IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI SPECIAL BENCH, 'J' MUMBAI

BEFORE SHRI R.S. SYAL (V.P.), SHRI ABY T. VARKEY (J.M.)
AND SHRI PRASHANT MAHARISHI (A.M.)

आयकर अपील सं. / ITA. No.7872/MUM/2019

निर्धारण वर्ष / Assessment Year : 2015-16

Star India Private Limited, Star House, Urmi Estate, 95 Ganpatrao Kadam Marg, Lower Parel (W), Mumbai 400 013 Maharashtra PAN : AAACN1335Q	Vs.	ACIT-16(1), Mumbai
Appellant		Respondent

Assessee by	Shri Porus Kaka, Senior Advocate and Shri Divesh Chawla, Advocate
Revenue by	Shri Vinod Tanwani
Date of hearing	09-05-2023
Date of pronouncement	05-06-2023

आदेश / ORDER

PER R.S. SYAL, VP :

The Hon'ble President has constituted this Special Bench u/s.255(3) of the Income-tax Act, 1961 (hereinafter also called 'the Act') for the captioned assessment year, on a reference made by the Division Bench, which found itself unable to concur with the view

adopted by the predecessor Bench in the assessee's own case for the immediately preceding assessment year 2014-15 on the benchmarking of the international transaction of `Purchase of Bundle of Sport Broadcasting Rights'. Albeit, no question has been referred for consideration, the Special Bench, after taking into consideration the factual matrix of the case, proposed the following question and sought comments of the parties to the same: -

> "Whether on facts and in law, the Assessing Officer was justified in making transfer pricing adjustment anent to the international transaction of acquiring Bundle of Sport Broadcasting Rights, on the basis of deficiencies found by him in the valuation report submitted by the assessee?"

2. The assessee, who is the appellant, did not raise any objection to the question. However, the ld DR was not convinced. It will be seen *infra* that the question represents correct controversy between the parties as the transfer pricing adjustment in the international transaction under consideration has been made solely on the basis of deficiencies found in the valuation report submitted by the assessee.

3. Succinctly, the factual panorama of the case is that the assessee furnished revised return declaring total loss of Rs.1334.14 crore. It also filed Form No.3CEB containing a list of international transactions, including, payment of Rs.3075,24,15,714/- for acquiring Bundle of Sport Broadcasting Rights (BSB Rights) hitherto held by its US based Associated Enterprise (AE), namely, ESPN Star Sports Ltd. (ESS). The transaction of acquiring the BSB Rights (rights to broadcast through television/internet/mobile various sports events like ICC Tournaments including Cricket World cup, Champions League T20 cricket, Formula-1 GP2 and Wimbledon Championships etc.) from ESS was concluded for 1211 USD million by means of Master Rights Agreement (MRA) entered on 31-10-2013 in the financial year relevant to the immediately preceding assessment year. To substantiate the agreed price of 1211 USD million, the assessee furnished a report of an independent valuer determining the total value of BSB Rights at this level by considering the finite period value at 663 USD million and

the terminal value at 548 USD million. Such value was determined by adopting Discounted Cash Flow (DCF) method.

4. The assessee claimed deduction of Rs.1013.26 crore on this score for the immediately preceding assessment year, 2014-15. It applied the Comparable Uncontrolled Price (CUP) method for demonstrating that the international transaction of acquiring the BSB Rights was at Arm's Length Price (ALP). For doing so, the assessee adopted the comparable uncontrolled transaction of ESS acquiring such BSB Rights for a total sum of 1388 USD million. Since the overall purchase price of 1211 USD million agreed between ESS and the assessee was 9.5% less than the agreed price between ESS and third parties [International Sport Bodies (ISBs)], the assessee claimed that the international transaction was at ALP.

5. During the course of transfer pricing proceedings for the immediately preceding year, being, the first year when the assessee acquired the BSB Rights, the Transfer Pricing Officer (TPO) observed that the rights acquired by the assessee were by two

different means viz., one set of rights was sub-licensed by ESS to the assessee in which the latter was to pay its 90.5% (after discount of 9.5%) share to its AE, who, in turn, was to make full payment to ISBs; and second set of rights was by means of novation of the agreements under which the assessee was substituted in place of ESS, becoming liable to make full direct payment to ISBs and recovering 9.5% from ESS. Out of 1338 USD million agreed to be paid by ESS to ISBs, the agreements worth 326,557,549 USD were sub-licensed and agreements worth 1,011,630,729 USD were novated. The TPO observed that the Valuer had inflated the amount of cash flows during the `Finite period' valuation of the BSB Rights by 38%. He further found that the `Terminal Value' of the Rights ought to have been taken at Nil because, firstly, the agreements were for Finite period and secondly, during the Finite period also, the assessee was incurring losses. He, therefore, determined ALP of the international transaction at 411 USD million by taking ALP of Terminal Value at Nil; and ALP of Finite period at 411 USD

million. This resulted into variation between actual consideration (1211 USD million) and ALP consideration (411 USD million) at 800 USD million, being, 66.06% [800(1211-411)/1211*100] of the actual consideration. The assessee had reported value of this international transaction for the A.Y. 2014-15 at Rs.1013.26 crore. By applying 66.06% to the value of the transaction, the TPO proposed transfer pricing adjustment of Rs.669.36 crore for the immediately preceding year. No succor was provided by the Dispute Resolution Panel (DRP), which culminated into making transfer pricing addition of the equal amount in the final assessment order passed by the AO for the A.Y. 2014-15. The Tribunal took note of the fact that the assessee submitted an expert's opinion as well as another valuation report before the DRP for the first time supporting its earlier valuation, which was again contradicted by the TPO during the remand proceedings. On consideration of the entire conspectus of the case, the Tribunal held that valuation of the BSB Rights was a highly technical matter, which could be done only by a

person having expertise in the field. It, therefore, set-aside the assessment order and remitted the matter with a direction to the Revenue to ascertain the correctness of the assessee's valuation reports by getting the valuation done through an expert in the field.

6. For the year under consideration, the assessee claimed deduction towards the value of international transaction of `Purchase of the BSB Rights' at Rs.3075,24,15,714/-. The TPO extensively discussed and reproduced his order for the immediately preceding assessment year in his order for the instant year, eventually, determining excess payment on overall basis at 66.06% towards Full terminal value and the Part finite period value. Finding the facts of this year identical to the preceding year, the ALP of the transaction for the year under consideration was determined at Rs.1043,73,69,893/-, thereby recommending transfer pricing adjustment at Rs.2031,50,45,821/-. The AO notified the draft order with transfer pricing adjustment in this transaction at Rs.2031.50 crore. No reprieve was provided by the DRP, which

also relied on its own order for the A.Y. 2014-15. This is how, the final assessment order came to be passed by making transfer pricing adjustment on this international transaction at Rs.2031.50 crore. It is apparent from the above factual panorama that the transfer pricing adjustment has been made by reducing the full terminal value and the part finite period value from the valuation report submitted by the assessee. This is the reason for our drafting the question to be decided in the manner as set out above. Assailing the final assessment order, the assessee has come up in appeal before the Tribunal.

7. We have heard the rival submissions *in extenso* and gone through the relevant material on record. The short question for our decision is determination of the ALP of the international transaction of Purchase of BSB Rights. Before delving into the merits of the controversy raised by the parties before the Special bench, it would be apposite to see the background and factual landscape of the transaction in a little more elaborate manner. ESS, a US based

entity having a branch office and headquarters in Singapore, has been engaged in the business of owning and operating sports channels in certain territories in Asia including India. The assessee and ESS (both related parties) entered into the Master Rights Agreement (MRA) dated 31.10.2013, under which the assessee agreed to purchase from ESS a bundle of broadcasting rights of sports events, such as, Cricket World cup, Championship league, T20 cricket, Formula-1 GP2 and Wimbledon etc. Prior to this, ESS was holding broadcasting rights for such sports events for certain number of years with a well defined year-wise consideration payable each year on the happening of the sports events and the assessee's sister concern, namely, Star Sports India Pvt. Ltd. (SSIPL) was involved in the sale of advertisement airtime and subscription of sports Channels in India when the broadcasting was done by the ESS. Almost simultaneous with the assessee entering into the MRA with ESS for purchase of bundle of rights on 31-10-2013, SSIPL got merged with the assessee w.e.f. 04-11-2013

vide High Court order dated 22-08-2014. With such acquisition of bundle of broadcasting rights from ESS and merger of SSIPL, the assessee became a full-fledged broadcasting owner of sports Channels run by Star group in India. By virtue of the MRA, the assessee stepped into the shoes of ESS *qua* the broadcasting rights purchased earlier by ESS from third parties and thus acquired all the rights and obligations that ESS had with the ISBs. This was done by two modes, viz., the first in which there was Novation of roughly 75% of the agreements under which ESS went out and the assessee came in assuming all the rights and obligations of ESS with third parties; and the second in which there was sub-licensing of remaining around 25% of the agreements by which ESS sub-licensed their agreements with the third parties to the assessee. A chart has been provided linking the original agreements between ESS and third parties with the Novated and Sub-licensed agreements, as the case may be, pursuant to the MRA. There is no dispute between the Revenue and the assessee about the

arrangement of the assessee acquiring all the rights from ESS and paying net 90.5% of the price that ESS would have paid for the year under consideration had there been no sale of BSB rights to it.

8. To satisfy ourselves as to the mechanism under the MRA agreement, we randomly examined novation of the largest agreement, being, with Cricket Australia. ESS entered into Asian Broadcast Agreement with Cricket Australia, a copy of which has been placed at page 595 onwards of the paper book. This Agreement dt. 04-11-2011 granted license to ESS by Cricket Australia for broadcasting the events and to exercise any other rights granted within the territory. The licence period, as per clause 3 of the agreement, commenced on 01-05-2012 and was to expire on 30-06-2017. Clause 2 of the Agreement, dealing with the consideration aspect, provides that the licensee shall pay the licence fee set forth in clause 7 of Schedule 1 with all obligations and withholdings in accordance with the payment Schedule set forth in clause 9 of Schedule 1 irrespective of whether or not the licensee

had inhibited the programmes as of such date. Page 614 of the paper book, containing clause 7, talks of Licence Fee. Para 7.1.2 provides that the licence fee will be calculated on the basis of the events as set out in item 1 of Schedule 3. A copy of Schedule 3 item 1 is available at page 636 of the paper book. This gives copious details of season; touring teams; total scheduled matches; and scheduled tour dates. For example, for the season 2012-13, 2013-14 and 2014-15, the relevant part is reproduced as under :

Season	Touring Team(s)	Total Scheduled Matches	Scheduled Tour Dates
12/13	South Africa	3 Tests	November 2012
	Sri Lanka	3 Tests	December 2012-January 2013
	Sri Lanka	5 ODIs	
	Sri Lanka	2 Twenty20s	
	West Indies	5 ODIs	February 2013
13/14	England	5 Tests	November 2013-January 2014
	England	3 ODIs	
	England	3 Twenty 20s	
14/15	South Africa	5 ODIs	November 2014
	South Africa	3 Twenty 20s	
	India	4 Tests	December 2014- January 2015
	India England	7 ODI Triangular Series	January – February 2015

9. Item 2 of Schedule 3, with the heading 'The Matrix', has columns Date/tour; number of matches; value in US dollar. The details incorporated in respect of season 2012-13 to 2014-15 are reproduced as under :

Date/Tour	Number of Matches	Value US$
2012/13		
South Africa Tour of Australia	3 Tests	$1,680,000
Sri Lankan Tour of Australia	3 Tests	$900,000
	5 ODIs	$1,150,000
	2 Twenty 20s	$360,000
West Indies Tour of Australia	5 ODIs	$1,150,000
2013/14		
England Tour of Australia	5 Tests	$2,800,000
	5 ODIs	$1,375,000
	3 Twenty 20s	$540,000
2014/15		
South African Tour of Australia	5 ODIs	$1,375,000
	3 Twenty20s	$540,000
Indian Tour of Australia	4 Tests	$29,660,000
Tri-Series (India & England)		
India v Australia	2 ODIs	$15,000,000
India v England	2 ODIs	$15,000,000
Australia v England	2 ODIs	$550,000
Final	1 ODI	$7,500,000

10. The Payment schedule has been set out in clause 9 of the Agreement, which provides through clause 9.2 as under :

> "Thirty five percent (35%) of the Valuation of each Event as set out in Item 1 of Schedule 3 (as may be adjusted pursuant to Clause 7) to be paid no later than thirty (30) days prior to the commencement of each such Event subject to the Licensor confirming that the Event shall take place as scheduled.
>
> (a) If the Event does not commence as scheduled after payment is made by the Licensee then the Licensor shall refund the thirty five percent (35%) paid by the Licensee within fourteen (14) days of the earlier of;
>
> (i) the date the Event was scheduled to commence; or
> (ii) notification that such Event has been postponed provided that no refund shall be required where the Event has commenced within the aforesaid fourteen (14) days or where the Event is scheduled to commence within the next thirty (30) days.
>
> (b) The balance of the Valuation of each Event as set out in Item 1 of Schedule 3 (as may be adjusted in accordance with Clause 7 and after taking into account the ten percent (10%) paid pursuant to clause 9.1) is to be paid no later than thirty (30) days from the conclusion of each Event.

11. The following points, relevant for our discussion, emerge from the reading of the above Agreement:

(a) Grant of licence to broadcast the sports events by Cricket Australia to ESS was for a specified period.

(b) There were specified sports events whose broadcasting rights were assigned to ESS during the currency of the agreement (Schedule 3 Item 1)

(c) There were scheduled dates of the sports events supposed to happen year wise (Schedule 3 Item 1 – the Programmes)

(d) There was fixed amount payable in respect of each event each year (Schedule 3 Item 2 – The Matrix)

(e) The payment was linked with the events inasmuch as certain amount of the consideration for the sports events was to be paid 30 days prior to the commencement of such event and the remaining amount was to be paid within 30 days from the conclusion of each event (clause 9 of the agreement)

12. ESS entered into Master Rights Agreement (MRA) with the assessee on 31-10-2013 effective from 04-11-2013, whose copy is available at page 173 onwards of the paper book. The preamble clause A of this Agreement reads as under :

> "Pursuant to the contracts executed by ESS with third parties including, without limitation, several national and international governing bodies for various sporting events ("ISBs) such as Cricket Australia, Tennis Australia, English and Wales Cricket Board Limited, Football Association Premier League Limited etc., ESS is entitled to exploit media rights pertaining to various sporting events organized under the auspices of ISBs in the Designated Territory (as such term is defined hereinafter in this Agreement). ESS has offered to make available these rights, more specifically defined as the "Designated Rights", to SIPL only as *an integrated bundle* by way of novation or sub-license, as set out in this Agreement.

13. This clause provides that ESS entered into agreements with the third parties for various sports events. ESS offered to 'make available' the designated rights in such sports events to the assessee as *an integrated bundle* by way of novation or sub-licensing. This shows that all the broadcasting rights purchased by ESS from third

parties were passed on to the assessee in a bundled manner either by novation or sub-licensing.

14. Table 1 of the Schedule to the MRA contains a list of novated contracts. Similarly, Table 2 of the Schedule contains a list of the Designated Rights in the Designated Rights contracts to be sub-licensed to the assessee. The term Designated Rights has been defined to mean (a) Sports Media Rights (b) Cricket & Hockey Media Rights; (c) the Archive Rights. The term 'Designated Territory' has also been defined to mean - (i) in respect of an event involving Cricket and/or Hockey, all the territories in which ESS has the right to exploit Media Rights with respect to such events and (ii) in respect of Sporting Event (other than cricket and hockey) such territories in the Indian sub-continent for which ESS has the right to exploit media Rights in Asia Specific in relation to the said events. Here it is pertinent to note the second category of broadcasting rights given to the assesee only in Indian sub-continent

rather than Asia specific, which constituted only 3% of total value of the rights.

