INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "C": NEW DELHI
BEFORE SHRI H.S.SIDHU, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA No.1613/Del/2015
(Assessment Year: 2010-11)

International Management Group (UK) Ltd., Building 10-C, 18th Floor, Cyber City, Gurgaon PAN:AABCI9309N	Vs.	ACIT, International Taxation-2(1)(1), 4th Floor, E-2, Block, Pratyaksh Kar Bhawan, Civic Centre, J. L. Nehru Marg
(Appellant)		**(Respondent)**

ITA No.1646/Del/2015
(Assessment Year: 2010-11)

ACIT, International Taxation-2(1)(1), 4th Floor, E-2, Block, Pratyaksh Kar Bhawan, Civic Centre, J. L. Nehru Marg	Vs.	International Management Group (UK) Ltd., Building 10-C, 18th Floor, Cyber City, Gurgaon PAN:AABCI9309N
(Appellant)		**(Respondent)**

Assessee by :	Sh. Ravi Sharma, Adv Sh. Mudit Sharma, CA
Respondent by:	Sh. Anuj Arora, CIT DR
Date of Hearing	05/07/2016
Date of pronouncement	04/10/2016

O R D E R

PER PRASHANT MAHARISHI, A. M.

1. These are the cross appeals filed against the order of ACIT, [hereinafter referred to as the 'AO'] Circle-2(1) (1), New Delhi

dated 28.01.2015 for the Assessment Year 2010-11 u/s 143(3) of the Income tax Act [hereinafter referred to as 'The Act'] passed in pursuance of direction u/s 144C of the Income Tax Act dated 21.11.2014 passed by the Learned Dispute Resolution Panel [hereinafter referred to as the 'DRP'].

2. The assessee has raised the following grounds of appeal:-

"1. That in the facts and circumstances of the case and in law, the order passed by the ld Assistant Commissioner of Income Tax (AO) under section 143(3) read with section 144C (13) of the Income Tax Act (the Act) assessing the income of the appellant at Rs. 117350220/- instead of return income of Rs. 32804655/- is bad in law.

2. That in facts and circumstances of the case and in law the Hon'ble Dispute Resolution Panel (DRP) erred in not appreciating that once it is held that the receipts from service outside India amounting to Rs. 237750181/- are to be taxed as business income then the same is to be taxed to the extent the receipts are attributable to Permanent Establishment (PE) in India in view of the provisions of Article 5 read with 7 of the India UK Double Taxation Avoidance Agreement (DTAA of Tax Treaty)

3. That in the facts and circumstances of the case and in law, the Hon'ble DRP misinterpreted the attribution law and grossly erred in not appreciating that the attribution to the PE has already been examined and verified by the ld Transfer Pricing Officer (TPO) and the same has been accepted by the ld AO and accordingly, nothing more than that can be contributed to the PE.

4. That even otherwise the Hon'ble DRP ought to have held the receipts for the activities carried outside India cannot be attributable to India PE as per the sound cannons of tax jurisprudence.

5. That in the facts and circumstances of the case and in law, the Hon'ble DRP ought to have appreciated that the income offered by the appellant in India is on the basis of a transfer pricing report

capturing the function assets and risk analysis and is in accordance with the international principles of attribution which has been rightly accepted by the revenue.

6. That in the facts and circumstances of the case and in law, the ld AO as well as Hon'ble DRP grossly erred in observing that in the alternative/ on a protective basis the receipts amounting to Rs. 237750181/- would come within the purview of fees for technical services (FTS) as per the provisions of section 9(i)(vii) of the Act as well as Article 13(4)© of the Tax Treaty.

7. That in the facts and circumstances of the case and in law, the ld AO/ Honble DRP erred in not appreciating that the case of the appellant is covered by the exclusion clause provided in section 9(i) (vii) (b) of the Act and accordingly the receipts cannot be taxed in India.

8. That in facts and circumstances of the case and in law, the ld AO/ Hon'ble DRP grossly erred in not appreciating that the source of income of Board of Control for Cricket in India (BCCI) from India Premier League 2009 even is outside India (in South Africa) and accordingly, the payment made by BCCI to the appellant is for the purpose of making or earning income from a source outside India which triggers the exclusion clause as provided under section 9(i)(vii)(b) of the Act.

9. That in the facts and circumstances of the case and in law the ld AO/ Hon'ble DRP grossly erred in misinterpreting the principle of make available as per Article 13(4) (c) of the India UK DTAA and accordingly, erred in holding that the receipts of the appellant satisfied the make available principle and is to be taxed FTS under the provisions of India UK DTAA.

10. That in the facts and circumstances of the case and in law, the ld AQO/ Hon'ble DRP erred in observing that in the process of providing the services, the appellant has transferred the technical knowledge, experience, skill know how or process and the same

would remain with BCCI even after the event of rendition of service is complete."

3. The revenue has raised the following grounds of appeal:-

"1. Whether on the facts and circumstances of the case and in law, the Ld. DRP was correct in holding that the receipts for work done outside India will be governed by Article 7 and not by Article 13 of the Double Taxation Avoidance Agreement even though such receipts pertain to services rendered outside India and have no nexus with PE?

2. Whether on the facts & circumstance of the case and in law, the Ld. DRP was correct in holding that the receipts for work done outside India should be assessed as 'FTS' on protective basis and not on substantive basis?"

4. The brief facts are that International Management Group UK Ltd. is a tax resident of United Kingdom in terms of Article 4 of Indo-UK Double Taxation Avoidance Agreement. It is engaged in the business of event management and talent representation activities in sports events such as golf, tennis, football etc. It primarily and its main activities are event creation, client representation and consultation. The Board of Control for Cricket in India [hereinafter referred to as 'BCCI'] entered into a Memorandum of Understanding for assistance in establishment, commercialization and operation of the India Premier League in September 2007 [herein after referred to as

"IPL"). The first IPL event organized by Board of Control for Cricket in India in 2008 i.e. IPL 2008 was covered by this MOU. According to that MOU the appellant company was appointed to provide services for a period of 10 IPL events and subsequently, the assessee/ appellant also entered into several separate agreements wherein the terms and conditions with respect to subsequent IPL events was considered. Appellant was to provide services in relation to IPL 2009 which was scheduled to be held in India in April - May 2009, however, as the event clashed with the multi phased 2009 General Elections in India, this IPL 2009 was decided to hold outside India which was hosted in South Africa from April to May 2009. The appellant deputed its employees as well as also appointed several other parties for undertaking the on-ground implementation and event management and supervisions activities in India. The appellant follows event based accounting for the IPL event wherein the revenue and expenditure related to that event are recognized in the year in which event takes place. At the time when the decision was taken to shift IPL 2009 to South Africa, the appellant has prepared for the event in India and therefore, there was presence of staff as well as third parties connected

with that event on behalf of appellant in India. On the announcement that the event would be hosted in South Africa such third parties and employees moved out of India to South Africa but as the length of the stay of such staff etc. exceeded 90 days in a 12 months period, according to the assessee, it created a service permanent establishment of appellant in India in terms of Article 5 (2) (k) of the Indo-UK Double taxation Avoidance Agreement [hereinafter referred to as the "DTAA']. Therefore, income of the appellant was chargeable to tax in India as attributable to that permanent establishment [hereinafter referred to as "PE'].

5. The assessee received gross receipt of Rs. 33,00,00,000/-from Board of control for Cricket in India on account of this agreement. Appellant filed its return of income attributing receipt of Rs. 92249819/- to the permanent establishment of the appellant conducting transfer pricing study based on FAR analysis. The breakup of the income declared by the assessee in its return of income was with respect to expenditure incurred in India of Rs. 65159856/- and adding mark up thereto of 25% making it to Rs. 81449819/- and further adding thereto a sum of Rs. 10800000/- attributable to the permanent establishment

on account of commission of the Citibank N.A. on account of sponsorship. Therefore from the gross receipt attributable to the PE of Rs. 92249819/-, deduction of expenses of Rs. 65159856/-was claimed and net profit of Rs. 32804660/- has been offered to tax at the rate of 42.23% on net basis as per section 44DA of the Income Tax Act 1961. Therefore in nutshell out of the gross receipt of Rs. 33,00,00,000/- , appellant stated that only gross receipt of Rs. 92249819/- is attributable to the Indian permanent establishment of the assessee and consequent profit of Rs. 32804660/- is the income of the assessee under the head business income chargeable to tax under the provisions of section 44 DA of the Income Tax Act 1961.

6. During the course of assessment proceedings the Ld. AO asked the assessee about the taxability of remaining receipt of Rs. 23,77,50,181/- (being Rs 33,00,00,000/- - Rs. 9,22,49,819/-) stating that such balance amount is Fees for Technical Services [hereinafter referred to as 'FTS'] considering the fact that the whole of the receipt is taxable in India as services are rendered in India. Before the Ld. assessing officer assessee submitted that as source of income of BCCI from IPL 2009

event is the event held outside India and therefore it was submitted that the payment made by the BCCI to the assessee would fall under exceptions to clause (b) of section 9 (1) (vii) of the Income Tax Act as it pertains to the payments made by resident for income from a source outside India and such payments cannot be taxed as the fees for technical services under the provisions of the act as it does not deemed to accrue or arise in India. It was further submitted that receipt does not qualify as fees for technical services under article 13(4) (c) of the Indo UK DTAA as there is no 'make available' of any technical knowledge, experience or skill or know-how or process by the appellant to BCCI. It was further submitted that for the IPL 2009 event, the services have been rendered in United Kingdom, South Africa and India and the income is required to be attributed based on the functions performed in the respective jurisdictions. It was further stated that the work done in the South Africa primarily pertains to the activities carried out in connection with the implementation of IPL 2009 event and for such activities carried out in India it is undisputed fact accepted by the Ld. that the assessee that the assessee has a service PE in India under article 5(2)(K) of the

DTAA which is accepted by revenue. Further , fees for technical services covered by the agreement is 'effectively connected' with the PE of the appellant and therefore is chargeable to tax as business profits under article 7 of the DTAA. Therefore, accordingly it is offered for taxation. It was further stated that the Ld. TPO has also held that the profits as are attributable to the permanent establishment are rightly attributed to it, as there is no adjustment proposed. Therefore it was submitted that the balance amount of Rs. 237750181/- is not chargeable to tax neither as Fees for Technical Services nor the Business profits as per DTAA.

