and shall be deemed to have always included transmission by satellite (including up-linking, amplification, conversion for down-linking of any signal), cable, optic fibre or by any other similar technology, whether or not such process is secret;”
8. [2013] 39 taxmann.com 70 (Mad).
9. [2014] 44 taxmann.com 1 (Mum).
10. n 5.
11. n 1.
12. *ibid.*
13. *ibid.*
14. n 8.
15. *ibid.*
16. n 1.
17. n 5.
18. n 1.
19. n 1.
20. n 5.
21. n 1.
22. n 8.
23. n 9.

24. See para 9.1, Commentary on art 12, MTC 2017(n 2).

25. See para 20, Commentary on art 12, MTC 2017(n 2).

26. n 4.