15. Clause 2.2 of MRA deals with Novation of Designated Rights Contracts, the relevant part of which is as under :

> "2.2.1 ESS shall make commercially reasonable endeavours (and SIPL shall cooperate with ESS) to procure all such consents in accordance with the Designated Rights Contracts listed in Table 1 of the Schedule to novate the aforesaid Designated Rights Contracts in favour of SIPL (to the extent such Designated Rights Contracts have not been novated as of the Effective Date or except as otherwise agreed with SIPL), such that SIPL shall become a direct party to the Designated Rights Contracts replacing ESS, with effect from the Effective Date and in any event, on terms which are no less beneficial than the terms of such Designated Rights Contracts unless otherwise agreed by the Parties. SIPL undertakes to perform, discharge and observe all obligations and liabilities on the part of ESS under the novated Designated Rights Contracts which are to be performed, discharged or observed from the effective date of novation of such Designated Rights Contracts.
>
> 2.2.2 If the novation of a Designated Rights Contracts as contemplated under Clause 2.2.1 cannot be completed prior to the Effective Date, ESS shall continue to seek a novation, unless otherwise agreed in writing by the Parties, in which case pending a novation of such Designated Rights Contract in accordance with Clause 2.2.1 ESS shall be deemed to have sub-licensed the Designated Rights under such Designated Rights Contract to SIPL pursuant to Clause 2.3.1 below,

> subject to any consents and/or any other written document that may be required under any specific Designated Rights Contract to give effect to such sub-license.

16. This clause indicates that pursuant to the novation of the contracts, the assessee would become a direct Party to the Designated Right Contract replacing ESS and it "undertakes to perform, discharge and *observe all obligations and liabilities on the part of ESS* under which novated Designated Rights Contract which are to be performed or discharged or observed from the Effective Date of the novation of such Designated Rights Contracts". This shows that all the rights and obligations of ESS pursuant to the Agreement between ESS and third parties, were to become the rights and obligations of the assessee.

17. Clause 2.3 of MRA deals with 'sub-license of Designated Rights Contracts. The relevant part of this clause reads as under :

> "(b) with respect to each of the Designated Rights listed in Table 2 of the Schedule, the Designated Rights under such contracts shall be treated as sub-licensed by ESS to SIPL, subject to any consents and/or any other written document that may be required under any specific Designated Rights Contract to give effect to such sub-license, for the sole and

> exclusive use and exploitation by SIPL with effect from the Effective Date, *to the same extent such Designated Rights are available to ESS* under the Designated Rights Contract, such sub-licensing to be *on terms where SIPL assumes and agreed to comply with all obligations under such Designated Rights Contract* that are attributable to the Designated Rights sub-licensed to it and otherwise on terms set out hereunder or as set out in any separate sub-licensing agreement between ESS and SIPL in respect of the sub-license of such Designated Rights."

18. This clause also indicates that all the rights and obligations of ESS under the Designated Rights Contracts with third parties accrued to the same extent to the assessee on sub-licensing. Such Designated Rights which were available to ESS under the Designated Rights Contract, got sub-licensed to the assessee on the terms whereby the assessee assumed all the obligations of ESS under the Designated Rights Contracts.

19. Clause 3 of the MRA deals with payment of Agreed Consideration by the assessee. Para 3.1.1 of the Agreement as given at page 179 of the paper book reads as under :

> "In consideration for making the Designated Rights available to SIPL with effect from the Effective Date, SIPL shall pay

(or shall have paid) ESS and/or the relevant ISBs an aggregate consideration which the Parties have agreed will be determined by DH Consultants Pvt. Ltd. of Mumbai, India ("Independent Valuer") and communicated to both the Parties in writing ("Agreed Consideration") before 4 November 2013 or such other date as may be agreed by the Parties in writing, subject however to any adjustments strictly in accordance with Clause 3.2. The Parties hereby agree and acknowledge that 95% (ninety five per cent) of the portion of the Agreed Consideration allocated by the Independent Valuer in the Independent Valuer's Report to those Sporting Events identified as "Live in Table 1 and Table 2 in the Schedule, is being paid by SIPL to ESS for the rights pertaining to Live Transmissions. For the avoidance of doubt the Agreed Consideration excludes, and SIPL shall be responsible for, any technical costs (including costs associated with down-linking and reception of satellite signal and retransmission) attributable to the delivery from the designated point of supply to SIPL's nominated facility of all live signals (including all audio, visual and audiovisual material and ancillary data and information) and recorded audio, visual and audiovisual material in either case relating to any Sporting Event to which the Designated Rights relate."

"3.1.2. The Parties agree that they shall accept the Agreed Consideration as determined by the Independent Valuer in its written report ("Independent Valuer's Report) which the Parties agree shall, as appropriate, also contain a schedule for the payment of the Agreed Consideration commencing from the Effective Date ("Payment Schedule"). The Parties acknowledge that such Payment Schedule will not take into account the novations of the Designation Rights Contracts that take place after the Effective Date and the outcomes of the actions contemplated under Clause 3.2.4 and the Parties will amend the Payment Schedule from time to time to incorporate

the foregoing, provided, however, it is agreed that the amount of the Agreed Consideration will not be changed.

3.1.3 Subject to receiving an invoice from ESS, SIPL shall pay to ESS the portion of the Agreed Consideration allocated for each Sporting Event in accordance with the Payment Schedule. All payments of the Agreed Consideration will be subject to any adjustments (if required) in accordance with Clause 3.2."

20. To buttress the implementation of the above payment clause, the ld. AR placed on record a Table indicating year-wise Value as per original contract schedule between ESS and third parties and the Value as per Form 3CEB showing the discharge of such obligation by the assessee in respective years, reading as under:

Value as per original contract schedule

Particulars	AY 2014-15	AY 2015-16	AY 2016-17	AY 2017-18	AY 2018-19	AY 2019-20	AY 2020-21	Total
British Premiere League	26.10	49.88	52.32	10.14	-	-	-	138.44
England Cricket Board	-	94.89	3.85	3.75	3.75	-	-	106.23
ICC	101.00	209.00	-	-	-	-	-	310.00
Others	5.54	14.03	11.53	4.90	2.25	0.32	0.02	38.60
CLT20	-	119.00	119.00	119.00	119.00	119.00	-	595.00
Cricket Australia	4.72	69.63	66.40	9.02	-	-	-	149.76
								1,338.03
Discount – 9.5%	-13.08	-52.97	-24.09	-13.98	-11.90	-11.36	-0.00	-127.37
Total	124.28	503.45	229.01	132.83	113.10	107.96	0.02	1,210.66

Value as per Form 3CEB

Particulars	AY 2014-15	AY 2015-16	AY 2016-17	AY 2017-18	AY 2018-19	AY 2019-20	AY 2020-21	Total
British Premiere League	32.49	47.87	44.90	10.52	-	-	-	135.78
England Cricket Board	-	95.82	3.69	3.74	3.79	-	-	107.03
ICC	123.89	191.62	-	-	-	-	-	315.51
Others	6.35	11.11	13.79	1.83	0.02	0.02	0.02	33.15
CLT20	-	118.31	465.14	-	-	-	-	583.45
Cricket Australia	5.62	71.18	52.26	8.03	-	-	-	137.09
								1,312.02
Discount – 9.5% (net of advances)	-3.36	-32.01	-47.29	-1.18	-0.35	-	-	-84.19
Total	165.00	503.90	532.48	22.95	3.46	0.02	0.02	1,227.83

21. It emerges from the first table above that ESS purchased broadcasting rights from different third parties for a specific number of years at a price fixed in such agreements to be discharged separately for each year depending upon the number of sports events taking place in such year. The second table above deciphers the year-wise payments made by the assessee. For the year under consideration, ESS was otherwise required to pay 556.42 USD million to third parties in lieu of broadcasting rights purchased from them in earlier year. Now, pursuant to MRA, the assessee enjoyed the fruits of such broadcasting rights in a bundled manner and paid

503.90 USD million as a *quid pro quo* (at discounted price of 90.5%) partly to the third parties under the novated agreements and partly to ESS under sub-licensed agreements. In other words, the assessee started enjoying the rights acquired by ESS from third parties as such and discharged the obligation of ESS towards such third parties under the respective agreements but at a discounted price.

22. On a consideration of the above clauses from the MRA, the following points emerge :

(a) ESS made available all the broadcasting rights to the assessee as an integrated bundle either by way of novation or sub-licensing.

(b) The Designated Rights of broadcasting acquired by ESS from third parties were given to the assessee covering the entire territories which were available to ESS under the agreements with the third parties (except 3% of the

total value of rights where a part of the area was excluded).

(c) Pursuant to novation and sub-licensing, the assessee stepped into the shoes of ESS and became entitled to exploit broadcasting rights from the third parties in the same manner as ESS would have been.

(d) The assessee agreed to pay to ESS or the third parties the consideration as determined by the Independent Valuer, which was equal to the obligation of ESS to third parties less discount of 9.5%.

23. Now, we espouse the novated agreement between ESS (Original Party), Cricket Australia (Continuing Party) and assessee (New Party), which became effective from 01-05-2013, whose copy has been placed at page 652 onwards of the paper book. The preamble of this Agreement reads as under :

"(A) The Original Party and the Continuing Party entered into the Agreement.

> (B) That the Original Party wishes for the New Party to become a party to the Agreement and *assume all rights and obligations under the Agreement in place of the Original Party*, which shall be released and discharged from all its obligations under the Agreement from the Effective Date.
>
> (C) The Parties have agreed that the *rights and obligations under the Agreement shall novate from the Original Party to the New Party* on the terms set out in this Novation Agreement."

24. The assessee was substituted with ESS in the agreement between Cricket Australia to "assume all the rights and obligations under the agreement in place of the Original party which shall be released and discharged from all its obligations".

25. Clause 2, with the heading "Novation and Release", reads as under :

> "(a) in consideration of the covenants on the part of the New party in this Novation Agreement, it is hereby agreed by all the Parties to this Novation Agreement that the New Party shall become a party to the Agreement such that *the New Party shall be deemed to replace the Original Party* as a party to the Agreement on and from the Effective Date; and

26. The rights and obligations of the assessee, ESS and third party under the Novated Agreement have been given in clauses 2.2, 2.3 and 2.4. The rights and obligations of ESS as contained in clause 2.2 are as under :

> "The Original Party :
>
> (a) undertakes to perform, discharge and observe all obligations and liabilities on the part of the Original Party under the Agreement which fall to be performed, discharged or observed before the Effective Date;
> *(b) agrees that the Continuing Party shall be entitled to all rights, powers, interests and benefits under the Agreement which would, but for this Novation Agreement, subsist in favour of or be exercisable by the Continuing Party before the Effective Date; and*
> (c) *releases the Continuing Party from its obligations towards the Original Party under the Agreement* accruing before, on or after the Effective Date and discharges and releases the Continuing Party from all future claims and demands whatsoever by the Original Party in respect of the Agreement accruing before, on or after the Effective Date and referable acts, breaches or defaults by the Continuing Party before, on or after the Effective Date.

27. The above clauses indicate that ESS got released and Cricket Australia became entitled to exercise all rights and powers under the agreement upon the assessee in place of ESS after the effective date.

28. The rights and obligations of the assessee are contained in para 2.3, the relevant parts of which read as under :

> "The New Party :
>
> (a) *undertakes to perform, discharge and observe all obligations and liabilities on the part of the Original Party* under the Agreement which fall to be performed, discharged or observed on or after the Effective Date or which fell to be performed, discharged or observed prior to the Effective Date and remain outstanding as at the Effective Date.
>
> (b) agrees to assume, comply with and be bound by all the provisions of the Agreement by which the Original Party would, but for this Novation Agreement, be bound on and after the Effective Date;
>
> (c) agrees to an obligation to pay the Licence Fee set forth in the Agreement, including but not limited to Clause 7 of Schedule 1 of the Agreement in US$ without, and free from any and all set-offs, deductions, withholdings or taxes (including without limitation, withholding taxes levied in India, Singapore or any other country), to the Designated Account from time to time as set forth in Clause 8 of Schedule 1 of the Agreement in accordance with the Payments Schedule set forth in the Agreement, including but not limited to Clause 9 of Schedule 1 of the Agreement irrespective of whether or not the Continuing Party has exhibited the Programmes as of such date;

(g) agrees to indemnify and hold harmless the Continuing Party from and against any and all Indian laws or regulations regarding repatriation of income, including any financial liabilities or reporting compliance costs resulting, in whole or in part, from the effect of the parties agreeing to or giving effect to this Agreement; and

(h) agrees that *the Continuing Party shall be entitled to all rights, powers, interests and benefits under the Agreement* which would, but for this Novation Agreement, subsist in favour of or be exercisable by the Continuing Party on and after the Effective Date.

in each case *as if the New Party were named in the Agreement in place of the Original Party*."

29. On going through the above Novated Agreement, it clearly transpires that the assessee substituted ESS in its original agreement with Cricket Australia, obtaining all the rights and agreed to discharge all the obligations of ESS with effect from the effective date.

30. On an analysis of the above three Agreements, we can sum up the international transaction of `Purchase of Bundle of Sport Broadcasting Rights' as a purchase on aggregate basis by the assessee from ESS for the remaining years - of distinct sports

broadcasting rights acquired by ESS at a price settled separately in respect of each year covered therein from third parties in earlier years - at a consideration lower than what would have otherwise been paid by ESS for each such year.

31. Having seen the factual details at some length, we now advert to the transfer pricing adjustment made by the TPO. At this juncture, it is pertinent to note that as against the Comparable Uncontrolled Price (CUP) method applied as the most appropriate method for benchmarking this transaction in the immediately preceding year, the assessee invoked the `Other method' in its Transfer pricing study report (T.P.S.R.) as the most appropriate for the year under consideration. Further, the assessee argued for adoption of the CUP as the most appropriate method for this year before the authorities below as well as the Tribunal to justify that the transaction of payment of 90.5% of the amount which would have been paid by ESS to third parties, was at ALP. The ld. DR strongly opposed by contending that the assessee, having adopted

the `Other method' in its transfer pricing study report and not taken a specific ground of the CUP in its appeal memo, missed the bus and was precluded from changing the method at this later stage. He further argued that in any case, no CUP exists. In our view, the main question of whether the payment made by the assessee for purchase of BSB Rights was at ALP requires the Tribunal to answer the following three questions:

I. Can assessee resile from the most appropriate method adopted in its Transfer pricing study report?

II. Which is the most appropriate method in the transaction under consideration?

III. Whether the ALP determined by the assessee is correct?

32. We will espouse the above questions *in seriatim* for discussion and decision.

I. <u>CAN ASSESSEE RESILE FROM THE MOST APPROPRIATE METHOD ADOPTED IN ITS T.P.S.R.?</u>

33.1. The assessee adopted the `Other method' as the most appropriate method as per its Transfer Pricing Study Report. Then it advocated for the CUP as the most appropriate method in front of the TPO. Before the Tribunal also, the ld. AR heavily banked upon the CUP method to demonstrate that the international transaction was at ALP. This was opposed tooth and nail by the ld. DR contending that a method once chosen as the most appropriate in its TPSR cannot be changed by the assessee in further proceedings, much less the Tribunal for the first time. We need to examine if an assessee is entitled to switch over to a new method, different from the one taken in TPSR, as the most appropriate method?