7. Ld. Assessing Officer stated that BCCI is an Indian concern and its global income is chargeable to tax in India and merely because the event has happened outside India due to change of venue it cannot change the source of the income of the BCCI from India to outside India and therefore it was stated that the claim of exception to provisions of section 9(1)(vii) (b) of the act cannot be accepted. He further submitted that though the applicability of the Double Taxation Avoidance Agreement is not denied but the term 'make available' has not been defined and further the benefit of protocol relied upon by the appellant is

also misplaced . He further relied on ruling of the advance authority in case of Shell India Markets Private Limited and submitted that the BCCI would be able to equip itself to carry on the IPL events subsequently and therefore in fact the appellant has 'made available' the procedures, the protocols ,the agreements etc for organizing the Indian Premier league. He further stated that merely because the services are being provided it is 'made available' to the assessee. According to the Ld. AO it is difficult to accept the contention of the assessee for the simple reason that merely the assessee has been engaged on regular basis cannot be construed to mean that it does not enable the BCCI adequate skill in case it desire to do so to organize the independent event on its own basis without the help of the appellant .Therefore according to the Ld. A O it satisfies the 'make available' concept also and hence it is chargeable to tax as FTS. He further held that that though some of the services are rendered outside India even though those were utilized in the business of BCCI in India. He further submitted that these receipts cannot be said to be 'effectively connected' to the PE in India as per functions performed by appellant outside India and therefore they remain taxable in the

India as they qualify as fees for technical services as per the definition given in the Income Tax Act and DTAA both . Hence, balance amount shall be chargeable to tax on gross basis under section 115A of the Income Tax Act. The Ld. A O was of the view that since the income has not been characterized as business income it cannot go out of the tax net for the reason that they are ' effectively connected' to the permanent establishment of the assessee. Based on the above reasoning the Ld. AO accepted the business income shown in return of income filed by the assessee at Rs. 32804660/- but made an addition of Rs. 237750181/- , being balance receipt as fees for technical services and charged it at the rate of Rs. 10.5575 % on gross basis. Thereby the assessed income of the assessee was determined at Rs. 270554841/- against the returned income of Rs. 32804660/-in the draft assessment order dated 24th of March 2014.

8. Against this draft order of the Ld. AO , appellant preferred its objection before the Hon'ble Dispute Resolution Panel who vide its direction dated 11th Nov. 2014 held that the receipt of Rs 237750184/- is chargeable to tax u/s 9 (1) (vii) (b) of The Income Tax Act and also FTS under DTAA. The Ld. DRP further

directed that such receipt should be attributed to the permanent establishment and be taxed on net basis. It gave direction for taxing the sum as FTS on protective basis and considering the above sum as business income on substantive basis. Based on the above direction the final assessment order under section 143 (3) of the Income Tax Act dated 27/01/2015 was framed and computed the total income of the assessee by making an addition of Rs. 84545561/- being profits on the proportionate basis chargeable to tax over and above the returned income of the appellant of Rs. 32804655/-. Consequently, the total income was assessed at Rs. 117350216/- on substantive basis. The Ld. assessing officer further computed the income of the appellant alternatively treating the nature of the receipt of Rs. 237750181/- as fees for technical services considering the nature of the services being rendered by the assessee and upheld by the Ld. the DRP. Therefore, he computed the income of the appellant at Rs. 270554840/- considering the receipt of Rs. 237750181/- as fees for technical services over and about the returned income of the assessee of Rs. 32804660/- on protective basis.

9. The above order of the Ld. AO incorporating the direction of the Ld. DRP is challenged by both the parties. Against the assessment order under section 143 (3) assessee has filed an appeal against the addition of Rs. 84545561 being the profit on the above mentioned gross receipt of Rs. 237750181/- as further profits attributed to the permanent establishment of the appellant and also against the protective assessment of sum of Rs 237750181/- as fees for technical services. Revenue has also filed an appeal against the order of the Ld. DRP challenging that that such income of Rs. 237750181/-is chargeable to tax under article 7 and not under article 13 of the Double Taxation Avoidance Agreement even though such receipts pertain to services rendered outside India and have no nexus with the permanent establishment. Further, the revenue is also challenging the directions given by the Ld. DRP holding that the receipts for work done outside India should be assessed as fees for technical services on substantive basis.

10. Firstly, we take up the appeal of the assessee. Ground No. 1 of appeal is general in nature, no specific arguments have been advanced before us, and therefore we dismiss the ground No. 1.

11. Ground No. 2, 3, 4 and 5 of the appeal of the assessee are against charging of Rs. 237750181/- as business income. The ground No. 3 of the appeal is against the further attribution of income to the permanent establishment of the assessee even though the attribution has been verified by the Ld. Transfer pricing officer and accepted at arm's length. Therefore nothing more should be attributed to the permanent establishment. Ground No. 5 of the appeal of the assessee is that when the Ld. TPO has held that income attributable to the permanent establishment is at arm's length and is proper which is based on the proper FAR analysis then that should have been accepted and no further attribution of the profit should have been made to the permanent establishment of the appellant.

12. Before us the Ld. authorized representative vehemently argued that according to the article 5 (2) (K) of the Double Taxation Avoidance Agreement it is provided that the service permanent establishment will be constituted only for those services which are not having the receipt as fees for technical services or royalty and therefore according to him once the service permanent establishment is constituted of the appellant in India there cannot be any further attribution or for the

chargeability with respect to the fees for technical services as both are mutually exclusive. He further submitted that it is undisputed by the revenue that appellant has a service permanent establishment in India.

13. He further submitted that that once the contract is 'effectively connected' to the permanent establishment then taxability would be governed by the article 7 of the Double Taxation Avoidance Agreement and the article 13 would not be applicable. He further submitted that the contract entered into by the assessee is 'effectively connected' to the permanent establishment since for the said contract the assessee has created a permanent establishment in India in the current year for IPL 2009 even then for the future events in the subsequent year. Further as per article 7 of the DTAA income as is attributable to the PE can only be taxed in India. He further stated that out of the total receipt of Rs. 33 crores the receipt of Rs. 9.22 crores is attributed to the permanent establishment under article 7 of the DTAA applying the Transactional net marginal method (TNMM) based on FAR analysis and activities carried out in India therefore the balance of Rs. 23.77 crores pertains to the work done outside India and is not

taxable in India as per the provisions of the article 13 and article 7 of the DTAA. For this proposition he relied on the decision of the Hon'ble Supreme Court in the case of Ishikawajima Harima Heavy industries limited (288 ITR 408). It was further submitted that that once a portion of the FTS attributed to the permanent establishment as business profit than the balance fees cannot be taxed in the hands of the assessee as fees for technical services. For this he relied upon the decision of the Mumbai tribunal in case of Nippon Kaiji Kyokoi (2011 – TII – 115 – ITAT – MUM — INTL). He further submitted that the above legal position was also accepted by the Ld. AO in the assessment year for the immediately preceding assessment year and the receipts for work done outside India was not taxed as fees for technical services by the Ld. AO. Therefore, it was submitted that the instant year the tax department has changed its own stand and has sought to tax the remaining receipt for work done outside India as fees for technical services without any cogent reason. He further stated that that Ld. DRP has accepted that when there is permanent establishment in India of the appellant then the receipts can be taxed only as business income and not as fees for technical

services. He further stated that the Ld. DRP has made a patent error by holding that the receipt for services done outside India should be taxed as business income in the hands of the PE, which is not envisaged by the Double Taxation Avoidance Agreement. He further relied on the decision of the Special bench in case of Clifford chance wherein it has been held that the work performed outside India cannot be attributed to the permanent establishment in India.

14. The ground No. 6, 9 and 10 of the appeal of the assessee is against the taxability of the sum of Rs. 237750181/- as fees for technical services applying the provisions of the article 13 of the India UK Double Taxation Avoidance Agreement. For this Ld. authorized representative submitted that the services rendered by the appellant do not 'make available' technical know-how skills etc to enable board of control for Cricket in India and hence the consideration paid by the BCCI to the appellant does not qualify as fees for technical services in terms of definition provided under article 13 (4) (c) of the Double Taxation Avoidance Agreement. He further submitted that though the mere concept 'make available' has not been defined in the Double Taxation Avoidance Agreement however the term has

been explained by way of example in the protocol to the India US Double Taxation Avoidance Agreement wherein it is stated that the technology will be considered made available only when the person acquiring the same is enable to apply the technology. Further the fact that the provisions of the service may require technical input by the person providing the service does not mean that the technical knowledge skill etc are 'made available' to the person purchasing the services within the meaning of paragraph 4 (b) and similarly the use of a product which embodies technology shall not be considered to ' make technology available. In his arguments, main thrust was that that the BCCI has entered into this agreement for 9 subsequent events to be conducted of IPL and therefore had these technical expertise been obtained by the BCCI there was no need to award the contract to the appellant for such a long substantial period. He submitted that the services provided by the appellant are of highly specialized nature and do not make available technical know-how, skill etc to the BCCI. He relied on the decision of coordinate bench in case of NQA quality systems registrar Ltd versus Deputy Commissioner of Income Tax (2005) 2 SOT 249 (Delhi). He further referred to the several

decisions on 'make available' concept. He further relied on the decision of the Hon'ble Delhi High Court in case of Guy Carpenter and company 346 ITR 504 on this concept. He further submitted that the reliance by the Ld. AO on the decision of the Supreme Court of India in case of Oberoi Hotels India private limited and on the decision of authority of advance ruling are misplaced for the reason that Hon'ble Supreme Court considered the applicability of section 80 -O of the Income Tax Act and further the decision of the authority of advance ruling has been set aside by the Hon'ble jurisdictional High Court and is no longer sustainable in law.

15. On the issue that the proceeds of Rs. 237750181/- will not fall under the exception provided in section 9(1) (vii) (b) of the Income Tax Act the Ld. authorized representative submitted that for applicability of this clause service should have been utilized in India whereas in the present case the service have been utilized by the BCCI in South Africa and accordingly the source of income for BCCI is outside India and hence the exceptions provided under section 9(1)(vii) (b) of the income tax act shall apply and accordingly the income shall not be

chargeable to tax in India under section 9 (1) of the Income Tax Act.

16. In response to this ld. Departmental representative submitted that the that assessee has received the sum of Rs. 33 crores out of which it says that only 9 crores is 'effectively connected' to the permanent establishment of the assessee and then the balance Rs. 27 crores should fall back into the definition of the fees for technical services. He submitted that the full amount of Rs. 33 crore is arising out of contract of the assessee from the BCCI which is fees for technical services and out of that only 9 crores are stated that they are related to the permanent establishment of the assessee and thus covered by article 7 of the Double Taxation Avoidance Agreement then balance 23 crores still remains as fees for technical services. He submitted that there is no provision in the law that the balance of Rs. 23 crores shall go untaxed though it arises with respect to the contract with BCCI. He further submitted that this argument gets support from the decision of the coordinate bench in case of DDIT versus J.C Bamford Excavators limited 43 Taxmann.com 343 (Delhi). He submitted that when para 6 of article 13 comes into operation, the income which is fees for

royalty and technical services takes the character of business income and is then governed by article 7. The if there is a difference between the amount considered under article 13 then what is chargeable to tax under article 7 then the balance amounts is still chargeable to tax under article 13 of the DTAA. According to him the balance of Rs. 23 crores shall be chargeable to tax as fees for technical services since assessee himself says that the amount of Rs. 33 crores is fees for technical services out of which Rs. 9 crores is falling within the provisions of article 13(6) of the act therefore obviously the balance amount of Rs. 23 crores is chargeable to tax as fees for technical services. He further submitted that whatever is covered under article 13 (6) that amount only changes the characteristics from the fees for technical services to the royalty and the balance shall always remain as fees for technical services chargeable to tax. He further submitted that it is not mandate of the law as well as the Double Taxation Avoidance Agreement that full sum which is fees for technical services, the moment it is found to be ' Effectively connected' to the Permanent Establishment, article 13 (6) of DTAA triggers, even

if the small amount is charged to tax under article 7 of the DTAA , the balance amount is not to be taxed.