33.2. Section 92 of the Act provides that any income arising from an international transaction *shall* be computed having regard to the arm's length price. Section 92C dealing with computation of ALP provides through sub-section (1) that *the ALP shall be determined by any of the following methods, being the most appropriate method, having regard to the nature of transaction or class of*

transaction or class of associated persons or functions performed by such persons or such other relevant factors as the Board may prescribe. Five specific methods have been set out, namely, (a) comparable uncontrolled price method; (b) resale price method; (c) cost plus method; (d) profit split method; (e) transactional net margin method. Thereafter, another method is given in clause (f), namely, such other method as may be prescribed by the Board, which has since been prescribed in rule 10BA as `Other method'. Sub-section (2) of section 92C mandates that: `*The most appropriate method* referred to in sub-section (1) *shall be applied*, for determination of arm's length price, in the manner as may be prescribed'. On going through the prescription of sub-sections (1) and (2) of section 92C read with section 92, it gets highlighted that the legislature has used the word `shall' for determining the ALP under the most appropriate method and the most appropriate method is to be applied *having regard to the nature of transaction or class of transaction* etc. The crux is to apply the most appropriate

method for determining the ALP having regard to the nature of transaction etc. It means we need to first understand the nature of transaction and then select the method for the ALP determination, that is befitting its nature etc. The ultimate aim of Chapter –X of the Act is to determine the arm's length price of the transaction. The methods prescribed are only the means of achieving the object of the ALP determination. Technicalities of the assessee having selected a wrong comparable or adopted a wrong method cannot come in the way of determining the correct ALP. Suppose, an assessee applies a particular method as the most appropriate for determining the ALP of a transaction but the TPO, having regard to the nature of transaction or class of transactions etc., comes to the conclusion that the most appropriate method was not applied, he has every right to discard that method and apply the one which is actually the most appropriate in the given facts of the case. In the same way, if an assessee applies a particular method as most appropriate and thereafter realizes, during the course of the

proceedings, that the method applied by it was not the most appropriate having regard to the nature and class of transactions etc., he can also back-out from the method earlier selected provided the new method is actually the most appropriate having regard to the nature of the transaction under consideration. In both the scenarios, viz., where either the TPO rejects the assessee's selection of the method or the assessee itself realizes its mistake in the selection of the method, it is for the Tribunal (the next appellate authority in hierarchy) to examine the correctness of the newly selected method as the most appropriate in the facts and circumstances of the case. If the Tribunal holds that the change in the method by the TPO or the assessee resiling from its earlier selection is correct, then there can be no impediment in switching over to the new method because the legislature stipulates that the most appropriate method *shall be applied* for determining the ALP. The point to be noted is the selection of actual most appropriate method in the facts of the case is essential and not the perception of

the assessee or the TPO to this effect. It thus follows that there can be no estoppel to the change of a method so long as the new method is, in fact, most appropriate for determining the ALP. Mere urging for the application of a different method as most appropriate, does not *per se* entitle the assessee or the TPO to make such a change conclusive. What we are talking at this stage is just about the right of the parties to plead for a change in the method earlier selected and nothing more than that. An argument for a change is a first step in the process of actually changing the most appropriate method, which has to be followed by an independent evaluation by the authority before whom the change is canvassed. Proceeding further, there can be another situation wherein neither the assessee nor the TPO applied the most appropriate method in the facts of the case and the assessment gets finalized on the basis of such an inappropriate method but with transfer pricing addition made on some different count. The Tribunal in such cases, while hearing the appeal on the transfer pricing addition, can direct to apply another

method, which is really most appropriate in the facts and circumstances of the case. Our view is fortified by the judgment of the Hon'ble Delhi High Court in *Pr. CIT Vs. Matrix Cellular International Services Pvt. Ltd. (2017) 100 CCH 0191 Delhi High Court.* The facts of case are that the assessee therein applied the Transaction Net Margin Method ("TNMM") as the most appropriate method for benchmarking international transactions, which the TPO accepted. He, however, made transfer pricing addition by rejecting the claim of adjustment on account of unutilized capacity. The Tribunal observed that the most appropriate method, in the facts of the case, was the Resale price method (RPM). It accordingly directed to apply the RPM. The Revenue, in its appeal before the Hon'ble High Court, insisted that it was not open to the Tribunal to reject the TNMM and adopt the RPM as a new most appropriate method. Repelling such contention and approving the action of the Tribunal in *suo motu* changing the most appropriate method, the Hon'ble High Court held that the

RPM was most appropriate method in the given facts of the case. It further held that: `Since the ultimate aim of the transfer pricing exercise is to determine an accurate value of the arms' length price for the purpose of taxation/and therefore the appellate authorities would not be barred from adopting a different method, from that adopted by the assessee in the transfer pricing report, if the latter is not found to be the Most Appropriate Method.'

33.3. Adverting to the facts of the extant case, it is seen that the assessee applied `Other method' in its TPSR with a note on para 7.3 that : `Given that the Other method has been selected as the most appropriate method, the other methods (CUP, RPM, CPM, PSM, TNMM) have not been evaluated further'. This shows that the assessee did not remark that the CUP was not the most appropriate method and simply left it from evaluation. However, it was categorically urged before the TPO, as is evident from para 12.4 of his order, that: `since the payment made to the third party is more than the payment made to the AE for the same set of rights, a CUP

exists'. Para 12.5 of the TPO's order also records the defending by the assessee of the CUP method. Thus it is graphically clear that the assessee not only argued before the existence and the applicability of the CUP before the TPO as the most appropriate method, but also heavily relied on the same during the course of the hearing before the Tribunal. Without batting for the applicability of the CUP method before the TPO, the assessee could have even validly pressed for the change of the `Other method' as the most appropriate method before the Tribunal. As such, it is held that no exception can be taken to the assessee pleading for the applicability of the CUP as the most appropriate method instead of the `Other method', which is just a first step in the process of approval of the most appropriate method by the Tribunal.

33.4. The ld. DR relied on rule 11 of the ITAT Rules, 1963 to contend that no ground of the CUP as the most appropriate method was taken by the assessee in the memorandum of appeal and, as such, it was disentitled to take up this issue before the Tribunal. We

do not find much force in this contention. Rule 11 provides that: `The appellant shall not, except by leave of the Tribunal, urge or be heard in support of any ground not set forth in the memorandum of appeal'. However, the later part of the rule provides that: `the Tribunal, in deciding the appeal, shall not be confined to the grounds set forth in the memorandum of appeal or taken by leave of the Tribunal under this rule'. This shows that the Tribunal has to see the substance of the matter before it and then decide it accordingly. However, there should be no violation of principles of natural justice anent to the affected party, which is borne out from the proviso to rule 11 providing that `the Tribunal shall not rest its decision on any other ground unless the party who may be affected thereby has had a sufficient opportunity of being heard on that ground.' We are in a situation, in which the assessee has assailed the transfer pricing adjustment in the international transaction of purchase of bundle of broadcasting rights generally through ground no. 1 and then specific grounds have been taken to challenge the

addition made on the basis of the valuation report. Ground no. 1 covers the subject matter of the dispute in a comprehensive manner, which impliedly covers all the aspects of the addition, including the assail to selection of the most appropriate method. Further, the argument of the ld. AR on the CUP method has not only been taken up before the Tribunal for the first time, but was also raised before the TPO. Not only the ld. DR was given full opportunity of hearing on this aspect of the matter but he also made elaborate submissions on the same. Thus the reliance of the ld. DR on rule 11 of the ITAT Rules is misconceived.

33.5. We ergo, hold that an assessee, in principle, can resile from the most appropriate method as was adopted in its transfer pricing study report.

II. <u>WHICH IS MOST APPROPRIATE METHOD IN THE TRANSACTION UNDER CONSIDERATION?</u>

34.1. The controversy in the present case revolves around the selection of the most appropriate method between the CUP method

and the `Other method'. We have noted above that section 92C(1) enlists five specific and another method for the ALP determination. One of such six methods needs to be applied for the ALP determination having regard to the nature of transaction or class of transaction or class of associated persons or functions performed by such persons etc. The first method (CUP) and the last method (`other method') are price-based, whereas the remaining methods (RPM, CPM, PSM and TNMM) are profit-based. The manner of determination of ALP under section 92C has been set out in rule 10B, which states that: `For the purposes of sub-section (2) of section 92C, the arm's length price in relation to an international transaction … shall be determined by any of the following methods, being the most appropriate method, in the following manner, namely'. Clause (a) of rule 10B(1) prescribes the manner of determination of the ALP under the CUP method, which reads as under:

"(*a*) comparable uncontrolled price method, by which,—

(*i*) the *price charged* or paid *for property transferred* or services provided in a comparable uncontrolled transaction, or a number of such transactions, is identified;

(*ii*) such price is adjusted to account for differences, if any, between the international transaction or the specified domestic transaction and the comparable uncontrolled transactions or between the enterprises entering into such transactions, which could materially affect the price in the open market;

(*iii*) the adjusted price arrived at under sub-clause (ii) is taken to be an arm's length price in respect of the property transferred or services provided in the international transaction or the specified domestic transaction".

34.2. This method stipulates that, firstly, the *price paid* for property in a comparable *uncontrolled transaction* is identified. The term *uncontrolled transaction* has been defined in rule 10A(b) to mean : `a transaction between enterprises other than associated enterprises..'. So the price in an uncontrolled transaction is a price of some actual transaction between enterprises other than AEs. Such price is then adjusted to account for differences, if any, between the international transaction and the comparable uncontrolled transaction. The adjusted price is taken as ALP. It follows that a benchmark transaction, in so far as the ALP is concerned, has two ingredients, namely, benchmark property or

service and a benchmark price. On going through the mandate of the CUP method, it follows that the *benchmark price* is the actually transacted price (charged or paid and not some theoretical price) in a comparable uncontrolled situation; and the *benchmark property* is the property transferred (that is the same and not some similar) property. The *sequitur* is that the benchmark price in an actual comparable uncontrolled transaction of the same property, as transacted in a transaction to be benchmarked, weighs in the CUP method.

34.3. Clause (f) of section 92C(1) states the sixth other method to be as may be prescribed by the Board, which has since been prescribed in rule 10AB, reading as under:-

> `For the purposes of clause (f) of sub-section (1) of section 92C, the other method for determination of the arm's length price in relation to an international transaction or a specified domestic transaction shall be any method which takes into account the *price which has been charged or paid, or would have been charged or paid*, for the *same or similar uncontrolled transaction*, with or between non-associated enterprises, under similar circumstances, considering all the relevant facts.'

34.4. This method stipulates for determining the ALP of a transaction under any method, which takes into account (and not directly considering) the price charged or paid, or that would have been charged or paid, for the same or similar uncontrolled transaction considering all the relevant facts. The term `would have been charged or paid' may encompass quotations or valuation reports etc. Under this method, a *benchmark transaction* comprises of a *benchmark price*, being, the price actually transacted or the price that would have been transacted in a comparable uncontrolled situation; and the *benchmark property* is same or similar property transacted. On a comparative analysis of both the price-based methods, it follows that the CUP method has an edge over the `other method' because it employs the actually transacted price exclusively over the `other method' taking into account the probable price also; and it uses exclusively the *same* as the comparable transaction as against the `other method' using both the *same and similar* transactions. The words `same' and `similar'

have different ambits in terms of the degree of match between the international transaction to be benchmarked and the benchmark transaction. Whereas, the CUP method envisages a greater degree of match by considering only the *same* property in a comparable uncontrolled transaction, the `other method' gives a concession in this regard and settles with even lesser degree of match for choosing a benchmark property.

34.5. Though the Resale price method, Cost plus method and the TNMM also deploy the expression `*same and similar'* properties, but because of these methods being profit-based unlike the CUP and the `other method' being price-based, get placed at a different level. It thus transpires that there is a significant difference between the CUP and the `Other method' in terms of accurateness, tilting the balance in favor of the CUP method for a more rational ALP determination. Whereas the CUP is a precise and up-to-mark method considering only the price transacted and of the same property, the `other method' covers the price transacted or that

would have been transacted and also the same or similar uncontrolled properties. The precision and accuracy which is the hallmark under the CUP method is considerably watered down in the `other method'.

34.6. Moving further, when we consider the `other method' in juxtaposition to the five specific methods, it comes to the fore that the specific methods contemplate the benchmark price exclusively of an actual transaction in a comparable uncontrolled situation and do not permit of a probable or a hypothetical price. In addition to the CUP method discussed *supra*, considering only the actual price in a comparable uncontrolled situation as a benchmark, the Resale price method also refers to determining the Resale price by reducing "the amount of normal gross profit margin accruing to the enterprise or to unrelated enterprise from. . . . . " This method also talks of considering the actual gross profit margin accruing in a transaction between the two unrelated enterprises and does not utter of considering the gross profit margin that would have arisen in a

probable transaction between two independent parties. Similar is the position regarding the Cost plus method, which natters of adjusting "the amount of normal gross profit mark up to such costs arising from .... in a comparable uncontrolled transaction". It again does not refer to the amount of normal gross profit mark up that would have been earned in a hypothetical transaction. This method also refers only to the actual normal gross profit mark-up in a transaction between two unrelated parties. The TNMM also follows the rule by considering the net profit margin actually realized by an enterprise from a comparable controlled transaction. It again refers to the actual net profit margin realized by or between the two unrelated enterprises in an existing transaction and not of a theoretical profit margin in a non-existing transaction.

34.7. The above discussion vividly points out that the 'other method' given in Rule 10AB contemplates the determination of ALP on the basis of the price which has been charged or paid or would have been charged or paid for the same or similar property,

which is a step at distance from the specific methods, such as, the Comparable Uncontrolled Price, Resale Price, Cost plus etc., which provide for the ALP determination by considering the profit/price actually transacted. Quite logically, a good benchmark is established with an actual transacted price in a comparable uncontrolled situation, leaving any room to looking for a probable price that would have been transacted for same or similar property. Such a latter price is a step away from actual transacted price of the same property. These distinguishing features of the 'other method' in contrast to the five specific methods, keep the former at a lower pedestal in terms of accuracy of the ALP determination. Though the statute does not give priority to any method for selection as the most appropriate method, but the ambit of the 'other method' in contrast to the specific methods makes it a method of last resort because of its relatively lesser exactitude and meticulousness. The *fortiori* is that the `other method' should be considered as most

appropriate only when none of the other five specific methods is found to be capable of application.

34.8. There is an indication to this effect in the Act also. The entire purpose of Chapter-X is to determine the income having regard to ALP. The term "arm's length price" has been defined in section 92F(ii) to mean: `a price which is applied or proposed to be applied in a transaction between persons other than associated enterprises, in uncontrolled conditions'. This definition covers two eventualities, viz., primarily, `a price which is *applied* … in a transaction between persons other than associated enterprises, in uncontrolled conditions' and then, `a price which is … *proposed to be applied* in a transaction between persons other than associated enterprises, in uncontrolled conditions'. In the definition also, the preference and the first mention is of the price applied and then the price proposed to be applied. Here, it is pertinent to note that the definition of ALP is applicable to all the six methods. The first part of this definition of the *price which is applied* applies to the first

five specific methods and the latter part of the price *proposed to be applied,* in addition to the price which is applied, fits into the description of the last 'other method'. Placement of the two eventualities as to their applicability in the definition, first, to the specific methods and then, to the `other method', is also a pointer that the `other method' occupies the last place and should be resorted to only when none of the five specific methods can be applied. Narrowing down the proposition, if the CUP method is pitted against the `other method', then there is no prize for guessing that it is the former which will prevail over the latter provided the comparable uncontrolled data required for it is available. The ensuing discussion will demonstrate that the data required for the application of the CUP exists and is on record. We, ergo, hold that the CUP is the most appropriate method in the facts and circumstances of the case.

III. WHETHER ALP DETERMINED BY ASSESSEE IS CORRECT?

35.1. Having found that the CUP gains an advantage over the `other method' generally, let us proceed to determine whether the international transaction of purchase of broadcasting rights in the facts and circumstances of the case is at ALP under the CUP method? We have noted above the mechanism for determining the ALP under this method and also emphasized on higher degree of comparability required between the international transaction and the benchmark transaction. The nature of transaction of `Purchase of Bundle of Sport Broadcasting Rights' is purchase on aggregate basis by the assessee from ESS for the remaining years - of distinct sports broadcasting rights acquired by ESS at a price settled separately in respect of each year covered therein from third parties in earlier years - at a consideration lower than what would have otherwise been paid by ESS for each such year.

35.2. The ld. DR vehemently argued that the CUP method requires considering the benchmark price of the same property in a

comparable uncontrolled situation. The comparable uncontrolled price of the rights for the A.Y. 2015-16 can only be a price actually transacted during the same period. He advanced his case by submitting that since ESS purchased the broadcasting rights in earlier years, including some rights in the year 2007, the price settled at that time, cannot constitute a comparable uncontrolled price for the transaction of the assessee purchasing such rights in the year under consideration, namely, the financial year 2014-15.

35.3. We have no dispute with the proposition propounded by the ld. DR and fully agree with it that the price of the broadcasting rights for the year 2007 cannot be a comparable uncontrolled price for the purchase of same broadcasting rights in the financial year 2014-15. However, there is a fundamental fallacy in the argument of the ld. DR. ESS entered into agreements with third parties for purchasing broadcasting rights of certain sports events in earlier years. Such agreements were not for one year but covered a number of years. Certain consideration was agreed to be paid by ESS for

each of the years covered under the agreements depending upon the number of sports events in those years. Such consideration was to be paid not at the time of entering into the agreement, but in the respective years of the happening of the sports events and, that too, at the price settled for those years albeit at the time of entering into agreements. This shows that even though the price was settled in an earlier year, but it was a price payable in the respective years only. We have extracted above the relevant Schedules from the agreement of ESS with Cricket Australia, granting license for broadcasting the sports events. The first Table depicts the list of sports events to happen in each year during the currency of the agreement. The next table portrays the amount of license fee to be paid by ESS for such events in each year depending upon the happening of the number of sports events. Thus, it is manifest that though the agreement was entered in the year 2011, but there was a well defined amount to be paid by ESS in each year covered under the agreement depending upon the number of sports events taking

place in such year. It is not a case that ESS agreed to pay total consideration for all the years covered under the agreement in the year 2011 only, which, would have been the present value at that time of the amounts to be paid over a number of years ahead. Definitely, it could not have constituted a benchmark price for a separate comparable uncontrolled transaction taking place in the year 2014 or 2015 etc. Here is a case in which ESS agreed in the year 2011 to pay to the Cricket Australia specific amounts in the year 2014 or 2015 etc. Now pursuant to the MRA in the year 2013, the assessee acquired the broadcasting rights for the remaining period and agreed to discharge the obligation of ESS for and in the years 2014 and 2015 etc. at the same level which would have otherwise been paid by ESS in such years. This shows that the payment made by the assessee in this year is the present value of what ESS would have paid to the third parties during the year under consideration had there been no MRA. Rather, the amount paid by the assessee and claimed as deduction is a discounted price of

90.5% of the amount that would have been paid by ESS in the current year, thereby indubitably constituting its ALP. This underlines the fallacy in the contention advanced on behalf of the Revenue on this count.

35.4. The ld. DR approached the case from a different angle and accentuated that the discount of 9.5% was not at ALP. We do not intend to dive into this argument for the *raison d'etre* that the assessee reported international transaction of purchase of bundle of broadcasting rights, whose value was determined by considering discount of 9.5%. What has been benchmarked is only the international transaction of purchase of bundle of rights. Neither the TPO nor the DRP has considered the discount as a separate international transaction. The transfer pricing addition is in the international transaction of purchase of broadcasting rights and there is not even a whisper in the order/direction of the TPO/DRP that the discount obtained by the assessee was not at ALP.

35.5. The ld. DR also emphasized on the fact that the broadcasting territory in respect of some of the rights was not given fully to the assessee though the price charged by ESS was for full territory acquired. We have noted above that only 3% of the total value of rights acquired by the assessee were for broadcasting only in Indian sub-continent rather than Asia specific acquired by ESS. The fact that the broadcasting territory in respect of such rights is a little constricted *vis-à-vis* that acquired by ESS does not make any significant impact on the ground that all the rights were acquired by the assessee at an overall discount of 9.5%, thereby setting off the impact of lower territory with higher discount.

35.6. The ld. DR referred to the writ petition filed by the assessee in the Hon'ble Bombay High Court against the order passed by the Tribunal u/s 254(2) of the Act for the immediately preceding year, pleading that the valuation report was an external CUP for determining the ALP. In the light of this pleading, it was urged that the Valuation report should be considered as CUP for the year

under consideration as well and the transfer pricing adjustment made by the TPO, based on the deficiencies in the valuation report, should be affirmed. We are not impressed with the argument that valuation report can be a comparable uncontrolled transaction under the CUP method. When we talk of benchmark price under the CUP method, being, an actually transacted price, a valuation report, which is just a valuation and not a bargained price, ceases to have any say in it. Even if a valuation report is succeeded by and constitutes the basis for determining the actual bargained price, still it will be the resultant actual price, and not the valuation report, which can constitute a benchmark price under the CUP method. Moreover, it is just a pleading by the assessee, to which the Hon'ble High Court has not accorded its imprimatur. It is consequently held that valuation report in itself does not constitute a benchmark transaction under the CUP method.

35.7. The ld. DR was vociferous in arguing that the assessee paid a highly inflated price of the bundle of broadcasting rights because

the value of the broadcasting rights of CLT20 purchased by ESS in the year 2007 had considerably depleted later on. He relied on certain newspaper reports and articles suggesting that CLT20 was a disaster from the point of view of revenue as it could not withstand the challenge from IPL. Since the revenue from CLT20 substantially dipped over the period and eventually the assessee had to go out from this contract by cancelling the deal after paying a hefty amount of compensation in the succeeding year, the ld. DR contended that recognition of the price paid by the assessee in terms of agreement entered into by ESS with the third party sports broadcaster in the year 2007, did not represent the ALP in the year 2014 inasmuch as no independent prudent person would have purchased it at that price.

35.8. The argument of the ld. DR that the purchase of CLT20 rights was not at ALP as it did not represent its fair market value, in our considered opinion, is unfounded and not germane in the context of the ALP determination under the CUP method. It goes without

saying that the concept of the ALP is different from the concept of `fair market value'. The latter represents the true value of particular goods or services, which in certain cases, may not be equal to the actually transacted price in a comparable uncontrolled situation. Whereas the fair market value is the true value of the property etc. on a given date, a bargained price may sometimes vary depending on various factors, including, the demand and supply of the property etc. The statute has not used the expressions `arm's length price' and `fair market value' interchangeably. The term `fair market value' is a statutorily recognized concept applying to sections 45, 50A, 50C and 50D etc., substituting the full value of consideration and to sec. 49 substituting cost of acquisition in the computation of income under the head `Capital gains'. Since the transfer pricing provisions are based on the ALP concept, the fair market value is alien to the CUP method, which, in turn, seeks to compare the transacted price in the international transaction with another transacted uncontrolled price of the same property etc. Essentially,

the actually bargained price of property etc. between two independent parties is decisive for the ALP determination under this method rather than its fair market value.

35.9. What is significant to note in the instant case is that the assessee purchased a bundle of broadcasting rights under the MRA. It was a `take all or leave all' deal. The assessee had no option of selecting certain broadcasting rights out of the lot offered by ESS. Admittedly, CLT20 did not rise up to the expectations as speculated in the year 2007 and suffered serious setback in terms of viewership, which led to decline in its revenue generations over the period culminating into not a good deal of purchase on individual basis. However, we need to remind ourselves that the purchase was a composite deal of all broadcasting rights from different third parties that ESS had acquired. Whereas CLT20 right declined in terms of revenue, some other broadcasting rights were on premium. This is evidenced from the written submissions made by the assessee to the TPO, a copy placed at page 562 of the paper book,

as also referred to in the directions of the DRP at page 20, that the bid price of the ICC deal entered into by ESS in the year 2007 for 1100 USD million, transferred to the assessee under the MRA on 13.10.2013 at the same bargained price, was re-negotiated by the assessee in October 2014 for 1900 USD million. This shows that the additional burden of paying compensation of 465.14 USD million, and that too, in the next year on cancellation of CLT20 right for the remaining period, got set off with the premium of around 800 USD (1900 USD million minus 1100 USD million) it earned under agreement with ICC. This narration of fact is only to substantiate that the bundle of rights was a mixed kitty having premium rights as well.

35.10. At this stage, it is relevant to take note of the judgment of the Hon'ble Punjab and Haryana High Court in *Knorr Bremse India Pvt. Ltd. Vs. ACIT (2016) 380 ITR 307 (P&H)* which considered the question of aggregation of international transactions. Their Lordships laid down the principle of aggregation of international

transactions by holding, *inter alia,* that a number of transactions which are priced differently but on the understanding that the pricing was dependent upon the assessee accepting or leaving all, need to be clubbed and taken as one international transaction, meaning thereby, that the premium in one should be set off against the loss in the other.

35.11. At the cost of repetition, we emphasize that the assessee purchased several broadcasting rights in a bundled manner. It had no choice of refusing a particular right from the bundle offered. In such a situation, all such rights need to be seen in unison and not distinctly. We are confronted with a case in which ESS agreed to sell and the assessee agreed to purchase bundle of rights in one go, but with the price given separately to each such right, being, the same price (less discount) at which ESS had purchased from third parties. This deciphers that though MRA is an agreement for transfer of bundle of broadcasting rights, but the price of each right

in the bundle is specifically provided and the assessee has no option to drop a particular right which is less/not remunerative.

35.12. The ld. DR has laid a great emphasis on the fact that the assessee ought not to have purchased CLT20 at the earlier agreed price that was not its ALP since it was a losing proposition. Though this contention is meaningless in the context of bundle of rights purchased, we are still taking it up for the sake of refuting the allegation of the ld. DR. It is re-emphasized that the transfer pricing provisions are based on the arm's length price concept, which is a comparable uncontrolled price rather than the fair market value concept. At this stage, it is pertinent to note that the assessee gave another instance of comparable uncontrolled situation in the context of CLT20 by making submission before the TPO, as also recorded on page 20 of the DRP direction, that ZEE Entertainment enterprise was also a loss making sports broadcasting business and Sony Pictures Network purchased it by agreeing to pay to the third parties for the remaining period of rights, at the same price which was

contractually agreed earlier between ZEE and them. Such a contention has not been controverted. This shows that the purchase by the assessee of less remunerative CLT20 on a standalone basis at a discount of 9.5%, is on a much stronger footing when seen in the hue of the Sony-ZEE deal taking place at par price between ZEE and third parties, despite ZEE also running into losses. This, in itself, is a good comparable uncontrolled transaction to the assessee's purchase of CLT20 broadcasting rights on individual basis. We clarify that this part of the discussion has been made just to meet with the argument of the ld. DR about the separate CLT20 transaction. Actually, we do not subscribe to the argument of the ALP determination of individual rights, when the transaction is of purchase of several broadcasting rights in a bundled manner. We thus countenance the bundle of transactions approach as discussed *supra* and hold that the international transaction of purchase of bundle of broadcasting rights by the assessee was at ALP under the CUP, being the most appropriate method. Though the CUP method

contemplates considering the same property and its price in an uncontrolled situation, we have a classic case of not only the same property (broadcasting rights), but also the price of the same transaction (not even of a comparable uncontrolled transaction). Ordinarily, the CUP method contemplates two transactions, one, the international transaction and the other, some comparable uncontrolled transaction. In the present case, if we go with the technical argument of the non-availability of a comparable uncontrolled transaction in case of novated agreements, in that case, such transactions cease to be international transactions in the first place because of the same being between the assessee and the third parties sports bodies, not requiring any ALP determination. However, in case of substituted agreements between the assessee and ESS, the comparable uncontrolled transactions between ESS and third party sports bodies are available, which are at a price higher than the price between the assessee and ESS.

35.13. In view of the above discussion, there is no need to examine the ALP based on valuation report(s) or expert opinions submitted by the assessee under the `Other method' and also the deficiencies pointed out by the TPO in the valuation report, forming bedrock of the transfer pricing adjustment. It is, therefore, held that the ALP of the international transaction of `Purchase of Bundle of Sport Broadcasting Rights' determined by the assessee is correct under the CUP method and does not warrant any interference.

36.1. After dealing with the question, we would like to clarify the scope of arguments on behalf of the Revenue. The ld. DR took pains in explaining that the assessee misrepresented the facts in transfer pricing study report by trying to show a different value of the transaction in Form No.3CEB and claiming deduction for the higher amount. He invited our attention towards certain portions of Form No.3CEB to explain that the assessee declared only four sub-transactions to constitute the overall transaction of purchase of bundle of broadcasting rights, whose value was quite less *vis-à-vis*

the assessee's claim in the Chart submitted during the course of hearing with the price as per Form No. 3CEB at Rs.3075.24 crore.

36.2. We are not persuaded by the argument put forth on behalf of the Revenue for the obvious reason that the TPO himself, on page 6 of his order, considered "*the amount as reported in the Form No. 3CEB by the assessee (A) in INR 3075,24,15,714/-*". This proves that the TPO also recognized the assessee reporting the value of purchase of broadcasting rights for the year at Rs.3075.24 crore. As against that, the ld. DR continued to argue that the TPO went wrong in noting down the exact figure of the value of purchase of broadcasting rights in Form No. 3CEB, which was even less than Rs.2000/- crore. This argument of the ld. DR, in our opinion, tantamounts to crossing his brief and arguing beyond jurisdiction.

36.3. We have also taken note of the argument of the ld. DR in an earlier part of this order to the effect that the discount of 9.5% was not at ALP and rejected the same as it was not the case of the TPO.

36.4. At this stage, we want to elucidate that there are distinct powers statutorily vesting in the competent tax authorities. The power of the DR extends only to supporting the order of the AO and not setting up a new case or finding faults with the assessment order. The statute itself provides several recourses against the drawbacks in the assessment order, such as, the Assessing officer rectifying his order u/s.154 or reassessing the income u/s 147 of the Act. If the AO misses the bus, the Pr. CIT has the power to revise u/s 263 an assessment order which is erroneous and prejudicial to the interest of the revenue. Still further, the CIT(A) can enhance the assessment in an appeal before him. Thus, it is explicit that the powers to correct the mistakes of the AO in framing the assessment lie in the domain of the AO himself or the Pr.CIT or in certain cases with the CIT(A). The DR, in no case, can either set up a case different from that of the AO or point out mistakes therein to the Tribunal, thereby usurping the power statutorily vesting in other authorities. He has only to support the assessment order.

36.5. The argument of the ld. DR anent to the discount not at ALP is a glaring example of setting up a new case; and that of attempting to project difference in the value of the international transaction in Form No. 3CEB as finding fault with the TPO's action. Such attempts should be eschewed.