17. He further referred to the audited accounts of the company referring to page No. 47 of the paper book which is the profit and loss account for the year ended 31st of March 2010 where in this amount is stated to be fees for technical services. He further referred to the note No. 3 attached to the annual accounts of the company wherein the above receipt has been classified as fees for technical services. It is mentioned in the note that appellant has entered into a contract for service for the establishment of commercialization of operation of the Indian Premier league 2009 initially scheduled to be held in India but eventually hosted in South Africa. As part of the execution of the same certain activities related to on- ground implementation and sourcing official partnership deals with the sponsors were undertaken in India by the assignees of appellant pursuant to which appellant is deemed to have a permanent establishment India in terms of the provisions of the Double taxation Avoidance agreement. Further, it has been mentioned that it has apportioned fees for technical services amounting to Rs. 92249819/- to the permanent establishment

based on professional expert advice benchmarked on the basis of TNMM. Therefore, his contention was that the service income that is arising from the above contract is classified by the assessee himself as fees for technical services.

18. With respect to the 'make available' concept argument of the appellant it was submitted that as per para No. 4 of the agreement between BCCI and appellant dated 24th of September 2009 the appellant during the representation period shall provide the services which is a significant portion of the service constitutes service provided to the BCCI from outside India using IMGs international expertise and resources. It is further mentioned in para 4.1 of that agreement that based on research and advise by the BCCI the appellant shall continue to advise and assist the BCCI in connection with structure of the league, league rules and regulations, franchisee agreements , any necessary franchisee regulation, legal implementation budget and media rights agreements. Further, as per para No. 4.2, the appellant shall provide ongoing preparation and negotiations with respect to the contracts as well as the rights agreement and any other contracts with right holders. It is further submitted that appellant is providing development of

best practices match Day guidelines for franchisee and supervision in respect of their execution. It is further that appellant will also advise and assist in connection with the rules and regulation relating to the registration, trading and auction of the players, hospitality guidelines in relation to the league, provision of legal handbooks, advise and assist in connection with the player contracts, management of the annual player trading window and assist in the creation or development of new intellectual properties relating to league and all such properties created will be the sole property of the Board of control for Cricket in India. Appellant shall also provide by bringing in global best practices in building and evaluating sporting properties and related aspects. He further referred to the clause No. 6 of the agreement which talks about the consideration being paid to the appellant of Rs 33 crores as the payment, which is related to the consideration for the IPL 2009. In view of this, he submitted that all these are written documents and therefore they are made available to the BCCI. It is further submitted that all the intellectual property rights also belong to the BCCI and therefore nothing is left with the appellant. By citing all these clauses of the agreement, he

submitted that the recipient has to be enabled and it is not necessary that he should use it all this documents, which makes the BCCI able to host the subsequent IPL events without even the help of the appellant. He referred to the clauses of the services and submitted that all these documents etc can definitely help the recipient of the service to hold such kind of sporting events in future. In view of this, he submitted that the make available concept is satisfied and therefore the full receipt of Rs. 33 crores is fees for technical services based on the accounting records of the assessee as well as also by the agreement entered into by appellant with the BCCI. He further referred to the para No. 4 of the agreement, which says that significant portion of the services constitutes services provided to the BCCI from outside India using IMGs international expertise and resources. Thus, it shows that those significant activities have been performed outside India and they do not have any concern with the permanent establishment of the appellant in India. In view of this he submitted that whatever is attributed to the permanent establishment in India is the business income of the assessee and the balance amount which constitute the significant activities which are being

carried out by the appellant from outside India and services are also performed from outside India to the appellant which are consumed in India constitute over and above what is attributed to the person permanent establishment as fees for technical services.

19. He further referred to page number 5 of the assessment order where details of services performed by the head office from UK of the appellant are submitted. According to those substantial activities, listed 17 in numbers have been performed by the head office of the appellant from outside India and UK and in which there is no role of the permanent establishment of the appellant. He referred to such services wherein it is mentioned that the head office continued to advise and assist the BCCI in conducting research in respect of and making recommendation to BCCI and the appropriate structure for all aspects of the IPL, preparation of television production specifications, formulating policies procedure and work plan relating to running of the event in India including setting out the logistics, manpower etc requirements along with IMG India PE. He further submitted that except the services stated at para No. 4, 5, 6, 10, 13, 14 all other services are being provided separately by the UK office to

the BCCI in which there is no role of the Indian permanent establishment of the appellant. Therefore there has to be some amount of income which requires to be attributed to the such activities carried out by the head office which has no connection with the income which is attributed to the permanent establishment. Therefore he submitted that there is much more which should be charged to tax in India over and above whatever is attributed by the appellant himself to the permanent establishment of the appellant in India. Therefore he assailed that the argument of the appellant that if the amount is attributed to the PE there is no further attribution which is required to be done in case of the appellant. He submitted that for all the services other than those mentioned above which are specifically listed at page No. 5 of the assessment order only 5 to 6 activities are required to be carried out with the assistance of the permanent establishment whereas the balance activities are required to be carried out by the appellant from outside India independently. He further stated that even in those 5 to 6 activities also the role of the permanent establishment is very minimal. Therefore his argument was that that the claim of the assessee that no further income is required to be assessed as

fees for technical services in the hands of the appellant over and above whatever is attributed to the permanent establishment of the appellant deserves to be rejected. He submitted that there is no consideration, which has been offered by the assessee for those services, which is being charged to BCCI performed by the appellant from UK, which falls in to the definition of FTS as per Income Tax Act and also DTAA.

20. He further referred to the para No. 8 of the assessment order and stated that balance gross receipt has been charged to tax over and above what is being offered by the appellant as business income proportionately amounting in all to Rs. 84545561/- and alternatively on protective basis the full consideration of Rs. 237750181/- which has not been considered by the appellant as fees for technical services on protective basis. Therefore, he submitted that in view of the agreement between the assessee and BCCI looking at the services, which has been performed by the appellant outside India without even the help of the permanent establishment of the assessee, shall be charged to tax as fees for technical services only. He further referred to para No. 10 of the assessment order at page No. 23 to support his contention. In a

way, he supported the order of the Ld. assessing officer stating that the balance sum of Rs. 237750181/- is fees for technical services only.

21. He further submitted that beyond Rs. 9 crores offered by the appellant as gross receipt out of which the profit is offered for the taxation the explanation to section 9 of the Income Tax Act applies and therefore it is chargeable to tax under the Income Tax Act 1961 as fees for technical services.

22. On the report of the transfer pricing officer where in appellant stated that no further amount is required to be attributed to the permanent establishment of the appellant it is stated that the functions, assets and risk which been considered by the TPO does not include the independent services offered by the appellant without even the help of the permanent establishment of the assessee cannot be said to be have been considered by the Ld. Transfer Pricing Officer. He therefore submitted that the argument of the appellant that as the Ld. TPO has considered the international transaction at arm's length does not have any relevance with respect to taxability of the balance sum over and above Rs. 9 crores.

23. He further submitted that there cannot be an overemphasis on MOU between India and the USA Double Taxation Avoidance Agreement. He further referred to para No. 5.2 to 5.4 of the order of the Ld. DRP wherein it has been held that in order to fall within the exceptions provided under section 9 (1) (vii) (b) that it is the source of income which needs to be considered and not the receipt which should be situated outside India. In the present case, he submitted that that in order to get the benefit of the exception it is necessary for the taxpayer to show that the technical services were utilized in a business carried outside India by the payer. He therefore submitted that source of the income of the appellant resides in India and merely because the event has been held outside India in South Africa the sources of receipt is irrelevant. He stated that the source of such income is BCCI who is hosting an IPL event and is residing in India.

24. He further referred to the para No. 7.5 of the agreement of the appellant with BCCI which speaks that BCCI has appointed appellant on an exclusive basis to provide the host broadcaster television production services in respect of the league and each match for a period of further 5 consecutive seasons

commencing with 2010 season on the same terms and condition as set out in the television production agreements entered into by the BCCI with appellant in respect of the 2009 season. He submitted that no such agreement is produced by the assessee before the Ld. AO or before the TPO or before the Ld. DRP and not even before the tribunal. Therefore, the consideration for these services without looking at the agreement cannot be decided. He submitted that assessee has failed to produce such agreement before all the authorities.

25. He further referred to the page No. 76 to 79 of the paper book, which is part of the transfer pricing study report prepared by the assessee for the financial year 2009 – 2010 with respect to the appellant's Indian permanent establishment. He submitted that the functions performed by the Permanent establishment stated at para No. 4.4 wherein in para No. 1 shows functions performed by the appellant from its UK office and further the functions performed by its Indian be are two different set of functions in the transfer pricing analysis carried out by the assessee. There is no income offered by the appellant on income attributable to such functions performed by the foreign office or head office of the appellant from United Kingdom. He

therefore submitted that the transfer-pricing officer's order is with respect to the functions performed by the Indian PE and not with respect to the functions performed by IMG UK that is the appellant's head office in United Kingdom. In view of the above he submitted that the order of the Ld. AO charging the balance sum as fees for technical service is correct interpretation based on the agreement entered into by the appellant with BCCI.

26. He further relied up on decision of the Hon'ble Delhi High Court in case of CIT vs. Jansampark advertising and marketing private limited [56 Taxmann.com 286] to support his contention that it is also the obligation of the 1st appellate authority, and indeed of the tribunal, to have ensured that effective Inquiry was carried out, particularly in the face of the allegation of the revenue that the agreements have not been submitted by the assessee as stated in the para No. 7.5 of the agreement and the assessee may be directed to produce all such agreements to determine the correct nature of income of the appellant.

27. On the subsequent date of hearing the clarification was sought from the parties with respect to the services rendered by the

permanent establishment of the assessee and services which are rendered by the head office of the assessee which are directly provided to the appellant and how they are effectively connected with the PE of the assesse, whether the issue of Rs. 23.77 crores was available before the Ld. transfer pricing officer while framing the order on the aspect of arms length price, further evidences were sought regarding details of services rendered by United Kingdom company to examine 'make available' concept and taxability or otherwise as per Indo UK DTAA of Rs 23.77 Crores .