37. In the ultimate analysis, we answer the question in negative by holding that the Assessing Officer was not justified in making transfer pricing adjustment in the international transaction of acquiring Bundle of Sport Broadcasting Rights on the basis of deficiencies found by him in the valuation report submitted by the assessee. The addition is hereby deleted.

38. Before parting, we wish to place on record our deep commendation for the enlightening arguments advanced by both the sides, which greatly assisted us in the disposal of the issue. We also want to make it clear that all the judicial decisions relied on by both the sides have been duly taken into consideration while deciding the matter. The omission to make specific reference to some of them in

the order is either due to their irrelevance or to ease the order from the burden of the repetitive *ratio decidendi* laid down in such decisions.

39. Now the instant appeal is directed to be placed before the Division Bench for disposal having regard to the decision of the Special bench on the questions raised before it.

Order pronounced on this 05th day of June, 2023.

separate order	separate order	Sd/-
(Prashant Maharishi)	**(Aby T. Varkey)**	**(R.S.Syal)**
Accountant Member	**Judicial Member**	**Vice President**

Mumbai : Dated : 05th June, 2023

Satish

Copy to :

1. The Appellant.
2. The Respondent.
3. The CIT (DRP-2), Mumbai
4. The DR/ITAT, 'J', Mumbai.
5. Guard File.

By Order

Assistant Registrar, ITAT, Mumbai

		Date		
1.	Draft dictated on	10.5.2023 onwards	Initial	Sr.PS
2.	Draft placed before the author	16.5.2023		Sr.PS
3.	Draft placed before the ld. JM through e-mail	17.5.2023		
4.	Draft placed before the ld. A.M. through e-mail	17.5.2023		
5.	Kept for pronouncement on			Sr.PS
6.	File sent to the Bench Clerk			Sr.PS
7.	Date on which file goes to the AR			
8.	Date on which file goes to the Head Clerk.			
9.	Date of dispatch of Order.			

*

PER PRASHANT MAHARISHI, AM

1) Perused the order proposed by the ld. Vice President. I am in

   i. agreement with the view expressed that Assessee can resile from the Most Appropriate method selected earlier , if new method is in accordance with applicable provisions, is 'The Most Appropriate Method.'

   ii. However, I am unable to persuade myself that on the facts and circumstances of the impugned case, that 'The Most Appropriate method' [MAM] to determine Arm's Length price [ALP] of The Impugned international transaction is ' CUP' [Comparable Uncontrolled price] method. According to me, The Most Appropriate method in this case is ' Other method.' I have set out facts, circumstances and my reasons for holding so hereinafter.

2) Assessee is a company engaged in the business of broadcasting and distribution of various satellite channels primarily in India. It is engaged in broadcast and distribution of its own General Entertainment Channel such as Star Plus , star Gold , Star word , life OK , movies OK , Star Movies, star Sports in India and outside India. It enters into franchisee agreements with its associated enterprise for exclusive rights to broadcast star world, Star movies, FX and Fox crime channels in India, Bangladesh, Nepal, Bhutan, Pakistan and Sri Lanka and channel for entire world primarily in Hindi and in other Indian regional languages. Assessee has also entered into agreements for the purchase of advertisement airtime inventory and the right to distribute the channels on principal-to-principal basis. Assessee procures content related to these channels and offers revenue from

the sale of advertisement airtime and the distribution of these channels.

3) For assessment year 2015 – 16, assessee filed its return of income on 28/11/2015 at a total loss of Rs. 13,690,503,399/– which was revised on 31/3/2017 at a loss of Rs. 13,344,059,469/–.

4) Assessee has entered into an international transaction with its associated enterprises wherein one transaction of acquisition of sports right under Master Rights Agreement was disclosed. The assessee had acquired bundled rights in respect of various sporting events from ESPN's Star sports (ESS) as per agreement known as Master Rights Agreement [MRA] dated 31st day of October 2013 having effective date of 4thNovember 2013.

5) MRA states that ESS executed several contracts with third parties several national and international governing bodies for various sporting events and it is entitled to exploit media rights pertaining to various sporting events organized under these sports bodies in the designated territory. It has offered to make available these rights defined as'designated rights' to assessee, only as an integrated bundle by way of novation or sub- license. Assessee is desirous of expanding its broadcasting operations by setting up, operating, and managing a sports business and sports channel within its bouquet of offerings. Therefore, both parties have entered into the MRA. As per the contract agreed consideration is required to be decided according to clause 3.1.1 to be determined by and independent valuer DH Consultants private limited. The independent valuer issued the valuation report on 5 November 2013 covering 65 contracts. The valuer has considered three valuation approaches, (1) cost approach, (2) market approach, (3) income approach (and adopting discounted

cash flow method). It stated that the cost approach is not appropriate for the reason that estimating the current cost to purchase, or replacement cost of the asset does not consider future economic benefit arising from assets. Therefore, the application of this approach is only appropriate for assets which are usually accounted for by the cost of reproduction such as software.So, it was rejected. It also rejected the marketapproach, giving several reasons. It ultimately states that they are unable to conclude on the value of the bundle of rights under market approach. As per income approach, it gives buyer's and seller's perspective valuation. As per ESPN Star sports perspective, it reached the absolute value of bundle of rights at US$ 1166 million. The valuation from assessee's perspective was also derived at absolute value of bundle of rights at US$ 1255 million. It provided weight of 1 each to the above two perspectives and determined the fair value of bundle of rights at US$ 1211 million. It allocated total value amongst different rights where the contracts are novated of designated rights and designated rights licensed or anticipated to be novated. Ultimately it valued agreed considerationat US$ 1210659,000/- whose contract price from November 2103 till end of contract is US$ 1338031132/-Thus, apparently there was a discount of 9.5% amounting to US$ 127 million. The payment schedule for contract price was to be made on an instalment basis over a period of years starting from financial year 2014 to financial year 2019.

6) The designated right contracts are also tabulated in table 1 and table 2 of the schedule.Table 1 lists 21 contracts where designated right contracts anticipated to be novated. Out of US$ 1338 Million, agreements amounting to US $ 1011630729/- were novated. In

Novation contracts , Assessee was to pay full contract amount [as agreed by ESS originally] to sports Bodies and Assessee would be compensated by 9.5 % discounts by ESS . Table 2 listed contracts no 22 to 65 where in designated rights in designated rights contracts to be sublicensed by ESS to Assessee. Contracts worth US$ 326557549 were sub licensed. In sublicensed contracts , Assessee will pay its share to ESS and ESS will pay discount amount 9.5 % . Thus 90.5 % is to be paid by assessee and 9.5 % is to be paid by ESS to sports bodies.

7) In its statutory filing in Form No. 3CEB, assessee disclosed international transaction with ESPN Star sports, Singapore stating acquisition of sports rights paid or payable amounting to Rs. 371,091,181/– and another transaction of discount on acquisition of sports rights amounting to Rs. 1,581,526,609 benchmarking applying such 'other method' as may be prescribed by the board. Note number 14 of Form no 3CEB also explained the transaction as under:-

> "14.SIPL has acquired bundled rights in respect of various sporting events from ESS (Novated subsequently to FIS Singapore) either through novation of the original contract between ESS and the sports bodies (SBs) or through the sublicense of the rights by ESS.
>
> In the case of novated agreements for sports rights, SIPL makes payment for the sports rights directly to SBs as per the original contract between the SBs and ESS. During the financial year under review, the assessee has made payment to ISBs amounting to INR 2058,98,66,242/–. Further as the price

determined under the Master Rights Agreement (MRA) between ESS and SIPL is less than the price actually paid by the SIPL then the same is received as a discount by SIPL from ESS /FIC Singapore. Further in respect of the right sublicensed by ESS, SIPL makes payment to ESS/ FIC Singapore as per agreed rate under MRA.

As per the transfer pricing study carried out by the assessee, it was determined that the 'other method' was the Most Appropriate Method of the methods prescribed under section 92C of the act for acquisition of sports rights.

Based on the valuation report of an independent valuer, it was concluded by the assessee that the prices of the above transaction were at arm's-length as provided under section 92C read with third proviso to section 92C (2) of the act."

8) In its transfer pricing study report at Para number 7.3 it reported this transaction as under:-

"7.3 Acquisition of Sports Rights Under Master Rights Agreement

SIPL has acquired bundle rights in respect of various sporting events, from ESS (subsequently novated to FIC Singapore) either through novation of original contract between ESS and the sports bodies (SBs) or through the sublicense of rights by ESS. The value of the bundle rights was determined by an independent valuer appointed by ESS and SIPL under the Master Rights Agreement (MRA).

In the case of Novated agreements for sports rights, SIPL makes payment for the sports rights directly to SBs. The price paid by SIPL for such rights as per the original contract between the SB's and ESS/FIC Singapore. Further, as the price determined under the MRA between ESS and SIPL is less than the price actually paid by SIPL then the same is received as discount by SIPL from ESS.

In respect of the right sublicense by ESS, SIPL makes payment to the assessee/FIC Singapore as per agreed rate under MRA. The transactions during the subject financial year are summarized as below:-

Sr. No.	Particulars	Amount (in INR)
1	SIPL's payment to SBs under Novated contracts	2058,98,66,242
2	Discount received by SIPL from ESS /FIC Singapore	195,36,58,345
3	SIPLs payment to ESS/ FIUC Singapore under sub licensed rights	1211,62,07,817

The above amount is supported by a valuation report prepared by the independent valuer.

Having regard to the nature of functions performed and the services provided,'other method' has been considered as the most appropriate method for applying the arm's-length principle.

On the basis of the valuation report, it was concluded that the price of the above international transactions were at arm's length as provided under section 92C read with third proviso to section 92C (2) of the act and with rule 10 CA of the rules.

Given that the 'other method' has been selected as the most appropriate method, the other methods (CUP, RPM, CPM, PSM, TNMM) have not been evaluated further."

9) On reference to Transfer Pricing Officer to determine arm's-length price [ALP] of these international Transactions, he issued a show cause notice based on, in consequence of the original transaction that took place in assessment year 2014 – 15 where the learned TPO considered ALP of that transaction at 66.06% less than the consideration paid by the assessee. As the effect of such adjustment is spread over subsequent years, as assessee has claimed the amortization of the said cost incurred on bundle of rights in subsequent years, accordingly adjustment and consequential disallowance was also required to be determined in the respective years applying the same downward percentage on the amortization cost claimed by the assessee in respective years.

10) As controversy in this assessment year i.e., AY 2015-16 is an off shoot of controversy in AY 2014-15, it is required to have bird's eye view of that assessment year. For assessment year 2014 – 15, assessee disclosed the above transaction in Form No. 3CEBas purchase of licensing of sports rights amounting to Rs. 10132613124, adopted

Comparable Uncontrolled Price Method [CUP] as the Most Appropriate Method. In its transfer pricing study report for that year in para number 1.5 it was stated that:-

> " During the year under consideration, SIPL was granted access to a bundle of broadcast rights, in respect of various sporting events, by ESS, either throughNovation of original contract between ESS and the international sports bodies (ISBs) or through sub- license of the rights by ESS.
>
> Considering the functional and risk profile of this transaction, Comparable Uncontrolled Price (CUP) method was selected as the Most Appropriate Method. For the purpose of determining the value of licensing the bundle of rights by ESS to SIPL, the parties i.e., ESS and SIPL agreed to adopt the consideration determined by an independent valuer.
>
> Since the value has been determined by an independent valuer considering the appropriate valuation methodology and suitable exceptions, it can be concluded that the transactions entered into between SIPL and ESS for licensing of the broadcasting rights is at arm's-length."

11) Thus, for assessment year 2014 – 15 , Assessee adopted CUP Method as most appropriate method , for comparability analysis it used Valuation Report. The valuer adopted discounted cash flow method and valued international transaction of US$ 1211 Million of Master Right Agreement by considering Finite Period valuation at

US$ 663 Million and terminal value was determined at US$ 548 Million.

12) During the TP Assessment , ld. TPO found that there is inflation in cash flow during a finite period and there cannot be any terminal value when contracts are for a specified period and in such period also there is a loss or negative cash flow. Thus,ld. TPO found that consideration value is 38 % higher than its ALP. Accordingly , on a transaction price of US$ 1211 Million , Its ALP was determined at US $ 411 Million. Thus, in Rupee Terms, Adjustment of Rs 669.36 crores was made.

13) Before ld. DRP Assessee also submitted the valuation report prepared by another valuer Duff & Phelps dated 5/07/2018 who submitted its independent estimates of the Fair Market value of the subject rights transferred. It adopted amarket Approach as value of individual rights depends on the performance of the respective sporting event, industry performance, changes in consumer preferences, competition between sports broadcaster etc. Therefore, it was necessary to value certain major sporting broadcasting rights separately and then aggregate the individual values to get to the total value of the designated rights.Therefore, it identified 5 major rights under the Master Rights Agreement and analyzed them separately. The remaining 61 rights were valued as a separate bundle which consisted of only a small percentage of the total value. It also proposed an adjustment to contract price for each right to make a valuation adjustment to reflect changes in the market for such rights during the period between the negotiated contract date and the valuation date. It generally said that research showed that most broadcasting rights exhibited a significant increase in value overtime,

however there are exceptions. It further noted that if the sports bodies were supposed to reissue these rights as on the valuation date i.e., 4 November 2013, what would be the revised value market participant would have paid to acquire these subject broadcasting rights for the balance period of the contract as per the Master Rights Agreement. It also stated that the adjustment can be either positive or negative depending on how the market factors have moved between the two dates.

14) In conclusion, it found that the transaction value payable by ESS to various sports bodies of US $ 1338 million, it reached at a range where the lower value range was US dollar 1142 million and higher value range was US dollar 1223 million. Therefore, the transaction value is Within the estimated valuation range.

15) Assessee further supported its transaction by submitting expert opinion issued by Prof. Israel Shaked, and actualization report on financial projections and estimates made by valuer by BDO India LLP.Valuation as per actualization exercise, valuation as per ESS perspective was US dollar 1166 millionwhereas valuation as per the assessee's perspective was US$ 1045 million. Both the valuations were after assigning equal weight to each perspective was arrived at US$ 1105 million.

16) The learned DRP confirmed the action of the learned TPO.

17) For that year, matter reached before the coordinate bench wherein in ITA number 6649/M/2018 dated 25/11/2021 [TS-593-ITAT-2021 (Mum)- TP] assessee challenged the determination of arm's-length price of the above transaction rejecting the valuation report of the assessee to some extent namely the determination of terminal value for bundle of sports rights in comparison of actual profit and loss with

the projected financials, the coordinate bench in paragraph number 31 restored the issue to the assessing officer to ascertain the correctness of assessee's valuation reports by getting the valuation done through its own expert. This order was challenged by assessee before the honourable Bombay High Court.

18) For assessment year 2015-16, the learned transfer pricing officer passed order under section 92CA (3) of the act on 31/10/2018 holding that the direction of the learned dispute resolution panel for assessment year 2014 – 15 is applicable to the current year also. During the transfer pricing assessment proceedings, the statement of Shri Santosh Naga officer of Duff & Phelps was also recorded on 11/10/2018. Ld. TPO rejected the new Valuation report, expert opinion and actualization report, he concluded that new valuation reports submitted by the assessee.Accordingly, the total amount of international transaction reported in form No 3CEB of Rs. 30,752,415,714/–, its ALP determined at Rs. 10,437,369,893/– and thereby adjustment of Rs. 20,315,045,821/- was made.