28. In response to this the Ld. authorized representative submitted a detailed reply dated 30 /06/2016. With respect to the query that how the services rendered by UK company to BCCI were effectively connected with the PE in India with respect to the services rendered by PE and services rendered by the UK company directly on account of the service agreement, the appellant submitted relying upon the Philip Becker's Treatise on double taxation convention, that provisions of article 13 (1) and (2) are not applicable if the beneficial owner of the royalty, fees for technical services is a permanent establishment in another country and right property or contract in respect of which

royalties or fees for technical services are paid is effectively connected with the permanent establishment. In such situation the provisions of article 7 shall apply. Applying the above conditions it was submitted that the source of the revenue for appellant is only one contract, which is the contract with the BCCI for IPL 2009 and subsequent IPL events. Therefore according to him the contract in all circumstances is 'effectively connected' with the permanent establishment and therefore only article 7 is applicable and such situation is inescapable. He further submitted that this conclusion has been accepted by the Ld. DRP and the revenue is not in appeal contesting the same. Accordingly he submitted that the receipt on account of the alleged fees for technical services even if it is to be taxed can be taxed only as business income and not otherwise. Further as per the attribution of income to permanent establishment is concerned that had already been accepted by the revenue. With respect to the fact about the receipt of Rs. 23.77 crore whether it was available before the Ld. TPO he submitted that total receipt from BCCI for the IPL 2009 event amounting to Rs. 33 crore was available before him and he asked specifically about the total receipt vide notice dated 29/11/2013. Before him

appellant has submitted the details for such billing along with the copy of the invoices. He therefore submitted that the full detail of the receipt of the Rs. 33 crore was available with the Ld. TPO and he considered it while framing the order under section 92 CA (3) of the Income Tax Act. With regard to the evidence of services performed by the United Kingdom office it was submitted that that such services performed does not result in to fees for technical services in view of the restrictive definition provided under article 13 (4) (C) of the Double Taxation Avoidance Agreement. He further referred to the various services and explained that they do not constitute the fees for technical services as the 'make available' concept fails. He further submitted that had the technical know-how skill etc were made available to the BCCI it would not have given any contract to the assessee for 9 subsequent IPL events commencing from IPL 2009 event , therefore, that itself suggests that there is no satisfaction of 'make available' concept in the services rendered by the UK head office of the appellant. On query from the bench about the status of the subsequent assessment years he submitted that in subsequent years also the revenue has taken similar stand where over and above the

attribution of profits to the permanent establishment accepted by the Ld. TPO , Ld. AO has taxed balance receipt taxable as fees for technical services. He further added that these issues are pending with the various authorities.

29. In the rejoinder to the submission dated 30/06/2016 of the appellant, Ld. Departmental Representative submitted that admittedly the Ld. TPO has held that no further income is required to be attributed to the PE and Ld. assessing officer has accepted by not attributing any further income to the permanent establishment of the appellant. However he has taken such balance portion as fees for technical services therefore the contention of the of the appellant that once the transaction with the PE is held to be at arm's length no further income can be charged to tax on account of fees for technical services is devoid of any merit. He further referred to the clause No. 4.1 of the service agreement where significant services constituting advice provided to the BCCI from outside India using IMGs international expertise and resources. Therefore he submitted that this clearly indicates that at least some of the services provided were not 'effectively connected' with the permanent establishment but would still be chargeable to tax in

view of expiration under section 9 (2). He further submitted that it is not the duty of the Ld. Transfer pricing officer to tax the fees for technical services but it is the duty of the Ld. AO to frame the assessment which Ld. assessing officer has done by taxing the balance amount as fees for technical services. He further submitted that with respect to the classification of fees for technical services that the service agreement emphatically states that a report, guidelines, rules, regulations, agreements, best practices, advice, schedule, structure, manual, budget, contracts, handbook, systems and specification will be developed by the appellant and would be left behind by the assessee with the BCCI. He further submitted that this is apart from the video recording of the entire event as well as the interaction of the IMG staff with the BCCI functionaries is also given to BCCI. In view of this he submitted that it is a clear indication of 'make available' of all the services performed by the IMG UK to the BCCI. With respect to the argument of the Ld. that authorized representative that if the services have been 'made available' to the BCCI then why such agreement has been extended for further 9 years for subsequent events, he submitted that it is because of the marketing skills of the IMG

and it has nothing to do with the change in the IPL format in subsequent years. In any way he submitted that this does not impact the taxability of the present sum in the current year. With regard to the application of article 7 to the exclusion of article 13 of the Double Taxation Avoidance Agreement, he submitted that there is no bar on simultaneous application of article 7 and article 13 of DTAA , but off course there cannot be double taxation of the same receipt under the two articles and that is not the case here. He submitted that what is attributable to a permanent establishment and chargeable to tax under article 7 will get the benefit of deduction of expenses whereas in case of the article 13 it is chargeable to tax on grass basis. In view of above he vehemently supported the order of the ld AO.

30. We have carefully considered the rival contentions and perused the relevant material placed before us. We have also considered various judicial pronouncements cited by the parties before us. The short controversy involved in the present case is that appellant company has received Rs. 33 crores as remuneration in terms of a contract entered into with Board of control for Cricket in India (BCCI). Out of which assessee has contended

that gross receipt of Rs. 92249819/-has already been offered for taxation claiming it attributable to its permanent establishment in India with respect to functions and activities carried out by its permanent establishment in India. Accordingly appellant offered resultant income as business income of Rs 32804660/- after deducting expenses there from. However the dispute between the appellant and revenue is that whether the sum of the balance receipt from that contract amounting to Rs. 2 3775 0181/- shall be chargeable to tax in India at all. If the same is chargeable to tax it would be considered as the business income of the appellant and subsequently whether the proportionate expenditure would be allowable from that or not. The further controversy thereto is that whether such sum is chargeable to tax as fees for technical services or not with respect to Indian tax laws as well as Double Taxation Avoidance Agreement entered into between India and UK. The stand of the assessee is that income arising from that contract is chargeable to tax as fees for technical services as per Indian tax laws as well as per the Double Taxation Avoidance Agreement as per article 13 of that agreement. Further as appellant is carrying on business in India through its

permanent establishment therefore by virtue of the provisions of the article 13 (6) the income, which is effectively connected with the permanent establishment, shall be governed by article 7 i.e. Business profits of the Double Taxation Avoidance Agreement. According to assessee gross receipt of Rs. 9 224 9819/- is income attributable to the permanent establishment in India and therefore shall be governed by the provisions of article 7 of the Double Taxation Avoidance Agreement and expenses there from would be granted as deduction and the balance amount shall be chargeable to tax in India. It is the contention of the assessee that the balance amount being difference between Rs. 33 crores and Rs. 9.22 crores shall not be chargeable to tax in India because the Indian permanent establishment has been appropriately remunerated and the transactions between the Indian PE and the appellants are considered to be an arm's length by the Ld. transfer pricing officer therefore now nothing is required to be offered by the appellant for taxation thereby saying that the balance amount of Rs. 23775 0181/- is not chargeable to tax. Further it is also the contention of the assessee that according to article 13 of the Double Taxation Avoidance Agreement which provides for the 'make available'

clause for taxation of fees for technical services which in the present case according to the appellant is not satisfied the balance amount shall not be chargeable to tax in India as fees for technical services. Against this the claim of the revenue is that such amount shall be chargeable to tax as fees for technical services as under the article 7 only Rs. 9.22 crores have been held to be attributable to the activities of the permanent establishment and balance sum of Rs. 23.77 crores still remains the fees for technical services and it is further submitted that it satisfies 'make available' test and hence same is chargeable to tax under article 13 of the Double Taxation Avoidance Agreement.

31. The basic edifice of the controversy is based on 2 documents entered into between the board of control for Cricket in India as well as the appellant. The 1st is the memorandum of understanding between the 2 parties dated 13/09/2007 and service agreement dated 24/09/2009. According to the memorandum of understanding it has been agreed between the parties that appellant shall provide services by conducting research in respect of the appropriate structure for the IPL and make cut recommendations to BCCI. Further the appellant

shall provide appropriate presentation documentation in the research on various presentations to be made based upon which the BCCI will decide upon the most appropriate structure for the IPL under advice from the appellant. The BCCI has required the appellant to prepare the documentation being the Constitution of the IPL, authority of the governing Council of the IPL, structure of the tournament, IPL tournament rules and regulations, the franchisee tender document, the franchisee agreement and any necessary franchisee regulations and IPL implementation budget. In addition to that the appellant was also required to develop right management process in respect of commercial rights and assets of any kind arising out of the IPL which are owned by the BCCI, it was in respect of those rights, repression and execution of marketing strategies, the management of the franchisee tender process, the management of the sale process in respect of those rights and preparation and negotiation of contracts with various parties. It was further required to prepare television production specifications and development of best practice match Day guidelines for media and franchisee and further advice and assistance in connection

with the development of any will relevant stadium and the Finance which may be necessary in connection therewith.

32. In terms of the above memorandum of understanding entered into between the 2 parties a service agreement was entered into on 24th of September 2009. The terms and conditions agreed upon as per memorandum of understanding were as under:-

" IMG Services

IMG has been appointed on a sole and exclusive basis to provide the following services in connection with the IPL (the "Services").

*1.1 IMG shall conduct research in respect of the appropriate structure' for the **IPL** und make recommendations to BCCI accordingly (it being acknowledged that the final, decisions in respect thereof are BCCI'"s).*

1.2 IMG shall research and provide appropriate presentation documentation in respect of the following:

(a) the meetings in Singapore on 2na and 3"1 September 2007.

*(b) the JPL presentation and press conference which is scheduled to take place in New Delhi on 13 September (Including the preparation of marketing collateral and press packs in association with BCCI's **PR.** agency); and*

(c) any other appropriate events.

1.3 Once BCCI has decided upon the most appropriate structure for the IPL under advice from IMG, 3MG shall conduct research into and prepare the following IPL foundation documentation in connection with it including:

(a) the constitution of the IPL;

(b) the authority of the Governing Council of the IPL

(c) the structure of the tournament;

(d) the IPL tournament rules and regulations

(e) the franchise tender document

(f) the franchise agreement and any necessary franchise regulations

(g) the IPL implementation budget

1.4 In addition to the matters referred to in paragraph 1.1 to 1.3 above IMG shall carry out/ provide (as appropriate) the following:

(a) the development of a rights management process in respect of the commercial rights and assets of any kind arising out of the IPL including, without limitation

- *Franchise rights*
- *Media rights*
- *Sponsorship rights*
- *Official suppliership rights*
- *Licensing and merchandising rights*

- *Stadium signage rights*

Together the Rights

(b) advice in respect of those of the Rights which may be 100% owned centrally and the division of the Rights between BCC1 and the Franchisees;

(c) the preparation and execution of marketing strategies for:

- *the Franchise tender*
- *the media Rights*
- *the sponsorship Rights*
- *the official supplier Rights*
- *the licensing Rights*
- *any other Rights*

(d) the management of the Franchise tender process;

(e) the management of the sales processes in respect of the rights;

(f) the preparation and negotiation of the contracts with

- *the successful Franchisees*
- *sponsors*
- *the media*
- *all other entities which acquire or may be interested in any of the rights*

*such contracts being for the purposes of this MOU, '"**Rights**' Agreements-' and all income of any kind generated therefrom being income*

*(g) the implementation and management of the centrally controlled/ owned Rights on **behalf of the relevant third parties sponsors etc***

***(h)** the preparation of a television production specification;*

***(i)** **the** development of best practice match day guides and supervision in respect of the execution;*

***(j)** the development of **best** practice match day media guidelines and supervision in respect of their execution*

***(k)** advice and **assistance** in connection with the development **of any** relevant stadia and.' the finance which may be necessary in connection with therewith"*

33. Firstly, we examine various clauses of the agreement entered into by the assessee with the BCCI. The BCCI entered into an agreement on 24/09/2009 with the appellant which is a company incorporated in England and having its registered office there as preferred agent and representative to advise and assist in the exploitation of the rights and in the provision of the services throughout the territory during the representation

period commencing from January 2009 and on the date of conclusion of 9th complete session thereafter. Therefore in nutshell the BCCI has entered into a contract with the appellant for holding the IPL from January 2009 and subsequent 9 season of IPL. By virtue of this agreement the appellant was granted the right and authority to assist BCCI in exploiting the rights during the representation period including without limitation making arrangements for agreements in respect of the rights provided that IMG does not have the power to bind or commit BCCI to any agreement or arrangement relating to those rights. The obligation of the IMG was to provide the services set out in clause No. 4.1 and 4.2 of the service agreement and it is acknowledged between the parties that a significant portion of the services constitutes advice provided to the BCCI from outside India using appellant's international expertise and resources. Precisely the obligation of the appellant are as under:-

"4. IMG's Obligations

IMG shall during the Representation Period provide the services set out in Clauses 4.1 and 4.2 (the "Services") it being acknowledged that a significant proportion of the Services constitutes advice provided to the BCCI from outside India using IMG's international expertise and resources.

4.1 Having carried out research and advised the BCCI in connection with the with the formation and governance of the League and IPL, IMG shall continue to advise and assist BCCI in connection with, the following:

(a) the structure of the League;

(b) the League rules and regulations;

(c) the Franchise agreements and any necessary franchise regulations:

(d) the League implementation budget; and

(c) the Media Rights agreements. i

4.2 the addition to the matters referred to in Clause 4.1 above, IMG shall continue its work in carrying out or providing (as appropriate) the following;

(a) the ongoing execution of the management in respect of the Rights of BCCI and advice in connection therewith including, without limitation:;

(i) Franchise Rights;
(ii) Media Rights;
(iii) sponsorship rights;
(iv) official suppliership rights;
(v) licensing and merchandising rights;
(vi) stadium signagc rights; and
(vii) any other rights in relation to the League that may come-up for leverage by BCCI in the future

(b) the preparation and execution of marketing strategies for and advice in connection with: :

(i) any ongoing tender process in respect of Franchise Rights;
(ii) the Media Rights; and
(iii) the commercial Rights;

(c) advice and assistance in the management of any future Franchise tender .process;

(d) advice and assistance in the management ,of the sales processes in respect of the Rights; ,

(e) the ongoing preparation and negotiation, subject to the final decision of the BCCI, of

(i) contracts with the successful Franchisees;
(ii) the Rights Agreements and any other contracts with Rights Holders;

(f) the implementation and management of the sale and delivery of the Rights to Rights Holders;

(g) the preparation of a television production specification provided IMG Media is not a bidder for this service;

(h) the development of best practice match day guidelines for Franchisees and supervision in respect of their execution

(i) the development of best practice match day media guidelines and supervision in respect of their execution;

(j) advice and assistance in connection with the development of any relevant stadia and the finance which may be necessary in connection therewith and, jf requested, the introduction to the BCCI of third parties who are involved In the redevelopment of stadia;

(k) advice and assistance in connection with the rules and regulations relating to the registration, trading and auction of flayers;

(1) the creation of and advice and assistance with the "look and feel" elements in relation to the BCCI Marks generally and, in particular, at any relevant Stadia;

(m) the provision of hospitality guidelines in relation to the League and implementation of hospitality in the latter "case in a latter case in manner to be mutually discussed and agreed;

(n) the provision of a League handbook;

(o) advice and assistance in connection with the Player contracts;

(p) the establishment and maintenance of the player registration system

(q) the management of the annual Player trading window;

(r) provision of the requisite manpower that is required to carry Out such activities as are within IMG's control in connection with the successful naming of the League and Matches including the provision of a CUIH staffed, office to do the same, at the sole cost of MG;

(s) the hiring of whatever resources are required to fully perform IMGs obligations under this Agreement at the sole cost of IMG;

(t) advice and assistance ***in*** *connection with Anti Doping and WADA Compliance Regulations;*

(u) assistance in the creation / development of new intellectual properties relating to the league. All such properties created will be the sole prop of BCCI

(v) carrying out research in consultation with BCCI each year to ascertain un improvements in various areas of management and execution of the League

(w) development of the strategic brand framework for BCCI and marriage brand IPL working with the BCCI team;

(x) bringing-in global best practices in building and evaluating sporting properties and related aspects;

(y) delivering a post event report at the end of each season and be subject to review on the performance and delivery of services rendered to BCCI."

34. The obligations set out in above paragraph has been further assigned between the UK office of the appellant and the Indian permanent establishment as set out in the transfer pricing study report produced by the assessee before the revenue as under:-

"4.4. Functions performed

4.4.1. Functions performed by IMG UK

The entire contract negotiation, pricing discussions, finalization of terms, etc., with BCCI were undertaken by IMG UK.

As mentioned earlier, IMG UK was awarded the contract because of the vast knowledge and experience of IMG UK, which has been developed by the UK entity over the years as a result of working on similar assignments in the field of sports (including cricket) prior to

this contract. IMG UK possessed all the necessary technical skills, expertise, know-how and related intangibles for the purpose of executing the BCCI contract.

Further, the execution of the entire contract is the responsibility of IMG UK. IMG UK's team is involved in all of the activities/ responsibilities entrusted upon IMG UK under the contract and were responsible for performing/ managing the contract on an end to end basis.

IMG UK was responsible for conceptualization, strategy formulation, development of framework for IPL event, etc from UK. To this end, the activities undertaken by the UK team from completely outside of India include:

1. Conducting research in respect of, and making recommendations to BCCI on, the appropriate structure for all aspects of the IPL

2. Preparation of the core/ key strategic framework for the IPL, including: constitution of the IPL, devising the structure of the tournament, creation of the sporting model to be adopted for IPL, devising/ suggesting the investment model (or the franchisee, creation of the media and sponsorship rights, key decisions relating to the event (like how many cities to be involved, no of matches), etc.

3. Preparation of the IPL foundation documents, including: rules and regulations, franchisee tender documents, franchisee agreements, franchisee regulations, IPL implementation budget, drafting tender documents relating to media and sponsorship rights, etc.

4. Assistance in respect of development of and advise relating to commercial rights management process with respect to franchise rights, media rights, sponsorship rights, licensing and merchandising rights, stadium signage rights, official vendor rights etc.

5. Formulation/ preparation of marketing strategies for franchise tender

6. Formulation/ preparation of marketing strategies for media rights, sponsorship rights, official supplier rights, licensing rights, etc.

7. Formulation of policies/ procedures and work plan relating to management of the franchise tender process in India

8. Formulation of policies/ procedures and work plan relating to management of the sales process in respect of the various aforementioned rights in India

9. Preparation of and offshore assistance in negotiation of contracts with sponsors, media, successful franchisees etc.

10. Preparation of television production specifications

11. Formulating policies/ procedures and work plan relating to running of the event in India, including setting out the logistics, manpower etc. Requirements along with IMG India PE

12. Development of best practice match day guidelines for franchisees and for the IPL along with IMG India PE

13. Development of best practice match day media guidelines along with IMG India PE

14. Undertaking offshore market/ industry analysis and supervision of research activities undertaken in India for identification of prospective sponsors along with IMG India PE

15. Advice and assistance in connection with the rules and regulations relating to the registration, auction and trading of Players

16. Development of the strategic brand framework for BCCI and managing brand IPL along with the BCCI team

17. Creation of the look and feel elements in relation to the BCCI Marks generally and, in particular, at any relevant Stadia

18. Creation of the League handbook along with IMG India PE

19. Advice and assistance in connection with the Player contracts

20. Establishment and maintenance of the Player registration system
21. Creation of the IPL match schedule along with IMG India PE
22. Advice and assistance in connection with Anti-Doping and WADA Compliance Regulations along with IMG India PE
23. Development assistance in creation of new intellectual properties relating to the League
24. Carrying out research in consultation with BCCI to ascertain improvements in various areas of management and execution of the League
25. Bringing-in global best practices in building and evaluating sporting properties and related aspects
26. Delivering a post event report at the end of each season
27. Preparation of marketing collaterals, press packs and appropriate presentation documentation for meetings/ events conducted in this regard

Accordingly, the conceptualization, strategy formulation, core process and know-how development, creation of framework for IPL, etc was done by IMG UK from the UK.

Further, it must be noted that all the contractual risks and obligations relating to the contract vest with IMG UK, which assumed the entrepreneur role and responsibilities pertaining to the contract.

The team in IMG UK working for the IPL contract comprised of highly skilled senior personnel with significant knowledge and experience. Over the years, the learn in the UK has developed significant expertise by working on similar contracts in the past and is well acknowledged in the Industry for its experience/ knowledge in assisting clients in the management of sports/ cricket events.

4,4.2, Functions performed by IMG India PE

As part of the execution of the contract, a certain set of activities were required to be undertaken in India. Accordingly, some of the discussions/ negotiation processes between BCCI and various other parties (like franchises, sponsors, media partners, etc.) happened in India since the 2009 event was scheduled to take place in India.

For this purpose, IMG UK employees came to India from time to time for short term visits. Further, few freelancers were appointed/ engaged by IMG UK for undertaking the on-ground implementation and related supervision activities in India.