19) In objection before the learned Dispute Resolution Panel, assessee also argued over and above the arguments raised in earlier that sports rights typically command premium for the renewal citing the bid amount for IPL, ICC and ACB. Transaction of sale of broadcasting business of ZEE was also pressed in argument. It was argued thatthe market approach by the independent valuer that the value of the bundle of sports rights should be at least equal to the remaining payments due under the right agreement is acceptable. The learned Dispute Resolution Panelwas also presented with several media articles. The learned DRP asked the assessee to provide the details of basis and projection on the basis of which the biddings were done by

ESS supporting the contention with respect to the various objection. The assessee submitted that the process to bid and acquire right is a matter of pure commercial rational and were concluded by the management of the ESS as per the business needs and market conditions, since these rights were acquired through a bidding process, basis and projections are neither relevant nor available at this point of time. The learned dispute resolution panel,thereafter, following the direction for assessment year 2014 – 15 rejected the contentions of the assessee. Consequently, the final assessment order was passed which is subject matter of appeal before tribunal.

20) Meanwhile as order of the tribunal for assessment year 2014 – 15 was challenged by assessee before the honourable High Court, honourable High Court pleased to pass an order on 10 February 2023which resulted in the formation of the special bench.

21) The question raised is:-

> " Whether on the facts and in law, the assessing officer was justified in making transfer pricing adjustment anent to the international transaction of acquiring bundle of sports broadcasting rights, on the basis of deficiencies found by him in the valuation reports submitted by the assessee ?"

22) Three issues were identified in this appeal for determination.

23) The first question that arises is whether the assessee can resile from the Most Appropriate Method adopted in Transfer Pricing Study Report. Assessee adopted "other method" in form no 3CEB, however before us the learned authorized representative stated that CUP method is the most appropriate method. It is undisputed that the arm's-length price of an international transactions is to be determined by adopting

the Most Appropriate Method with regard to the nature of transaction or class of transaction or class of associated persons or functions performed by such person. Rule 10 C of The Income Tax Rules 1962 provides what is the most appropriate method. It is the method which is best suited to the facts and circumstances of each international transaction, and which provides the most reliable measure of an arm's-length price in relation to the international transaction.

24) Rule 10C (1) provides that Most Appropriate method should be selected :-

i. Best Suitedto the facts and circumstances of the of particulars international transaction

ii. Which provides the most reliable measure of an Arm's length price of that transaction

25) Rule 10C (2) of IT Rules prescribes several facts required to be considered in selection of The Most Appropriate Method as under:-

(2) In selecting the most appropriate method as specified in sub-rule (1), the following factors shall be taken into account, namely:—

(*a*)	the nature and class of the international transaction
(*b*)	the class or classes of associated enterprises entering into the transaction and the functions performed by them taking into account assets employed or to be employed and risks assumed by such enterprises;
(*c*)	the availability, coverage and reliability of data necessary for application of the method;
(*d*)	the degree of comparability existing between the international transaction [or the specified domestic transaction] and the uncontrolled transaction and between

	the enterprises entering into such transactions;
(*e*)	the extent to which reliable and accurate adjustments can be made to account for differences, if any, between the international transaction and the comparable uncontrolled transaction or between the enterprises entering into such transactions;
(*f*)	the nature, extent and reliability of assumptions required to be made in application of a method.

26) Therefore, undoubtedly every assessee, transfer pricing officer, Dispute Resolution Panel or any appellate authority determining the arm's-length price or adjudicating the same are duty-bound to follow the mandate of rule 10 C to hold what is the most appropriate method out of the method prescribed under section 92C of the act. Therefore, The Most Appropriate Method is a single method selected out of 6 methods prescribed under that section.This is also the mandate of the honourable Delhi High Court in case of Principal Commissioner of Income Tax Versus Metrix Cellular International Services Private Limited [2018] 90 taxmann.com 54 (Delhi). However, the only rider that can be placed is that it should be justifiable in accordance with rule 10 C (2) of The Income Tax Rules. Of course, one has to consider the nature and class of the international transaction, parties to the transaction and functions performed by them with respect to the assets employed and risks assumed. Further, the most important is the availability, coverage, and reliability of data necessary for application of that method. Naturally, if the availability of data fails,

the Most Appropriate Method also fails because it does not result in determination of arm's-length price of an international transaction. While finding the most appropriate method, degree of comparability between the international transaction entered into in controlled environment with the uncontrolled transaction is also of paramount importance. If that does not exist, the whole methodology of determination of the arm's-length price fails.

27) Thus, it is always possible that during the journey of determining Arm's length price , MAM already considered is not appropriate , one can resile from the most appropriate method adopted in its transfer pricing study report with a caveat that provided the earlier method selected by the assessee or for that matter any assessing authority or appellate authority, does not fulfil the requirement of rule 10 C (2) of the rules and new MAM selected fulfils it. Thereafter, once again the whole exerciseof determination of arm's-length price according to that method, which is now selected as MAM , confirming to rule 10 C (2) must be carried out.However,the onus is very high on the party which resiles from MAM originally selected. It has to demonstrate why original selection of MAM is faulty and how the new MAM selected is The Most Appropriate conforming with standards laid down in Rule 10C. Therefore, there is no bar to any of the parties in concluding the most appropriate method by reselling the earlier method selected by it, if it is confirming to the requirement of rule 10C (2) of The Income Tax Rules. Thus, to that extent I agree with the view expressed.

28) The next question that arises is what could be the most appropriate method in the transactions under consideration is. It is fact that Assessee has argued only on the CUP as MAM. The ld. DR was also

directed by us to restrict his arguments only why CUP is not MAM. Nothing else was argued before us.

29) The present case shows that the international transaction permeates into several subsequent years.

(i) For AY 2014-15 , In the first year assessee adopted CUP method relying upon the valuation report holding that valuation report is the CUP. In all further proceedings , it argued by substantiating CUP method with expert opinion, another valuation report of Duff & Phelps, etc.

(ii) For assessment year 2015 – 16, for the same transaction, assessee adopted in its Form No 3CEB adopted "other method" as the most appropriate method. For this, it adopted the same valuation report which it relied upon in assessment year 2014 – 15 justifying the CUP method as the most appropriate method. In its transfer pricing study report, which is reproduced above for assessment year 2015 – 16, placed at page number 52 of the paper book of the assessee clearly says that it has selected the "other method" as the most appropriate method. Rationale given is it is supported by the valuation report, in such valuation report the nature of functions performed and services provided are taken care of, along with the nature of the assessee and associated enterprises as well as the transaction and its documents such as Master Rights Agreement. It further stated that as "other method" has been selected as The Most Appropriate Method, it did not evaluate any of the other methods prescribed such as CUP, RPM, CPM, PSM and TNMM.

(iii) For AY 2015-16 , before the learned transfer pricing officer at page number 5 of the TP order, which is a reproduction of the transfer pricing order for assessment year 2014 – 15 has argued the CUP method as the Most Appropriate Method. Therefore, the argument of the assessee was for assessment year 2014 – 15 for that year which is reproduced in T P Order for AY 2015-16.

30) Assessee heavily relied before us that CUP method is the most appropriate method. The argument of the assessee before the assessing officer/TPO for assessment year 2014 – 15 as culled out from page number 5 of the TP order wherein the extractions for assessment year 2014 – 15 TP order is made shows that according to assessee, the rights which are being sold by ESS to the assessee have been purchased for a finite period of time from different international sports bodies for which it had to pay an amount of US dollar 1338 million. The assessee obtained these rights at a price of US dollar 1211 million, therefore, since the payment made / to be made to third-party [sports bodies] is more than the payment made to the associated enterprises for the same set of rights, Therefore CUPexists and hence CUP is MAM. The claim of the assessee defending the CUP method is that it is paying less than the third-party cost in the hands of ESS Singapore.

31) Therefore, now it needs to be examined whether the CUP method passes the test of the most appropriate method in this case.

32) Actual delineation of transaction is the most important factor in arriving at MAM. The fact shows that property transferred in this case is‘designated rights’ as described in the Master Rights Agreement. ESS was having certain rights acquired by it through contracts executed

with third parties such as international governing bodies for various sporting events such as cricket Australia, tennis Australia, England and Wales Cricket Board, football Association Premier league etc. According to that ESS is entitled to exploit media rights pertaining to various sporting events organized by these bodies in the designated territory. These rights have been offered to assessee only as an integrated bundle by way of novation or sublicense. The designated rights collectively means sports media rights, cricket and hokey media rights and the archive rights. As per the master service agreement, the ESS shall make all reasonable commercial endeavors to procure all such consents in accordance with the designated rights contracts listed in table 1 of schedule to novate the designated rights in favour of assessee. By this novation, the assessee shall become a direct party to the designated rights contract - with sports bodies replacing ESS with effect from the effective date. Thereafter the assessee undertakes to perform, discharge, and observe all obligations and liabilities on the part of ESS under the novated designated rights contracts which are to be performed, discharged, or observed from the effective date of novation of such contracts. (Para number 2.2.1 of the master rights agreement). If the novation is not completed before the effective date, for all such contracts ESS shall be deemed to have sublicensed the rights in that contract to the assessee. Similarly, as per para number 2.3 of the master rights agreement , all risk and reward from the effective date are transferred in the name of ESS to the assessee by sub licensing. There is a further clause of 2 .5 of the refunds which speaks that if the assessee receives a refund from any sports body of any fees paid by ESS to such sports bodies under a novated contract, then assessee shall release the entire amount so received by it to the

assessee as soon as practicable but in any event within 30 days of receipt of such refund. Clause number 3.2 also speaks about adjustment to payments. According to that if ESS or any third-party acting on behalf of ESS makes any payment to sports bodies which is over and above the designated right contracts then the agreed consideration shall be increased by an amount equal to the amount paid by ESS or such third parties. Further, on looking at table 1, whichis a list of novated contracts, designated rights contract anticipated to be novated. In that list 21 contracts are enlisted. The last column of the table shows that advances paid by ESS prior to the effective date for sporting events post effective date to various sports bodies pursuance to various contract. According to that US dollar 4,21,90,545 already paid by ESS which should be further reimbursed to ESS by assessee under certain circumstances in terms of clause 3.2.4 of the agreement. Accordingly, in some of the contracts the novation agreement was entered into where the assessee stepped into the shoes of ESS with respect to the rights and liabilities of that contract for the remaining period. By this novation agreement, all the continuing parties i.e., sports bodies etc. have released the original party i.e., ESS from all its obligations under the agreement accruing on or after the effective date. Therefore, it is apparent that the assessee undertakes to fulfil all risk and to earn reward of these contracts as per these novation agreement or sublicenses according to master rights agreement.Thus, the assessee has stepped into the shoes of ESS so far as all the liabilities of the various contracts entered into a as well as reward of those contracts.

33) Therefore, it is apparent that the amount paid by the assessee to various sports bodies is an integral part of the contract i.e., master

rights agreement, which assessee has undertaken to pay by virtue of the agreement of buying of bundled sports rights. It was an obligation accepted by the assessee to be discharged for a period after the effective date of 4 November 2013. Therefore, all payments made by the assessee to various sports bodies are part of its contractual obligation towards third parties assumed by the assessee by this Master Rights Agreement.

34) It is the claim of the assessee that whatever it paid to the various sports bodies by virtue of various novation agreement which springs out of the master rights agreement to third-parties, obtained by the assessee at discount from ESS. Therefore, whatever it has got from its associated enterprise is less than what is required to be paid in discharge of the obligation of the ESS, hence, the transaction entered into by the assessee is at arm's-length by CUP method.

35) We are unable to appreciate arguments of the ld. AR that such price paid to ESS is comparable to the prices paid to sports bodies (third Parties) will constitute CUP . CUP Method Compares the price charged with regard to a controlled transaction for transfer of goods or services to the price charged for transfer of goods or services in a third-party scenario having comparable circumstances. Necessarily there have to be two prices for CUP to succeed. The Price paid in controlled environment for transaction [AE scenario] Price paid for similar or same transaction in uncontrolled environment [Third party scenario]. Price paid in controlled scenario is available, however there is no third party scenario exits at all. No evidence is available that a third party has purchased such sporting rights from another party. The Amount paid by assessee to various sports bodies, which was an obligation of ESS, is the agreement of the assessee as per the novation

agreement which is between Assessee. ESS and Sports Bodies. These novation agreements are part of the MRA terms. Therefore, agreed price paid by assessee to sports bodies is part of controlled transaction which is paid to a NON AE in terms of contract with AE.

36) The transaction here is the sale of bundled sports rights by ESS to assessee. While applying CUP method product comparability is of Paramount importance. It is used in cases where an independent enterprise deals with the product identically or very similar to the property transacted by associated enterprises. Therefore, the question that would arise is whether an independent party would have purchased these bundles of sports rights at the price which is paid by the assessee to ESS. The further question that would arise is whether in fact any transaction between the two independent parties would have fructified on similar or same terms, at the time of executing MRA, as have been entered into by assessee with its associated enterprises i.e., ESS. If yes, then there would have been a comparable uncontrolled transaction for applicability of CUP.

37) It is interesting to note that it's valuer DH consultants who prepared the valuation report for determining the consideration of the agreement of Master Rights Agreement between the assessee and ESS discarded reproduction cost method as well as replacement cost method. Thes twomethods are similar to the CUP method. Valuer adopted an income approach to determine what is the correct valuation at which these rights can be transferred. Thus, the valuer at first instance also did not consider that there is a comparable uncontrolled transaction instances available to value this transaction. The valuer also stated that:-

i. it is a transfer of an 'intangible asset' which is the 'bundle of rights'.
ii. The cost approach relies upon the principle of substitution and recognizes that a prudent investor will pay no more for an asset than the cost to replace it with an identical or similar unit of equal utility.
iii. It further analyzed the agreement and stated that as per the respective agreements, the acquirer i.e., assessee is required to agree to pay acquisition cost in future instalments. The cost of bundle of rights is only permitted by ESS that needs to be paid in future instalments.
iv. It further states that the value of various rights were determined by ESS based on the various 'market conditions existing' at the 'time of bidding events'. These conditions might have undergone a change as at the valuation date.
v. Further the bidding price was determined based on the future economic benefits estimated to be arrived from ESS perspective only. The future economic benefits from third party perspective may be different.
vi. Therefore, the cost approach does not provide an appropriate basis to ascertain the value of a bundle of rights.

38) Thus, this valuation report negates the adoption of the CUP method as the Most Appropriate Method as it does not satisfy the test of comparability of nature and class of international transaction because of changes in the perspective related to future economic benefits. The

Time factor and changes in economic and market conditions in future will affect the price and hence, the CUP method is not suitable. It also does not satisfy the condition that the rights obtained by the ESS were for an earlier period and there is a change in the market conditions on which date the Master Rights Agreement i.e., 2013 was entered into. It was for these reasons which will have different market conditions and since it is for subsequent period in subsequent years , market conditions would not be same. The valuer also did not find any availability, coverage, and reliability of data necessary for comparability analysis for application of this method. Further the degree of compatibility existing between the international transaction and absence of uncontrolled transaction i.e., whether an independent party would enter into buying an obligation and rights of ESS. It also holds that there cannot be a reliable and accurate adjustment if there is any difference. Thus, the CUP method was rejected by the valuer who was requested by both the parties to determine the sale consideration. Had there been a CUP available to the value, it is unusual for such an expert who has valued the consideration itself in the master rights agreement, would have rejected it straightway. Therefore, the CUP method was not found to be the "appropriate method" , leave aside 'the most appropriate Method' in the opinion of such an expert. The valuer authoritatively and exhaustively negatived applicability of CUP method.

39) Now coming to the valuation methodology of another valuer of the assessee i.e. Duff & Phelps as per their communication dated 5 July 2018 placed at page number 866 onwards of paper book of assessee has clearly stated thatit has given their opinion on the valuation offered by the assessee as well as considered by the revenue, that

given the attributes of the subject rights, market transaction approach was deemed more relevant. The market transaction approach is used to estimate fair market value by analyzing comparable transactions or asking prices for comparable assets. The process is essentially that of comparison and coalition between the subject assets and similar assets that have been sold or are offered for sale in the market. Considerations such as time and condition of sale in terms of agreements are analyzed for comparable assets and are adjusted to arrive at an estimation of the fair market value of the subject asset. Therefore, it is apparent that the second expert has also stated that the market transaction approach is more relevant. Considering the changes in the market for the subject rights during the time period between contract date and valuation date and referring to this analysis, by analyzing market trend factors, which are essential consideration to appropriately value the subject rights. Market trend factors include an analysis of historical and comparable trends in even to specific broadcasting rights, overall broadcasting rights, advertising, sponsorships, subscription data and overall market dynamics and viewership. These adjustments (market trend factors) at a normative level provide useful insight into the increase or decrease in the values of similar assets classes over a period of time. Valuer states that 5 specific contracts have significant valuation impact as they are large in value. It analyzed each of the five major contracts covered in the bundle of sports rights and found that there is an increase/decrease in the value of each of the contracts due to the market trends. Such market trend effects are considered from the date on which ESS negotiated prices with the sports bodies and at the time/date on which these contracts are novated in favour of the assessee by master rights

agreement. Thus, Duff and Phelps , a valuer who was engaged by 21st-century fox on behalf of the assessee, to provide the valuation services, has categorically held that markets have changed substantially from the date ESS acquired those rights and date at which MRA is entered in.It is more emphatic at page number 16 of the valuation report [page no 880 of Assessee's paper book] :-

> " Wherever available, we used transaction prices of comparable rights to estimate the fair market value of the subject rights and where comparable transactions were not available, we use the most recent transaction price (closest in time to the valuation date) for each of the individual rights that make up the subject rights as the starting point. It should be noted that the subject rights consist of individual broadcasting rights that were negotiated between knowledgeable, willing parties in an arm's-length transaction. Thus, the transaction price closest in time to the valuation date (referred to herein as Negotiated contract price) for each of the individual rights of the subject rights was good evidence of its respective value. However, in many cases, the subject rights were negotiated as a part of long-term deal (the Negotiated contract date) that occurred a few years before the valuation date. Thus, it was necessary, when using the negotiated contract price for each right, to make a valuation adjustment to reflect changes in the market for such rights during the time period between the Negotiated contract date and the valuation date. In

general, our research showed that most broadcasting rights exhibited a significant increase in value over time, but there were exceptions."

40) This itself shows that in case of long-term contracts entered into by the assessee in case of five major rights consisting of a significant proportion of the total value of the subject rights have undergone significant changes because of market conditions from the date they were entered into by ESS with the sports bodies and the date on which ESS transferred them to the assessee, therefore, there is no comparable prices available to select CUP as MAM. Thus, the only method that can be applied in this case is the market approach i.e., which supports "other method". Thus, according to the second expert also, the CUP method is not the appropriate method, leavingit to be 'the most appropriate method' for benchmarking of the transaction.

41) Furthermore, the same valuer on page number 34 [page no 898 of Assessee Paper book] has also held that the fair market value of the subject rights and income or market approach would be most appropriate. They have also stated so with utmost care, showing that market trend factors applicable to the base price of the subject asset have undergone substantial change, it might have increased or decreased the fair market value of the subject asset. They have given an example by taking five of the most significant contracts involved in the whole bundle of sports rights. If one looks at the lower and higher range of each of the contractsanalyzed by the valuer, anybody will agree that there are significant market trends which have changed the

value of the rights transacted. The valuer has given 18 work papers to show how the underlying asset transacted has undergone change. Of course , there may be a downward revision of a value of the contract or upward revision of a value of the contract based on different market conditions operating in different region, different sporting event, held across the globe, changes in the viewership, changes in preference of the viewers, etc.The variation of Lower and Higher range with Respect to five major contracts of weighted Annual Trend factor range speaks for themselves.

Sr No	Contracts	Negotiated contract price in USD Millions	Lower value range Price USD Millions	Higher value range USD Millions	Lower Range	Higher range
1	Cricket Australia Board	155	176	183	8.4 %	10.6%
2	ECB Rights	110	123	128	9.6 %	11.4%
3	ICC Rights supplemental Agreements	358 (Page 50)	505	536	11.7%	12.7%
4	CL T 20 Rights	351	161	199	2.7%	7 %
5	EPL Football Rights	133.8	134	134	Nil	Nil

To the fifth contract no adjustment was made in view of the facts mentioned on page no 57 of the report.

42) Thus, it is apparent that market factors have played a big role during the period such rights were acquired by ESS and when it is transferred to Assessee.

43) The valuer has also,on page number 60 of the report stated that.

> "Due to the diversity of the various assets that are part of the portfolio, the riskiness or volatility of the portfolio would be significantly lower than that of the individual assets. It further states that the subject asset is a bundle of rights and not an individual right. The economic attributes of a bundle of various rights are very different from that of the individual right and hence valuing this in aggregate would yield a different value, from that of valuing them individually and summing the total. In addition, the portfolio has a mix of unique rights spanning across different sports, different time periods, different formats (bilateral, sporting leagues, multinational tournaments etc.,), geographies, nature of rights (broadcasting, digital rights, composites etc.) and finding comparable bundle of rights to the value subject using the market approach was not possible. Hence, we have valued the assets individually."
>
> We failed to understand where the comparison between the price agreed by ESS is to be paid to various sports bodies, which assessee is now obliged to pay, due to the

several factors mentioned by an expert of international repute. Thus, the second export also confirms that only method available for valuation of this international transaction is "other method."

44) In assessment year 2014 – 15, assessee also supported the valuation report by obtaining expert opinion of Duff & Phelps LLC (page number 838 – 864 of the paper book), which has justified the valuation report in all its aspect including the approach for valuation to determine the arm's-length price. Thus, the other method was once again stamped by another expert.

45) Coming to the Rights Valuation Report Prepared for Actualization Exercise by another entity BDO India LLP , (surprisingly the person who certified the valuation of bundle of rights in the original agreement by DH consultants and BDO LLP is the same person,who signed both the reports) (page number 1024 – 1037 of the paper book), clearly once again confirms that, what information is available at page number 4 of that report for the purpose of valuation. It specifically says what is the source of information provided by the management. Even for the actualization report the management did not provide any information which could show the applicability of the CUP method. Thus, it nowhere indicates that any CUP comparable data is available. It also considers valuation report dated 5 November 2013 issued by DH consultants private limited which also rejected the cost approach (similar to CUP method). The purpose of the actualization exercise is for the assessee to understand the impact of replacing the projected cash flow considered in arriving at the valuation as per assessee's perspective with actual cash flow till 30

June 2017.On page number 7 the report itself mentioned that the value is adjusted on account of a few actual events as informed by the management of the company. It states that a few international cricket matches were cancelled, and no payments are due for the same. Therefore, the revised absolute value of bundle of rights was now arrived at Us dollar 1227 million compared to the transaction value under cost approach as per valuation report dated 5, November 2013 derived at US dollar 1338 million. This itself shows how the market condition changes and whether the historical data is right or not for valuation of such complicated designated rights. Thus, it clearly indicates that the Price for historical right agreed upon by the ESS at a different point of time cannot be substituted as CUP price for determination of arm's-length price of the international transaction of sale of such rights to the assessee at a later point of time.If we do that, we are absolutely ignoring the market factors, and various other factors which the experts have reiterated time and again in the assessment proceedings of the assessee itself, fails the applicability of CUP method. . And thus, we are bypassing the basic provisions of transfer pricing analysis of determination of arm's-length price of an international transaction. This shows that there is no CUPavailable, but the only approach is to value this bundle of sports rights by adopting 'other method'.

46) Now we consider expert report of Prof Israel Shaked - the Michel Shaked Group- where he analyzed and reviewed rights valuation report prepared by DHC consultants private limited dated 5 November 2013 and also considered T P assessment order for assessment year 2014 – 15. [page no. 662 to 837 of paper book] In this report spanning over 172 pages, he has considered various aspects of

sporting rights. He also considered the factors prevailing in the sporting media, he also supported his findings with market evidence, in his opinion he states that even negative cash flow does not hamper the valuation. In certain cases, he clearly opined that the valuation methodology at least for determining arm's-length price of the bundle of sporting rights in this case is only 'market approach'. Both parties agreed before that there is no reservation on the level of expertise of the professional. Therefore, it clearly gives an idea that only the 'other method' is the most appropriate method in this case.

47) Now we consider the argument of the assessee thatpurchase of bundle of sports broadcasting rights is purchase on aggregate basis by the assessee from ESS for the remaining years of distinct sports broadcasting rights acquired by ESS at a price settled separately in respect of each year covered there in from third parties in earlier years at a consideration lower than what would have otherwise been paid by ESS for such years. Meaning thereby, the assessee states that ESS has acquiredthose rights earlier based on conditions prevailing as on that date i.e. the date on which ESS has agreed, the assessee by entering into the master rights agreement coupled with the Novation agreement or sublicense by ESS to the assessee, assessee was supposed to pay only 90.5 % of that amount which ESS was to pay to the sports bodies and therefore the transaction between the payment to sports bodies by the assessee subsequently, shows the comparable price paid in uncontrolled transaction, as it is entered into between assessee and those sports bodies, is a valid CUP.

48) I am unable to persuade myself to accept this argument. The reasons being that whether any third party would have entered buying the bundle of sports rights at that price or not. The reasons stated by us

earlier shows that there is no comparable price/transaction is available that any independent party has purchased such rights, in similar circumstances at the agreed price. No such data is available. This is confirmed by the opinion of experts also in the form of valuation report, actualisation report, export opinion. Even the assessee could not show that in similar circumstances of similar products i.e., designated sports rights, have been purchased/transacted between independent parties. Even the valuer shows price could be higher or lower than agreed consideration due to several factors.

49) On the issue, whether the fees or payments made by assessee to the various sports bodies, which ESS would have paid in case this master rights agreement would not have been executed between ESS and the assessee could be a valid CUP, we disagree with the same. The CUP method compares the price charged for property transferred in a controlled transaction to the price charged for property transferred in a comparable uncontrolled transaction in comparable circumstances. If there is any difference between the two prices, clearly indicates that the conditions of the commercial and financial relations of the associated enterprises are not at arm's-length and that the price in the uncontrolled transaction may need to be substituted for the price in controlled transaction. As in this case, there is no evidence available that there is a price charged by independent parties in a comparable uncontrolled transaction in comparable circumstances.We emphatically state that there is no evidence available that any independent party has purchased identical/similar sports broadcasting right purchased at same time. Therefore, as there are no comparable uncontrolled transaction prices are available, the CUP method is not the most appropriate method as the comparability standards under rule 10 C

(2)(c) with respect to the availability, coverage, and reliability of that data necessary for application of the method.Thus, traditional transfer pricing method are not suitable for determination of ALP in this case.

50) The five Sports Broadcasting agreementsanalyzed by the expert clearly shows how the market prices of these sports broadcasting rights swings positively or negatively!

51) We also support our reason by giving an example thatwhat is the contention of the assessee:-

(i) an associated enterprise (A) (ESS) agreed to purchase the property (Sports Broadcasting Rights) from a third-party (Y) (Sports Bodies) in prior periodat Rs. 100/-. Agreed consideration of Rs. 100/– to be paid by (A) (ESS) to (Y) (Sports Bodies) in future years on happening of some events (Sports Events).

(ii) Subsequently, associated enterprises (A) (ESS) transfersthat right of purchase of the property to another associated enterprises (B) (Assessee) in FY 2013 at discount of 9.50 % i.e., at Rs 91.50. (Y) (Sports Bodies) releases (A) (ESS) from its obligation to pay (Y) (Sports Bodies) as (B) (Assessee) steps into the shoes of (A) (ESS) taking obligation to make such payment to (Y) (Sports Bodies).

(iii) The consideration paid by associated enterprises (B) (assessee) to the third-party (Y) (Sports Bodies) in 2013 or in subsequent years of Rs. 100/– on happening of events (Sports Events).

(iv) Amount paid by associated enterprises (B) (Assessee) to the original seller (Y) (Sports Bodies) is a price paid for

transaction between two unrelated parties i.e. (B) (Assessee) and (y) (Sports Bodies) and therefore the price so paid of Rs 100/- , Is an 'uncontrolled transaction" under rule 10 A (ab) of The Income Tax Rules 1962.

(v) Therefore, a valid CUP exists.

(vi) The Price paid by (B) (Assessee) to (B) (ESS) which is at 9.50 % discount, which is less than the price paid by (B) (Assessee) to (Y) (Sports Bodies) of Rs 100/- on happening of events (Sports events) and hence Transaction is at Arm's Length.

52) For comparability analysis and comparable uncontrolled transaction is a transaction between two independent parties that is comparable to the controlled transactions under examination. In this case the amount paid by the assessee to various sports bodies on happening of sports events is an offshoot of and directly springs from Master Rights Agreement by buying the obligation of ESS for payment to the sports bodies.Therefore,what an assessee pays to the various sports bodies is the liability for such payment, which directly springs from the obligation acquired by the assessee from entering into Master Rights Agreement. It is not the case that assessee has obtained the right to broadcast sports events directly from the sports bodies in contemporaneous time and has made payment for such rights.what assessee has paid to the sports bodies is merely discharge of the liability of ESS towards those sports bodies. There is no evidence of any transaction that any independent party would have taken such an obligation of payment to sports bodies. Therefore, payment made by the assessee to the various sports bodies is an irrelevant consideration

in determining the arm's-length price of the international transaction of purchase of bundle of sports rights.

53) Further, by Novation agreement the assessee has stepped into the shoes of ESS , qua its rights and liability towards sports bodies. That means now instead of ESS, assessee has obtained rights which were available to ESS and obligations which were to be discharged by ESS towards those sports bodies. Therefore, the payment made by the assessee to the sports bodies is merely a transaction arising fromthe Master Rights Agreement. The Master Rights Agreement was entered into 31/10/213. The rights acquired by ESS which are transferred through this master rights agreement in earlier years. The CUP method requires a high degree of comparability and similarity in terms of quality of product, contractual terms, level of market, market conditions, business strategies, geographical factors, and associated risk. By entering into Master Rights Agreement in 2013, assessee has assumed all risks and rewards which were available to ESS when it entered into respective agreements with respective sports bodies. Therefore, assessee by agreeing to pay in 2013 onwards, what ESS has agreed to pay in earlier time on happening of certain events, does not take into consideration the change in the market of sports broadcasting rights whether positive or negative, from earlier to 31/10/ 2013.

(i) Asian broadcasting right agreement was entered into between Cricket Australia and ESPN on 4 November 2011.

(ii) Asian football Federation broadcast right was entered into broadcast license agreement on 15 January 2013

(iii) International broadcast rights ATP 500 agreement was entered into on 31 May 2012

(iv) Tennis properties Ltd agreement was entered into on 13 April 2012

(v) Rights agreement BCCI CLT 20 was entered into on 10 September 2008

(vi) Agreement for audiovisual exploitation of cricket matches was entered into on 18 May 2012

(vii) Agreement for audiovisual exploitation of live package in the territory of India Bangladesh is et cetera was entered into on 14 June 2013

(viii) Hockey India agreement was entered into on 27 July 2012

(ix) License agreement for media rights ICC events was entered into on 25 October 2013

54) The valuation of 5 major contracts consists of the pith and substances of the whole MRA by internationally renowned experts how the time has changed for broadcasting rights qua competition, sports, geographies, people's preferences and also evils pervaded in sports too.

55) It was under these circumstances various experts opined viz:-

i. expert opinion of prof. Shaked , who has given ample evidence with empirical studies,

ii. valuation report of Duff& Phelps also gives many instances of significant changes in the market conditions,

iii. valuation report of DHC consultants Ltd also states significant changes in the market conditions and

iv. actualization report of BDO LLP

substantiates that the projections and actual reality has changed in assessee's own case. Further, such market changes have shown to

have either increased or decreased the value of each sporting right. Leading valuer Duff & Phelps also has made valuation on the basis ofa lower and higher range of values clearly proves that the CUP method is not the most appropriate method as it ignores the changes in the market conditions.

56) Even if the assessee does not know what the commercial rationale of the rights when acquired by the ESS which assessee acquired through MRA, how it can say that price paid based on that commercial rationale is the CUP. It is very pertinent to refer para no 14.3 of the directionsof DRP page no 110 of 115 which is as under :-

> " 14.3 Furthermore, in order to appreciate the claim of the assessee as to the findings of the TPO in this matter, learned authorized representatives of the assessee were asked to provide details of basis and projection on the basis of which the bidding were done by ESS supporting the contention of the assessee in respect to ground number (3) to (9) above. In response to the same, the assessee vide letter dated 7 August 2019 has informed that the process to bid and acquire rights is a matter of pure commercial rationale. Even when the assessee acquired these sporting rights by ISBs, it has acquired it through a competitive bidding process. These bids/the gauche Asians were concluded by the management of the ESS as per the business needs and market conditions. The assessee further submitted that, "since these rights were acquired through a bidding process, basis and projections are neither relevant nor available at this point of time."

57) Since, no evidencehas been produced before us that the market conditions remain the similar or same at the time at which ESS made the bids and time when assessee bought these rights, i.e., 31/10/2013. Going ahead a step, assessee submitted before the learned dispute resolution panel that same are not available. Therefore, the question of comparison of market conditions at bidding time and time of transfer is impossible to compare.

58) Once again it is reiterated that for the CUP method to be the most appropriate method, needs to be looked into following factors :- (i) quality of the product (ii) contractual terms including scope in terms of warranties provided, volume, credit terms, transfer terms et cetera (iii) level of the market (iv) geography market in which the transactions take place (v) the date of the transaction (vi) alternatives available realistically to the buyer and seller. In the present case, the assessee has merely accepted the responsibility/liability of ESS for payment to various sports bodies which were agreed to by ESS at one point of time. Therefore, the prices were agreed by ESS with the sports bodies have actually bound the assessee by entering into Novation agreement and Sub License arrangement. It is the same terms and conditions which are not contemporaneous so far as the time as well as the market factors prevailing on 31/10/213. Therefore, the CUP cannot be the most appropriate method in this case for this reason also.

59) Central Board of Direct Taxes has notified the "other method" as per rule 10 AB of The Income Tax Rules, 1962 on 23 May 2012 with effect from 1 April 2012. It provides:-

10AB. For the purposes of clause (f) of sub-section (1) of section 92C, the other method for determination of the arm's length price in

relation to an international transaction 91[or a specified domestic transaction] shall be any method which takes into account the price which has been charged or paid, or **would have been charged or paid,** for the same or similar uncontrolled transaction, with or between non-associated enterprises, under similar circumstances, considering all the relevant facts.]

60) It is introduced for the determination of arm's-length price which would otherwise not be possible as per the traditional comparable uncontrolled price method. Therefore, this method was introduced wherein generally use of CUP method fails as the most appropriate method. As it is evident that CUP method refers to the price charged or paid, whereas 'other method" also includes the price which would have been charged or paid or it also considers the price proposed to be charged against the actual price charged or paid as per CUP method. Thus, the 'other method' has a wider applicability. It takes intoaccount:-

(i) prevalent prices which might not have actually been transacted / charged ,
(ii) takes care of relevant circumstances and
(iii) also considers all relevant facts.

61) Even OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administration 2022 in paragraph number 2.9 clearly advocates about freedom to apply the 'other method' for determination of the arm's-length price if the method prescribed are not appropriate to the facts and circumstances of the case. In case,

where 'other method' is used in selection, it should be supported by the explanation where other traditional methods are regarded as less appropriate or non-workable in circumstances of the case and of the reasons why the selected 'other method' was regarded as providing a better solution. A taxpayer should maintain and be prepared to provide documentation regarding how its transfer prices were established under that method.

62) In the case before us, there was a transfer of Bundle of sports broadcasting rights as per MRA, which is a unique intangible asset, in such a case, all the more " Other Method" would be more appropriate to value those rights at different point of time based on changes in economic conditions and market situations, as also opined by experts.

63) Applying this to the fact of the present case,

(i) form number 3CEB,
(ii) transfer pricing study report,
(iii) valuation report of DHC consultants Ltd,
(iv) valuation report of Duff & Phelps India private limited,
(v) actualization report of BDO LLP,
(vi) expert opinion of Prof Israel shaked,
(vii) expert opinion of Duff & Phelps LLC

clearly establishes that in this case the most appropriate method for determining the arm's-length price of the international transaction of sale of bundle of sports broadcasting right is "other method"."Other method" is applied where other traditional method fails to reach at arm's-length price of international transaction. There is no order of preference in using the methods including the "other method". In

fact,the introduction of this method, i.e.,"other method" is in consonance with global best practices for determination of arm's-length price. It obliviates the difficulty of the taxpayer and the tax administration where the transfer pricing is of complex assets such as the designated rights covered as intangible rights therein. This method applies where traditional methods of transfer pricing fail and in fact serves as the "savior". Thus,"other method" of determination of arm's-length price of international transaction is neither inferior nor superior to other methods but helps the assessee and taxpayers in substantiating the arm's-length price of an international transaction in certain specified situations where other traditional methods does not support the case. In the present case, the sale of bundle of sports broadcasting rights is also a unique transaction where other traditional methods fail, therefore, the most appropriate method in this case is other method.

64) Therefore, according to us, the CUP Method is not The Most Appropriate Method, but the "other method" is The Most Appropriate Method in the transaction under consideration for determination of arm's-length price of international transaction of sale of bundle of sports broadcasting rights, and accordingly, we hold.

65) At this stage I do not want to emphasize the various factors and values that have undergone changes with figures and various conditions with respect to each of the contracts comprising in the bundle of rights, as it is not appropriate to discuss at this stage because , examination of ALP by Other method is the domain of the Division bench, as determination of ALP applying 'Other method' as MAM is not at all argued before us.

66) As we have held that the Most Appropriate Method to determine the arm's-length price of the international transaction of sale of bundle of rights is the 'other method', the ALP of this international transaction is to be determined applying 'other method'. As we have already rejected the adoption of CUP method as the most appropriate method, there is no need to determine the arm's-length price of the international transaction applying CUP method. Even before us, arguments were only raised with respect to the applicability of CUP as the most appropriate method and determination of arm's-length price of the international transaction under that method only. In view of our forgoing discussion and findings of facts; we answer the question that "The Most Appropriate Method" for determination of ALP of subject assets is "other method".

67) Accordingly, the instant appeal is directed to be placed before the division bench for disposal having regard to the decision of the special bench on the issue that the arm's-length price of the international transaction is required to be determined by adopting 'other method' as The Most Appropriate Method.

Order Pronounced on this day of 5th June, 2023.

Sd/-

(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

Mumbai: Date: 5th June, 2023

PER ABY T . VARKEY, JM :

1. I have read the orders of my learned brothers. It is noted that the entire conspectus of the facts involved in the present case has been succinctly set out by my learned brothers and therefore to avoid repetition, I am refraining from discussing the same again. The question posed for the consideration of this Special Bench is as follows:

> *"Whether on facts and in law, the Assessing Officer was justified in making transfer pricing adjustment anent to the international transaction of acquiring Bundle of Sport Broadcasting Rights, on the basis of deficiencies found by him in the valuation report submitted by the assessee ?"*

2. In light of the facts of the case, the first aspect which required consideration is whether the assessee can resile from the Most Appropriate Method adopted in the Transfer Pricing Report. On this, I find myself in agreement with both my learned brothers that the assessee, in principle, can resile from the most appropriate method as was adopted in the TPSR, provided that the new method confirms to the requirement of Rule 10C(2) of the Income-tax Rules, 1962. Moreover, this Tribunal being the last fact finding authority is duty bound to ascertain the correct facts, nature & class of transactions, the FAR analysis, reliability of data and thereafter arrive at the Most Appropriate Method to benchmark the impugned international transaction, which may resile from the Method adopted by the assessee in the TPSR.

3. In view of the above principle, the next aspect is to ascertain the Most Appropriate Method in the given facts of the present case. I find myself in agreement with the principles discussed by the Ld. VP at Paras 34.2 to 34.8 of his order, viz., the mandate of 'CUP Method' follows that the benchmark price is the actually transacted price in a comparable uncontrolled situation and the benchmark property is the same property transferred, whereas the '*other*

method' covers the price transacted or the price that would have been transacted under same or similar uncontrolled conditions. Naturally therefore, CUP Method when pitted against Other Method would prevail, provided reliable data under uncontrolled conditions is available.

4. Having held so as above, I find myself in agreement with the Ld. AM that, in the given facts of the present case, the '*Other Method*' and not the 'CUP Method' was not the most appropriate method. To recapitulate the facts, ESS had entered into several agreements with different sports bodies in prior years to acquire bundle of 'designated rights' in terms of which ESS has assumed several liabilities & obligations which it was required to discharge in future years over the tenure of the contracts/agreements. Vide MSA dated 31-10-2013, ESS essentially novated/sub-licensed all the contracts/agreements with the third parties in favour of the assessee, by virtue of which the assessee entered into the shoes of ESS and assumed all the liabilities as well as rewards which had been contracted by ESS in the earlier years. The Consideration under this MSA was agreed to be derived by Independent Valuation and the Valuer, M/s DH Consultants Pvt Ltd derived the consideration value at USD 1210.65 million as against the contracted liabilities by ESS which were worth USD 1338.03 million on the date of the Agreement. The difference was worked out by way of discount of 9.5%. So post-facto events shows that, the assessee would make payments assumed by virtue of the MSA directly to the third parties i.e. sports bodies and simultaneously ESS would reimburse the discount of 9.5% to the assessee. By this modus operandi, the parties had ensured that the actual outflow of the assessee would be USD 1210.65 million [1338.03 million paid by assessee less discount of USD 127.37 million reimbursed by ESS] i.e. the consideration derived by the Independent Valuer.

5. In view of the above stated facts, I find myself in agreement with the Ld. AM at Paras 34 & 35of his order that the agreed prices paid by the assessee to various sport bodies by virtue of the liabilities assumed under the MSA entered into with ESS represented only the discharge of liabilities and was a part of the controlled transaction which was paid to non-AE [Sports Bodies]at the instance of the AE [ESS]. It therefore did not represent uncontrolled price/transaction under un-controlled conditions and hence did not constitute reliable data to undertake CUP analysis.

6. Undeniably to apply CUP, product comparability is of paramount importance and the uncontrolled price has to be ascertained which was based on same or similar terms during the same time period, market conditions as prevailing during the period when the assessee transacted with the AE. In the given facts, it is not in dispute that ESS had contracted these liabilities in prior years when the prevailing market conditions, time period etc. were materially different than the date on which the MSA was entered into with the assessee. Hence, it was indeed relevant to ascertain the comparable uncontrolled price which an independent party would have paid to acquire the designated rights during the relevant period when the assessee entered into the MSA with ESS.

7. I agree with the Ld. AM that the Independent Valuer i.e. M/s DH Consultants Pvt Ltd who had arrived at the consideration of USD 1210.65 million had himself discarded the cost approach and rather followed the income approach to arrive at the consideration. The Independent Valuer had categorically observed that the value of various rights were determined by ESS based on the market conditions, surrounding circumstances existing at the time of contracting with sporting bodies and they may or would have undergone change as on valuation date. It is for this reason that the liabilities worth USD 1338.03 million contracted in the earlier years by ESS was not considered as

suitable replacement cost to ascertain the independent valuation of these designated rights for the purposes of MSA. The fallacy of the contention of the appellant stands fortified by this report of the Independent Valuer. If the assessee's manner of application of CUP Method is to be taken to its logical conclusion, then the benchmark price ought to have been the value of the contracted liabilities i.e. USD 1338.03 million and there would not have been any reason for ESS under uncontrolled circumstances to give discount of 9.5% and bear loss on this count. The very fact that the independent consideration agreed by the assessee and ESS of USD 1210.65 million was different than the value of contracted liabilities of USD 1338.03 million shows that the market conditions had indeed underwent a change and an independent party would not have acquired these designated rights in 2013 for the same price which ESS had negotiated in earlier years.

8. In support of the findings of the Ld. AM, it is noted that the Ld. CIT, DR had rightly pointed out the changed dynamics regarding the value of rights of CL-T20 which had substantially declined in 2013 than the values/ liabilities contracted by ESS in 2007 and there was an additional burden of payment of compensation of USD 465.14 million. Further, the bid price of ICC deal entered into by ESS in the year 2007 for USD 1100 million which stood transferred to the assessee under the MSA, had been re-negotiated for USD 1900 million. Clause 3.2 of the MSA which deals with adjusted payments states that any payments made over and above the designated right contracts shall result in increase in the value of the agreed consideration by equivalent amount. Hence, as a consequence of this re-negotiation and in terms of Clause 3.2, the assessee had to bear the increased re-negotiated price of USD 800 million. These instances resonate with the findings of the Ld. AM at Para 38 which, at the cost of repetition, is set out below:

"38) Thus, this valuation report negates the adoption of the CUP method as the Most Appropriate Method as it does not satisfy the test of comparability of nature and class of international transaction because of changes in the perspective related to future economic benefits. The Time factor and changes in economic and market conditions in future will affect the price and hence, the CUP method is not suitable. It also does not satisfy the condition that the rights obtained by the ESS were for an earlier period and there is a change in the market conditions on which date the Master Rights Agreement i.e., 2013 was entered into. It was for these reasons which will have different market conditions and since it is for subsequent period in subsequent years, market conditions would not be same. The valuer also did not find any availability, coverage, and reliability of data necessary for comparability analysis for application of this method. Further the degree of compatibility existing between the international transaction and absence of uncontrolled transaction i.e., whether an independent party would enter into buying an obligation and rights of ESS. It also holds that there cannot be a reliable and accurate adjustment if there is any difference. Thus, the CUP method was rejected by the valuer who was requested by both the parties to determine the sale consideration. Had there been a CUP available to the value, it is unusual for such an expert who has valued the consideration itself in the master rights agreement, would have rejected it straightway. Therefore, the CUP method was not found to be the "appropriate method", leave aside 'the most appropriate Method' in the opinion of such an expert. The valuer authoritatively and exhaustively negatived applicability of CUP method."

9. Ultimately, I find myself in agreement with the Ld. AM that the MAM to benchmark the international transaction in question is the 'Other Method' and not 'CUP Method'. Before us, since no arguments were put forth regarding the manner of application of 'Other Method' and the deficiencies in the valuation report as pointed out by Ld. TPO, the instant appeal may be placed before the

Division Bench on the issue of determination of ALP of the international transaction in question by adopting 'Other Method'.

Order Pronounced on this day of 5th June 2023.

Sd/-

(Aby T. Varkey)
Judicial Member

Mumbai : Date : 5th June, 2023