However, for reasons explained earlier in the report, the event was finally hosted/ held in South Africa. The announcement of the event location shifting from India to South Africa was made on March24, 2009, till which time the on ground preparations for the event were being done in India. Accordingly, for the 2009 event, IMG India PE was involved in performing the following activities:

1) Undertaking market/ industry research to assist IMG UK in identification of prospective franchisees and sponsors in India;
2) Providing liaison/ co-ordination support in dealing with the client/ BCCI, media partners, sponsors, franchisees etc. in India;
3) Functional Analysis
4) Along with BCCI, attending meetings with sponsors for execution of marketing strategies (developed by IMG UK) relating to sponsorship rights, official supplier rights, licensing rights, etc.;
5) Assistance in negotiation of contracts with sponsors, media, successful franchisees etc., by way of presence in joint meetings along with BCCI;

6) Implementation and management of work plan relating to running of the event, including arranging for and management of the logistics, manpower etc. requirements based on the policies/ procedures set out in the framework documents developed by IMG UK;
7) Based on the framework developed by IMG UK, development of best practice match day guidelines for franchisees media, etc;
8) Based on the overall framework developed by IMG UK, providing on-ground advise relating to the implementation of the look and (eel elements In relation to the BCCI Marks generally and, in particular, at any relevant Stadia, etc. based on approvals from IMG UK;
9) Along with IMG UK, development/ customization of the League Handbook and discussions with BCCI thereafter for finalizing the same;
10) Along with IMG UK, development of the IPL match schedule and discussions with BCCI thereafter for finalizing the same;
11) Assistance in connection with ensuring compliance by BCCI with Anti-Doping and WADA Compliance Regulations;
12) Carrying out analysts in consultation with BCCI to ascertain improvements in various areas of execution of the League;
13) Assist BCCI in the management of brand IPL by way of discussions with the BCCI team;
14) Assistance in preparation of hospitality guidelines in relation to the League and implementation of hospitality;
15) Delivering a post event report at the end of the event; and
16) Management and supervision of the activities undertaken by IMG India Branch:

The activities undertaken by the Branch include: liaison/ co-ordination support in dealing with the client/ BCCI, media partners, sponsors, franchisees, player auction process, etc. in India; organizing the implementation of the event in India viz. coordinating with various third parties in India to ensure that facilities/ arrangements at the match locations are in line with the desired IMG UK guidelines; providing/ managing logistics, manpower support in India relating to running of the event and undertaking related administrative support activities, assistance in negotiation of contracts with sponsors, media, successful franchisees etc.; undertaking market/ industry research to assist IMG UK in identification of prospective sponsors in India. The logistic activities essentially involved making arrangements for travel bookings, room bookings, commuting of IMG staff, etc.

As mentioned earlier, IMG UK/ IMG India PE sub contracted certain routine services relating to on-ground implementation/ running of the event to IMC India Branch. IMG India PE was involved in/ responsible for overseeing and managing the liaisoning and implementation support activities undertaken by IMC India Branch.

All these aforesaid activities were undertaken by IMG India PE under the framework, guidelines and policies prepared by IMG UK (from outside India). Any significant divergence or variation from the framework required specific approval from the Project leader, who was based in UK.

Further, it must be noted that all the activities were undertaken in India purely as a sub contracted support service to IMG UK and India was not responsible for its services to the end client/ BCCI.

Functional Analysis

4.4.3. Functions performed by deputed employees/ appointed freelancers in -South Africa

Post the announcement of the fact that the 2009 IPL event would be hosted in South Africa, the UK employees and freelancers appointed/ engaged by IMG UK moved out to South Africa. Such employees and the freelancers appointed/ engaged by IMG UK for undertaking event implementation and related activities in South Africa were involved in undertaking on-ground implementation and related supervision activities in connection with the event held in South Africa. Accordingly, for the 2009 event, the following activities were undertaken in South Africa.

1. Assistance in respect of development of and advise relating on the commercial rights management process relating to media rights, sponsorship rights, licensing and merchandising rights, stadium signage rights, official suppliership rights etc.;
2. Formulating policies/ procedures and work plan relating to the running of event including setting out the logistics, manpower etc. requirements;
3. Assistance in implementation and management of the rights on behalf of third parties;
4. Assistance In development of best practice match -day guidelines for franchisees and for the IPL and match day media guidelines;
5. Providing liaison/ co-ordination support in dealing with (he client/ BCCI, media partners, sponsors, franchisees etc. in South Africa;
6. Organizing the implementation of the event i.e., coordinating with the various third parties in South Africa to ensure that facilities/ arrangements at the match locations are in line with the desired IMG UK guidelines;
7. Managing logistics and manpower support relating to the running of the event;
8. Supervising whether the match day guidelines for franchisees and match day media guidelines prepared by IMG UK/ BCCI are being followed during the match/ event;
9. Advise and assistance with the implementation of the "took and fee!" elements in relation to the BCCI Marks generally and, in particular, at any relevant Stadia;
10. Along with IMG UK, development/ customization of League handbook and creation of the IPL match schedule;
11. Assistance in connection with Anti-Doping and WADA Compliance Regulations:
12. Development of the strategic brand framework for BCCI and manage brand IPL working with the BCCI team,
13. Dealing with the Stadia authorities and vendors/ suppliers, etc for management and implementation of an accreditation system relating to entry/ exit of players, franchisees etc into the stadia, etc; and
14. Assistance in preparation of hospitality guidelines in relation to the league and implementation of hospitality."

35. Based on the above FAR analysis of the Indian permanent establishment of the assessee, the Ld. TPO passed order under section 92CA (3) on 31/12/2013 wherein he has examined the transfer pricing documentation of the assessee with respect to fees for technical services amounting to Rs. 92249819/- , event management expenses of Rs. 11909828/- and reimbursement

of expenses of Rs. 53430529/- totaling in all to Rs. 157590176/- pertaining to the transaction entered into with its associated enterprise i.e. IMG, United Kingdom and IMG USA applying the transactional net margin method for determining the arm's length price and has held that as stated in the prior year order, article 13 of the India UK Treaty read with article 7 of the treaty states that if assessee constitutes a service PE, the profits are attributable to the PE are to be taxed in the other contracting states that is in India. This implies that profits of the PE are rightly attributable to it should be taxed in India. He further held that after going through the facts and information submitted by the assessee during the course of the assessment proceedings, it is noted that the facts and circumstances of the IPL 2009 event are different from IPL 2008 event since IPL 2009 took place in South Africa unlike the previous IPL event 2008 which was hosted in India during April to June 2008. On the basis of the above facts no adverse inference was drawn towards the amount of revenue of Rs. 92249819/- attributable to the Indian permanent establishment. Therefore, on reading the transfer-pricing officer's order it is apparent that according to him no further profit is required to be attributed to the permanent establishment of the assessee. However these attribution of the profit is undisputedly based on the functions performed by the permanent establishment of the assessee, assets employed by the permanent establishment in performing those functions and risk assumed by it while performing those functions. However it is to be noted that over and above those functions performed by the permanent establishment of the

appellant in India there are certain functions which have been performed from its head office from outside India by the appellant which are not at all connected with the permanent establishment of the appellant in India. Appellant has submitted that it has a permanent establishment of India as it is deputed some of its employees and also appointed third-party freelancers for undertaking the on- ground implementation and related event management and supervision activities in India which has created a permanent establishment as the threshold limit of 90 days has exceeded and therefore it constitutes a service permanent establishment in India according to the Indo UK Double Taxation Avoidance Agreement. Based on this premises which has been accepted by the revenue has resulted into the exercise of attribution of profit to the permanent establishment and taxation of income of the appellant to that extent on net basis after deduction of the expenses. It is interesting to note that in the present case there is only a service PE which has come into existence only because of the on- ground implementation and related event management and supervision activities in India by deputation of staff and appointing third parties. It does not talk about the services which have been rendered by the IMG UK directly from the head office to the board of control for Cricket in India. On specific query by the bench that how the services rendered by the United Kingdom company to BCCI were effectively connected with the permanent establishment in India the appellant has given an answer stating that the contract is in all circumstances is effectively connected with the permanent establishment and

therefore the conclusion that the instant case only article 7 will apply. The Ld. appellant further stated that the effective connection has to be read in relation to the contract and not in relation to the services rendered and during the year assessee has only one contract entered into by the appellant with the BCCI for IPL 2009 event and due to that contract only the service PE is coming into existence and therefore the whole contract has been 'effectively connected' with the permanent establishment. The appellant has further submitted that in case if the bench is of the view that the balance consideration is not attributable to the permanent establishment for the services rendered by the appellant and it is in the nature of the fees for technical services as per the provisions of article 13 (4) (c) , then also because of the PE the receipts would be taxed as business income under article 7 of the Tax treaty. Admittedly appellant is a UK resident and without any doubt the provisions of the Income Tax Act or the provisions of the Double Taxation Avoidance Agreement whichever is more beneficial to the assessee shall be applied for determining the tax liability of the assessee in India. In view of this undoubtedly the appellant is entitled to the benefit of Indo UK Double Taxation Avoidance Agreement. Therefore To examine this argument of the Ld. appellant we would like to examine the provisions of article 13 of the Indo UK DTAA which are as under:-

ARTICLE 13

ROYALTIES AND FEES FOR TECHNICAL SERVICES

1. Royalties and fees for technical services arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.

2. However, such royalties and fees for technical services may also be taxed in the Contracting State in which they arise and according to the law of that State; but if the

beneficial owner of the royalties or fees for technical services is a resident of the other Contracting State, the tax so charged shall not exceed :

(*a*) in the case of royalties within paragraph 3(*a*) of this Articles, and fees for technical services within paragraphs 4(*a*) and (*c*) of this Article,—

(*i*) during the first five years for which this Convention has effect ;

(*aa*) 15 per cent of the gross amount of such royalties or fees for technical services when the payer of the royalties or fees for technical services is the Government of the first-mentioned Contracting State or a political sub-division of that State, and

(*bb*) 20 per cent of the gross amount of such royalties or fees for technical services in all other cases; and

(*ii*) during subsequent years, 15 per cent of the gross amount of such royalties or fees for technical services; and

(*b*) in the case of royalties within paragraph 3(*b*) of this Article and fees for technical services defined in paragraph 4(*b*) of this Article, 10 per cent of the gross amount of such royalties and fees for technical services.

3. For the purposes of this Article, the term "royalties" means :

(*a*) payments of any kind received as a consideration for the use of, or the right to use, any copyright of a literary, artistic or scientific work, including cinematography films or work on films, tape or other means of reproduction for use in connection with radio or television broadcasting, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience; and

(*b*) payments of any kind received as consideration for the use of, or the right to use, any industrial, commercial or scientific equipment, other than income derived by an enterprise of a Contracting State from the operation of ships or aircraft in international traffic.

4. For the purposes of paragraph 2 of this Article, and subject to paragraph 5, of this Article, the term "fees for technical services" means payments of any kind of any person in consideration for the rendering of any technical or consultancy services (including the provision of services of a technical or other personnel) which :

(*a*) are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 3(*a*) of this article is received ; or

(*b*) are ancillary and subsidiary to the enjoyment of the property for which a payment described in paragraph 3(*b*) of this Article is received ; or

(*c*) make available technical knowledge, experience, skill know-how or processes, or consist of the development and transfer of a technical plan or technical design.

5. The definition of fees for technical services in paragraph 4 of this Article shall not include amounts paid :

(*a*) for services that are ancillary and subsidiary, as well as inextricably and essentially linked, to the sale of property, other than property described in paragraph 3(*a*) of this Article;

(*b*) for services that are ancillary and subsidiary to the rental of ships, aircraft, containers or other equipment used in connection with the operation of ships, or aircraft in international traffic;

(*c*) for teaching in or by educational institutions ;

(*d*) for services for the private use of the individual or individuals making the payment ; or

(*e*) to an employee of the person making the payments or to any individual or partnership for professional services as defined in Article 15 (Independent personal services) of this Convention.

6. The provisions of paragraphs 1 and 2 of this Article shall not apply if the beneficial owner of the royalties or fees for technical services, being a resident of a Contracting State, carries on business in the other Contracting State in which the royalties or fees for technical services arise through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the right, property or contract in respect of which the royalties or fees for technical services are paid is effectively connected with such permanent establishment or fixed base. In such case, the provisions of Article 7 (Business profits) or Article 15 (Independent personal services) of this Convention, as the case may be, shall apply.

7. Royalties and fees for technical services shall be deemed to arise in a Contracting State where the payer is that State itself, a political sub-division, a local authority or a resident of that State. Where, however, the person paying the royalties or fees for technical services, whether he is a resident of a Contracting State or not, has in a Contracting State a permanent establishment or a fixed base in connection with which the obligation to make payments was incurred and the payments are borned by that permanent establishment or fixed base then the royalties or fees for technical services shall be deemed to arise in the Contracting State in which the permanent establishment or fixed base is situated.

8. Where, owing to a special relationship between the payer and the beneficial owner or between both of them and some other person, the amount of the royalties or fees for technical services paid exceeds for whatever reason the amount which would have been paid in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In that case, the excess part of the payments shall remain taxable according to the law of each Contracting State, due regard being had to the other provisions of this Convention.

9. The provisions of this Article shall not apply if it was the main purposes or one of the main purposes of any person concerned with the creation or assignment of the rights in respect of which the royalties or fees for technical services are paid to take advantage of this Article by means of that creation or assignment.

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36. On perusing above article of the Double Taxation Avoidance Agreement it is apparent that if the fees for technical services are 'effectively connected' with the permanent establishment of the appellant in India then provisions of article 13 (6) shall be applicable to the assessee. In that case provisions of article 7 of the Double Taxation Avoidance Agreement shall apply to that income.

37. Provision of article 7 of the DTAA provides as under :-

ARTICLE 7

BUSINESS PROFITS

1. The profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent, establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enter price may be taxed in the other State but only so much of them as is directly or indirectly attributable to that permanent establishment.

2. Where an enterprise of a Contracting State carries on business in the other Contracting State through a permanent establishment situated therein, the profits which that permanent establishment might be expected to make if it were a distinct and separate enterprise engaged in the same or similar activities under the same or similar conditions and dealing wholly independently with the enterprise of which it is a permanent establishment shall be treated for the purposes of paragraph 1 of this Article as being the profits directly attributable to that permanent establishment.

3. Where a permanent establishment takes an active part in negotiating, concluding or fulfilling contracts entered into by the enterprise, then, notwithstanding that other parts of the enterprise have also participated in those transactions, that proportion of profits of the enterprise arising out of those contracts which the contribution of the permanent establishment to those transactions bears to that of the enterprise as a whole shall be treated for the purpose of paragraph 1 of this Article as being the profits indirectly attributable to that permanent establishment.

4. Insofar as it has been customary in a Contracting State according to its law to determine the profits to be attributed to a permanent establishment on the basis of an apportionment of the total profits of the enterprise to its various parts, nothing in paragraphs 1and 2 of this Article shall preclude that Contracting State from determining the profits to be taxed by such an apportionment as may be necessary; the method of apportionment adopted shall, however, be such that the result shall be in accordance with the principles laid down in this Article.

5. Subject to paragraphs 6 and 7 of this Article, in the determination of the profits of a permanent establishment, there shall be allowed as deduction expenses which are incurred for the purposes of the business of the permanent establishment, including executive and general administrative expenses so incurred, whether in the State in which the permanent establishment is situated or elsewhere, which are allowed under the provisions of and subject to the limitations of the domestic law of the Contracting State in which the permanent establishment is situated.

6. Where the law of the Contracting State in which the permanent establishment is situated imposes a restriction on the amount of the executive and general administrative expenses which may be allowed, and the restriction it relaxed or overridden by any Convention between that Contracting State and a third State which is a member of the Organisation for Economic Cooperation and Development or a State in a comparable stage of development, and that Convention enters into force, after the date of entry into force of this Convention, the competent authority of that Contracting State shall notify the competent authority of the other Contracting State of the terms of the relevant paragraph in the Convention with that third state

immediately after the entry into force of that Convention and, if the competent authority of the other Contracting State so requests, the provisions of this Convention shall be amended by protocol to reflect such terms.

7. Paragraph 5 of this Article shall not apply to amounts, if any, paid (otherwise than towards reimbursement of actual expenses) by the permanent establishment to the head office of the enterprise or any of its other offices, by way of royalties, fees or other similar payments in return for the use of patents or other rights, to by way of commission, for specific services performed or for management, or, except in the case of a banking enterprise, by way of interest on monies lent to the permanent establishment; nor shall account be taken in the determination of the profits of a permanent establishment of amounts charged (otherwise than towards reimbursement of actual expenses) by the permanent establishment of the head office of the enterprise or any of its other offices, by way of royalties, fees or other similar payments in return for the use of patents or other rights, or any way of commission, for specific services performed or for management, or, except in the case of a banking enterprise, by way of interest on monies lent to be head office of the enterprise or any of its other offices.

8. No profits shall be attributed to permanent establishment by reason of the mere purchase by that permanent establishment of goods or merchandise for the enterprise.

9. Where profits include items of income which are dealt with separately in other Articles of this convention, then the provisions of those Articles shall not be affected by the provisions of this Article."

38. Now the issue arises is whether the whole contract is 'effectively connected' with the permanent establishment or part of the services are 'effectively connected' with the permanent establishment. On reading of the above two agreements and the transfer pricing study report submitted by the assessee, more specifically at para number 4.4.2 are the functions performed by the permanent establishment of the appellant in India and para number 4.4.1 shows what are the functions performed by the IMG UK. It is further mentioned in the transfer pricing study report that certain routine services relating to on ground implementation and running of the event was subcontracted to the IMC India branch. The IMG India PE was involved in/responsible for overseeing and managing the liasonsing and implementation support activities undertake taken by the IMC India branch. It is also important to note that

how this functions were performed it was stated in the transfer pricing study report of the appellant that IMG UK employees came to India from time to time for short-term visits. Further few freelancers were appointed/engaged by IMG UK for undertaking the on- ground implementation and related supervision activities in India. As these functions performed, assessee has claimed that it has created a service PE in India and therefore the income should be chargeable to tax according to the article 7 of the Double Taxation Avoidance Agreement. Therefore according to us the above agreements and memorandum of understanding has two limb one with respect to the performance of the activities performed by the permanent establishment in India and another limb deals with respect to the performance of the services by the IMG UK directly for which the India PE has nothing to do. Admittedly the issue is concerned with respect to the fees for technical services. It is also admitted position that while the effective connection of royalties with a permanent establishment has to be evaluated by applying the 'assets test' , and for the purpose of fees for technical services the 'activity test' or 'functional test' should be applied as held in case of Nippon Kaiji Kyokoi V ITO 47 SOT 41 (Mum). Therefore to "effectively connect' the whole income with the PE, contending party i.e. assessee, should establish that PE is engaged in the performance of all those services or should be involved in actual rendering of such services, or (2) it should arise as a result of the activities of the PE, or (3) The PE should, at least, facilitate, assist or aid in performance of such services irrespective of the other activities PE performs.

Therefore according to article 7, for attribution of the profits to the permanent establishment the activity carried out by the permanent establishment is important and to that extent only the profits can be attributed to that particular permanent establishment. However if there are other activities, which are also incorporated in the agreement, which are not at all carried on with the help of, or through, or by, or under the control, or under the supervision of the permanent establishment such activities and income arising there from cannot be said to be 'effectively connected' with the permanent establishment and article 7 cannot be applied to those services. In the present case certain activities are carried out by the appellant which are not even concerned with the functioning of the permanent establishment therefore in our view only the activities which are performed by the permanent establishment are effectively connected with the permanent establishment and activities which are not carried on by the permanent establishment but are carried out by the head office of the appellant are not 'effectively connected' with the permanent establishment. We are also of the view that the term 'effectively connected' should not be understood to mean the opposite of 'legally connected' but rather something in the sense of 'really connected'. Therefore the activities mentioned in the contract should be connected to the permanent establishment not only in the form but also in substance. It is also interesting to note that the permanent establishment of the assessee has been admitted by the appellant only because of the reason that some of the employees of the appellant came to India from time to time for

short visit and further certain freelancers were appointed for undertaking the own ground implementation related supervision activities in India. Therefore according to us there are minimum activities performed by the PE of appellant in India. Hence just performing such minimum activities it cannot be said that whole of the revenue of Rs. 33 crores involved in the contract is 'effectively connected' with the activities of the permanent establishment in India. Hence we reject the contention of the assessee that the whole of the revenue involved in the contract should be considered as effectively connected with the permanent establishment of the appellant. We also give one more reason may be a hypothetical one which supports our view. Supposedly a contract of Rs. 100 crore is awarded to an overseas entity for rendering of the management services and if such overseas entity establishes a permanent establishment by just deputing its staff for more than 90 days, it creates a service permanent establishment of that for an entity in India. On the basis of the minimum activities performed by that particular staff which is deputed in India 10% of the gross receipt say 10 crores is attributed to permanent establishment and after claiming deduction of expenses there from of say 60% of the income attributed , assessee offered balance amount as profit of the permanent establishment for taxation. In transfer pricing study report, based on FAR analysis such attribution of the profit is considered to be at arm's length by the assessee and as well as by the transfer pricing officer, it cannot be said that the balance sum of Rs. 90 crores cannot be taxed in India as the whole

contract was 'effectively connected' with the permanent establishment created by the petitioner of some staff for performing some of the activities and crossing the threshold duration. We do not subscribe to such a view and we are also of the view that such is the case of the assessee before us.

39. Further now coming to the interplay between article 7 and article 13 of the Double Taxation Avoidance Agreement gives an insight that first there has to be an existence of the permanent establishment through which the business is carried out and further existence of 'effective connection' between such PE and the rights properties and contracts in respect of which the fees for technical services are paid. That would mean that only such fees for technical services are excluded from the scope of article 13 (6) as are 'attributable' to the permanent establishment of the assessee through which the business is carried on by the appellant. Therefore according to us the taxability under article 13 shifts to the taxability of article 7 only in respect of fees for technical services which are 'attributable' to the PE in question. Therefore the article 13 (6) of the Double Taxation Avoidance Agreement shall apply only to the extent of the activities carried on by the appellant through its permanent establishment. In view of this we are of the view that activities carried out by the appellant which are not at all connected with the activities of the permanent establishment are not covered by article 7 or 15 of the Double Taxation Avoidance Agreement between India and United Kingdom and same shall remain as fees for technical services under article 13 only. Therefore natural corollary that

follows is that whatever is income excluded by the applicability of article 13 (6) and goes back to article 7 is the same amount.

40. Our this view is also supported by the provision of article 13 (6) of the DTAA which provides as under :-

> (6) . The provisions of paragraphs 1 and 2 of this Article shall not apply if the beneficial owner of the royalties or fees for technical services, being a resident of a Contracting State, carries on business in the other Contracting State in which the royalties or fees for technical services arise through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the right, property or contract in respect of which the royalties or fees for technical services are paid is effectively connected with such permanent establishment or fixed base. In such case, the provisions of Article 7 (Business profits) or Article 15 (Independent personal services) of this Convention, as the case may be, shall apply."
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41. on reading of the above article it is apparent that the provisions of paragraph 1 and 2 of this article shall not apply if the beneficial owner of the royalty fees for technical service, being a resident of a contracting state, carries on business in other contracting State in which the royalties or fees for technical services arise through a permanent establishment situated therein, and the right property or contract in respect of which the royalty fees for technical services are paid is effectively connected with that permanent establishment or fixed base. Then only the provisions of article 7 related to business profit shall apply. Therefore the above article provides for twin conditions , (1) that the royalty or fees for technical services

should arise through a permanent establishment situated in the other State and (2) the right property or contract in respect of the royalty or fees for technical services are paid is effectively connected with the such permanent establishment or fixed base. In the present case the benches raised a specific query that how the activities carried on by the UK office of the appellant are arise through the permanent establishment and how the contract is effectively connected with such permanent establishment. The Ld. authorized representative responded by submitting that it is with respect to the contract which should be effectively connected to the permanent establishment or fixed base. However with respect to the evidence of activities carried on by the overseas head office of the appellant and how they are connected or arising through the permanent establishment has not been responded to. Despite this we have pursued the relevant activities performed by the foreign office of the appellant as well as the permanent establishment of the appellant. We are of the view that activities carried on by the foreign office of the assessee are not at all arising through the permanent establishment of the appellant in India. Therefore one of the condition of the about twin conditions also failed in case of the appellant. Once again we would like to reiterate that for the purpose of applicability of article 13 (6) with respect to the fees for technical services one has to apply the activity test of the permanent establishment in the source country is held by the coordinate bench in case of the Nippon Kaiji Koyokoi V ITO (supra).

42. Therefore we reject the contention of the assessee that out of 33 crores Rs. 9 crores are effectively connected with the permanent establishment of the appellant, the balance 22 crores cannot be taxed in India under article 13 as fees for technical services. Our one more reasons for holding such a view is that according to us there is no distinction between the two phrases used into two different articles of the Double Taxation Avoidance Agreement. These two phrases are (1) "attributable to ' in article 7 of the Double Taxation Avoidance Agreement, and (2) 'effectively connected with ' in article 13 (6) the Double Taxation Avoidance Agreement, because Indo US DTAA uses the same term 'attributable to' in place of 'effectively connected' with in article 12(6) of that agreement as under:-

> "*6.* The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of the royalties or fees for included services, being a resident of a Contracting State, carries on business in the other Contracting State, in which the royalties or fees for included services arise, through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the royalties or fees for included services are attributable to such permanent establishment or fixed base. In such case the provisions of Article 7 (Business Profits) or Article 15 (Independent Personal Services), as the case may be shall apply."
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Therefore, in the present case, according to us, out of the total receipt of Rs. 33 crores the receipt of Rs. 92249819/- which is attributable to the permanent establishment in India and the balance sum of Rs. 237750181/- shall be chargeable as fees for technical services under article 13 of the DTAA.

43. Now the next contention raised by the appellant is that as there is no 'make available' test satisfied in case of the services

provided by the appellant, hence, according to article 13 (4) which defines the fees for technical services means payments of any kind of any person in consideration for the rendering of any technical or consultancy services which make available technical knowledge, experience, skill know-how or processes, or consist of development and transfer of a technical plan technical design. According to the assessee as clause C of article 13 (4) is not satisfied the balance cannot be charged to tax as fees for technical services. In the present case the services are already described in the previous paragraphs and there cannot be two opinion about that that mere provision of services or technical services is not sufficient, it is essential that services should be "make Available" technical knowledge, experience, skill, know-how or process. The expression make available has far-reaching significance since it limits the scope of technical and consultancy services. Generally this expression 'make available' is used in the sense of one person supplying or transferring or imparting technical knowledge or skill or technology to another and technology is considered 'made available' only when the services receiver is enabled to absorb and apply the technology contained therein. If the services do not have any technical knowledge the fees paid for it do not fall within the meaning of fees for technical services as per the article 13 of the India UK DTAA.. The services receiver is able to make use of the technical knowledge etc by himself in his business or for his own benefit and without recourse to the service provider in future and for this purpose the transmission of the technical knowledge, experience, skill, etc from the

service provider to the services CP is necessary. In other words the technical knowledge, experience, skill etc must remain with the service recipient even after the rendering of the services has come to an end and the services receiver is at liberty to use the technical knowledge skill know-how and processes in his own right. In the present case the assessee has hired for conducting research in respect of the appropriate structure for the IPL and makes recommendation to BCCI accordingly. It is required to provide the Constitution of the IPL, the authority of the governing Council , the structure of IPL, tournament rules and regulation ,the franchisee tender document ,the franchisee agreement, necessary franchisee regulation and the IPL implementation budget. According to the para No. 9 of the agreement that intellectual property rights remains with the board of control for Cricket in India. Even before us Ld. authorized representative could not point out that why 'make available test' has not been satisfied in this even by providing all the rules and regulations of IPL, standard operating procedures of matches, copies of the franchisee agreement, various documentation/ contracts etc which shall remain with the BCCI. Therefore in the present case according to us the BCCI is enabled to absorb and apply the information and the advice provided by the appellant to it for conducting such sporting events. According to us when all this documentation and material is provided to the BCCI it is able to use such know-how and documentation generated from provision of the services of the appellant independent of the services of the appellant in future. It is too naïve to say that in absence of

IMG services BCCI on its own IPL tournament cannot hold. Merely because the BCCI has entered into a contract for conducting further 9 events does not lead to the conclusion that the information documentation, agreements, contracts etc cannot be said to be 'made available' to the appellant. In fact according to us it is. In view of this we reject the contention of the appellant that the sum of Rs. 237750181/-cannot be taxed as fees for technical services as it does not satisfy 'make available' condition provided in article 13(4) 9c) of the DTAA.

44. We would also like to state that appellant has relied on the decision of Hon'ble Delhi High Court in case of Guy Carpenter V DIT 346 ITR 504. According to us that decision does not support the case of the assessee as it was related to an intermediary.

45. Appellant has further relied upon the decision of the Nippon kaiji Koyokoi V ITO (supra) of coordinate bench. We have perused that decision and we found that in that particular case the permanent establishment of the appellant was providing some services with respect to the earning of the head office and therefore facts of that case are different. In the present case the services of the head office which are directly provided from the United Kingdom are no way related to the services of the permanent establishment of the appellant. In view of this we reject the contention of the assessee that issue is covered by the above decision of the coordinate bench. In view of this we also disagree with the direction of the Ld. Dispute resolution panel to the Ld. assessing officer to assess fees for technical services

as business income on substantive basis by applying the formula of gross receipts with respect to the expenditure.

46. Further with respect to ground No. 7 and 8 of the appeal of the appellant saying that receipt of Rs 237750181/-fall under the exception provided under section 9(1) (vii) (b) of the Income tax act as the services have been rendered outside India and the income is generated in the hands of the BCCI outside India. The provisions of section 9 (1) (vii) are as under :- .

> (*vii*) income by way of fees for technical services[55] payable by—
>
> (*a*) the Government ; or
>
> (*b*) a person who is a resident, except where the fees are payable in respect of services utilised in a business or profession carried on by such person[55] outside India or for the purposes of making or earning any income from any source outside India[55] ; or
>
> (*c*) a person who is a non-resident, where the fees are payable in respect of services utilised in a business or profession carried on by such person in India[56] or for the purposes of making or earning any income from any source in India :

48. According to provisions of section 9 (1) of the Income tax Act the income by way of fees for technical services payable by a person who is resident to a non-resident shall be deemed to accrue or arise in India and shall be chargeable to tax u/s 5 of the Income Tax Act in the hands of a non-resident. The claim of the appellant is that receipt of Rs. 237750181/- falls within the exception provided under clause (b) of the above section which says that where the fees for technical services are payable in respect of services utilized in a business or profession carried on by such person outside India or for the purpose of making or earning any income from any source outside India, it shall not be considered as fees for technical services as income deemed to accrue or arise in India in terms of the provisions of section 9(1)

(vii) (b) of the Income Tax Act. The main reason to say so by the appellant is that the IPL 2009 event has been held outside India and therefore the BCCI has utilized those services outside India and therefore they fall into the exception and cannot be taxed in India. We have carefully considered the rival contentions and reject the contention of the appellant for the reason that to fall within the exception the assessee must be carrying out business outside India and such services must be utilized in that business by a person who is a resident in India and who pays income by way of fees for technical services to a non-resident. It is an established fact that BCCI is carrying on business in India and not outside India. Further the source of income of the BCCI is in India and not outside India. Merely because the event is performed outside India it cannot be said that source of income of the BCCI is not in India. Therefore according to us the income of the appellant of Rs. 237055181/- is chargeable to tax as fees for technical services under section 9 (1) (vii) of the Income Tax Act as Fees for technical services.

49. In view of above facts and circumstances we adjudicate the appeal of the assessee as under:

a. with respect to ground No. 2, 3,4,5 and 6 of the appeal of the assessee we hold that that the receipts from the services rendered outside India of Rs. 237750181/- are chargeable to tax as Fees for Technical Services in terms of Article 13(4) (c) as it makes available the technology to the recipient of services and further the provisions of article 13(6) of the Indo UK Double Taxation Avoidance Agreement does not apply to this sum, as it does not

'arise through' and also not 'effectively corrected' with the permanent establishment of the appellant.

b. With respect to the ground No. 7 and 8 of the appeal we hold that income of Rs 237750181/-is chargeable to tax under section 9 (1) (vii) (b) of the Income Tax Act as fees for technical services and it does not fall into the exception thereof.

c. With respect to ground No. 9 of the appeal we hold that receipt of the appellant satisfies the 'make available' test as provided under article 13 (4) (c) of the India UK DTAA as fees for technical services.

50. In the result appeal No. 1613/Del/2015 for assessment year 2010 – 11 filed by the appellant is dismissed.

51. Now we come to the appeal of the revenue in ITA No 1646/Del/2015 and we decide the grounds of appeal for the reasons given above as under:-

a) we allow the ground No. 1 of the appeal of the revenue holding that that the balance receipt of Rs. 237750181/-shall be governed by the provisions of article 13 of the Double Taxation Avoidance Agreement as fees for technical services as it is not arising through and not effectively connected with the permanent establishment of the appellant in India.

b) With respect to ground No. 2 we hold that the receipt from work done outside India of Rs. 237750181/-is

assessable as fees for technical services on substantive basis.

52. In the result appeal filed by the revenue in ITA No 1646/Del/2015 Russell, he borrowed tutorial is allowed.

53. Order pronounced in the open court on 04 /10/2016.

-Sd/-	-Sd/-
(H.S.SIDHU)	**(PRASHANT MAHARISHI)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: 04/10/2016
A K Keot
Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi