IN THE INCOME TAX APPELLATE TRIBUNAL
"L" Bench, Mumbai

Before Shri Shamim Yahya, Accountant Member
and Shri Ravish Sood, Judicial Member

ITA No. 1732/Mum/2016
(Assessment Year: 2012-13)

M/s Endemol South Africa (Proprietary) Ltd., C/o Endemol India Private Limited 501, 1601, Lotus Grandeur, Off Veera Desai Road, Andheri (W), Mumbai- 400053.	Vs.	Deputy Commissioner of Income Tax-(International Taxation), circle 2(2)(1), Room No. 132, Scindia House, Ballard Estate, Mumbai- 400038

PAN – AACCE7009G

(Appellant) **(Respondent)**

Assessee by: Ms. Rekha Mehta, A.R
Revenue by: Shri M.V. Rajguru, Sr.D.R

Date of Hearing: 13.07.2018
Date of Pronouncement: 03.10.2018

O R D E R

PER RAVISH SOOD, J.M

The present appeal filed by the assessee is directed against the order passed by the A.O under Sec. 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961 (for short 'Act') for A.Y 2012-13. The assessee assailing the order passed by the A.O has raised before us the following grounds of appeal:

"1. On the facts and circumstances of the case and in law, the learned Assessing Officer ('AO') has erred in proposing and the Hon'ble Dispute Resolution Panel ('DRP') further erred in confirming that the income received by the Appellant for Line Production Services from Endemol India Private Limited of Rs.9,60,23,838/- should be taxed at 10% under Article 12 of the India-South Africa Tax Treaty.

2. It is prayed that the Learned AO be directed to hold that payments are neither taxable under Article 12 of the India- South Africa Tax Treaty nor under Section 9 of the Income Tax Act, 1961.

The Appellant craves leave to add, alter, amend or withdraw all or any of the Grounds of Appeal herein and to submit such statements, documents and papers as may be considered necessary either at or before the appeal hearing."

2. Briefly stated, the assessee which is a company incorporated in and is a tax resident of South Africa is engaged in the business of developing and producing entertainment serials for audio-visual platform. The assessee had filed its return of income for A.Y 2012-13 on 28.03.2014, declaring total income of Rs. Nil. Subsequently, the case of the assessee was selected for scrutiny assessment and its total income was assessed at Rs.9,60,23,838/-, vide a draft assessment order, dated 27.03.2015 passed under Sec. 144C(1) r.w.s. 143(3) of the Act. The assessee filed its objections before the Dispute Resolution Panel-1, Mumbai (for short 'DRP').

3. The assessee in its objections assailed the proposal of the A.O to subject the income of Rs.9,60,23,838/- received by the assessee company for Line Production Services from Endemol India Pvt. Ltd. to tax under Article 12 of the India-South Africa tax treaty by characterising the same as "royalty" and "fees for technical services" (for short 'FTS'). As claimed by the assessee, it did not have any presence in India in terms of a branch, office, factory, workshop, project office, subsidiary company or agent during the year under consideration.

4. The facts involved in the present case lies in a narrow compass. Endemol India Pvt. Ltd., which is a company incorporated in India was commissioned to produce a television series viz. 'Fear Factor', based on the US version/form of the same for broadcast in India on the "Colors channel". The show involved filming of the episodes on various locations in Cape Town, South Africa. Accordingly, in relation to the shooting of the episodes in South Africa, Endemol India Pvt. Ltd. had in terms of an agreement dated 19.04.2011 (for short 'agreement') hired the assessee viz. Endemol South Africa (Pty) Ltd. to carry out Line Production Services in South Africa on work-for-hire basis. As per the aforesaid agreement, the assessee as a line producer was to act as a facilitator and coordinator for filming of the series in South Africa. In terms of the agreement, the assessee company received

an amount of Rs.9,60,23,838/- from Endemol India Pvt. Ltd. for providing the aforementioned line production services in South Africa. The aforesaid payments received by the assessee outside India were subjected to deduction of tax at source by Endemol India Pvt. Ltd. The assessee being of the view that the amount received for rendering the aforesaid services was not in the nature of "FTS" and accordingly, not taxable under the provisions of Clause (vii) of sub-section (1) of Sec. 9 of the Act, thus, filed its 'return of income' for the year under consideration viz. A.Y 2012-13, declaring nil income. However, the claim of the assessee that the facilitation/production fees received for providing services to Endemol India Pvt. Ltd. was not taxable in India, did not find favour with the A.O. The A.O was of the view that the role of the assessee was not that of a mere facilitator and it had as a matter of fact received "royalty" and "FTS" for the copyright and the managerial and technical services provided to Endemol India Pvt. Ltd. In order to fortify his aforesaid view the A.O took support of the fact that the assessee and Endemol India Pvt. Ltd. only after understanding the exigibility of the receipts to tax India, had consciously withheld tax according to the requirements of the Indian tax authorities. On the basis of his aforesaid observations, the A.O concluded that the revenue earned by the assessee from Endemol India Pvt. Ltd. was taxable in India as "royalty" and "FTS" at the rate of 10%, as per Article 12 of the India-South Africa tax treaty.

5. The assessee company aggrieved with the aforesaid observations of the A.O which had led to a consequential taxing of the receipts in India, filed objections with the DRP. During the course of the proceedings before the DRP, it was submitted by the assessee company that it had during the year under consideration viz. A.Y: 2012-13 received an amount of Rs.9,60,23,838/- from Endemol India Pvt. Ltd. for providing line production services in South Africa. It was submitted by the assessee, that as the aforesaid payment was received outside India, hence, tax was deducted at source on the same by Endemol India Pvt. Ltd. Further, it was the contention of the assessee that as the payments received for rendering the line production services did not qualify as "FTS" under the Act and the

India-South Africa tax treaty, hence the same in the absence of any business connection/P.E of the assessee in India could not be brought to tax in India. It was further submitted by the assessee, that its services were engaged by Endemol India Pvt. Ltd. to carry out line production services, which involved various administrative services viz. (i). making logistic arrangements; and (ii). acting as a facilitator and coordinator for filming of the television series in South Africa. It was the claim of the assessee that the services which it was required to perform were contemplated in Clause 6.2 of the agreement with Endemol India Pvt. Ltd., which read as under:

- *Arranging all production facility and location filming services;*
- *Providing a line producer, production staff, local crew for providing stunt services, transport necessary for stunts for production of the show;*
- *Providing and arranging for a director, staff, art department and production staff to set up and film the series for Endemol India;*
- *Providing for all required paper work and declaration regarding fair treatment meted out to animals, insect etc. during the production of the show etc.;*
- *Providing Film Producer's Indemnity insurance for all resources including the filming of the stunts; and*
- *Providing for an appropriate storage space for Endemol India to store the footage.*

The assessee further submitted before the DRP, that as it was engaged as a facilitator and coordinator on a work-for-hire basis by Endemol India Pvt. Ltd. for providing line production services, hence the amount received for rendering of such services was not in the nature of "Royalty" and "FTS", and thus, not taxable in India in terms of the India-South Africa tax treaty.

6. The DRP after deliberating on the contentions advanced by the assessee was however not persuaded to subscribe to the same. The DRP was of the view that as was discernible from a perusal of Clause 6 of the agreement, the assessee was not providing simply administrative services as claimed by it, but was providing managerial services to Endemol India Private Limited in South Africa. Further, it was observed by the DRP, that the fact that the assessee had not merely acted as a coordinator and provided administrative services to Endemol India Private Ltd., but had provided a vast range of technical and managerial services could safely be gathered from a perusal of Article 10.1 of the agreement, which revealed that

the assessee had rendered technical services to Endemol India Pvt. Ltd by producing visual-sound recordings. On the basis of his aforesaid observations, the DRP concluded that the amount of Rs. 9,60,23,838/- received by the assessee from Endemol India Pvt. Ltd. would fall within the realm of "FTS" and thus, would be taxable in India.

7. Still further, the DRP observed that Article 10.1 of the agreement provided that the copyright in the format, recorded footage, scripts, visuals etc. produced by the assessee for Endemol India Pvt. Ltd shall vest exclusively with the latter viz. Endemol India Pvt. Ltd. In the backdrop of his aforesaid observations, the DRP was of the view that it could safely be concluded that the assessee was not merely providing administrative services to Endemol India Pvt. Ltd, but was providing both managerial and technical services to it. In order to fortify its aforesaid conviction, the DRP observed that as per Article 10.2 of the agreement the assessee remained under an obligation of assigning all its copyrights (if any) conferred by the Copyright Act 98 of 1978, as well as all intellectual rights etc. that may be vested with it in future as a result of producing materials for Endemol India Private Ltd., to the latter. On the basis of its aforesaid deliberations, it was observed by the DRP that as the assessee was engaged in the co-production of the television series viz. 'Fear Factor' in South Africa, and was engaged as a line producer to provide certain agreed locations filming/recording services, thus its claim that it was providing just line production services as a facilitator was not factually correct. Rather, the DRP was of the view that the assessee was providing the technical inputs and technical manpower to Endemol India Pvt. Ltd. in the production of the aforementioned television series. On the basis of its aforesaid observations, the DRP was of the view that the fees received by the assessee for rendering managerial and technical services, along with other coordination activities which formed part and parcel of the aforesaid services would fall within the sweep of "FTS" and would be chargeable to tax in India.

8. Further, it was observed by the DRP that as the assessee had failed to show that it had not become the owner of any copyright or any intellectual property rights by virtue of its producing materials in respect of the aforesaid television serials, thus, it could safely be concluded that it had assigned all its copyrights etc. to Endemol India Private Ltd. In the backdrop of his aforesaid deliberations, the DRP observed that the AO had rightly held that payment of Rs.9,60,23,838/- received by the assessee from Endemol India Private Ltd. was taxable both as "FTS" and "royalty".

9. The A.O on the basis of the aforesaid directions of the DRP, therein vide his order passed under Sec. 143(3) r.w.s 144C(13) assessed the amount of Rs.9,60,23,838/- received by the assessee from Endemol India Pvt. Ltd. both as "royalty' and "FTS", and subjected the same to tax at the rate of 10% under Article 12 of the India-South Africa tax treaty.

10. Aggrieved, the assessee has carried the matter in appeal before us. The ld. Authorized Representative (for short 'A.R') for the assessee took us through the facts of the case. It was submitted by the ld. A.R, that the assessee company which is incorporated in the republic of South Africa and is a tax resident of the said country was carrying on the business of developing and producing entertainment serials for Audio-visuals platforms. It was submitted by the assessee that Endemol India Pvt. Ltd., which is a company incorporated in India, was commissioned to produce a television series viz. 'Fear Factor', based on the US version/format of the said series, for broadcast in India on the "Colors channel". The ld. A.R submitted that Endemol India Pvt. Ltd in terms of an agreement entered on 19th April, 2011, had engaged the assessee to carry out line production services in South Africa, on a work-for-hire basis. It was the contention of the ld. A.R, that as the facilitation/production fees which was received by the assessee outside India for rendering the Line Production Services was not in the nature of "royalty" or "FTS" and accordingly, not taxable in India, hence, the assessee had filed its "return of income" declaring Nil income. It was submitted by the ld. A.R that the lower authorities being of the view that the

assessee had provided managerial and technical services to Endemol India Pvt. Ltd., had thus held the same as being in the nature of "royalty" and "FTS", and brought the amount of Rs.9,60,23,838/- to tax at the rate of 10% as per Article 12 of the India-South Africa tax treaty. The ld. A.R in her attempt to dislodge the aforesaid observations of the lower authorities, submitted that the taxability of the line production services had already been considered and decided by the Authority for Advance Ruling (for short "AAR"), vide its order dated 13.12.2013, passed in AAR No. 1083 of 2011 and in AAR No. 1081 and 1082 of 2011, dated 19.02.2014. It was submitted by the ld. A.R that the aforesaid ruling was obtained by Endemol India Pvt. Ltd., in respect of line production services which were received from Endemol Argentina (Non-resident) and Utopia Films (Non-Resident), outside India. The ld. A.R submitted that the "AAR" had in its aforesaid orders held, that receipts towards line production services, which mainly included services for providing line Producer, local crew, stunt services, transport etc., did not qualify as "FTS" under the Act. It was the contention of the ld. A.R, that the nature of line production services which were provided by the aforementioned non-resident companies viz. Endemol Argentina and Utopia Films viz. (i) arranging for crew and support personnel, as may be requisitioned; (ii) props and other set production materials; (iii) safety, security and transportation; and (iv) filming and other equipment, as may be requisitioned, were the same as were rendered by the present assessee viz. Endemol South Africa (Pty) Ltd. to Endemol India Pvt. Ltd. for shooting of the episodes of the television series viz. 'Fear Factor' in South Africa. The ld. A.R taking support of her aforesaid contention submitted, that keeping in view the similarity of facts involved in the present case, it could safely be concluded that the fees received by the assessee for providing line production services to Endemol India Pvt. ltd. could not be held to be in the nature of "FTS". On the basis of the aforesaid contentions, it was the claim of the ld. A.R that the A.O/DRP failing to appreciate that the services provided by the assessee were purely commercial services of an administrative/logistical nature, had thus erred in concluding that the fees received from rendering of the same was taxable as "FTS" as also "royalty",

both under the Act and the India-South Africa tax treaty. The ld. A.R in order to support her aforesaid contention also placed reliance on the decision of the ITAT, Mumbai, in the case of Yashraj Films Pvt. Ltd. Vs. ITO (IT) [2012) 23 ITR (T) 125] (Mum). It was averred by the ld. A.R, that in the aforementioned case, it was held by the Tribunal that as the services rendered by the non-resident service providers for making logistic arrangements were in the nature of commercial services, thus, the same could not be treated as managerial, technical or consultancy services within the meaning of Explanation 2 to Sec. 9(1)(vii) of the Act. Further, it was averred by the ld. A.R that the amount received by the assessee could also not be regarded as "royalty" within the meaning of Article 12 of the India-South Africa tax treaty. It was the contention of the ld. A.R, that the A.O/DRP misconstruing Clause 10 of the agreement had wrongly concluded that the amount received by the assessee qualified as "royalty" under the India-South Africa tax treaty. In support of her aforesaid contention, the ld. A.R averred that the lower authorities had lost sight of the fact that the agreement between the assessee and Endemol India Pvt. Ltd was for providing of line production services facilitating the shooting of television series viz. "Fear Factor" in different locations of Cape town, South Africa, and was not for granting a right in any copyright. Alternatively, it was submitted by the ld. A.R that as the entire consideration received by the assessee in terms of the agreement was for the services rendered to Endemol India Pvt. Ltd., thus, no part of the consideration received by the assessee could be related to royalty for copyright. Further, the ld. A.R submitted that the inference drawn by the A.O/DRP that the amount received by the assessee from Endemol India Pvt. Ltd was for grant of copyright was not only factually incorrect, but the same would tantamount to re-writing of the agreement executed between the parties. Rather, it was the claim of the ld. A.R that the Clause 10 of the agreement dealing with Intellectual property was incidental to the main object of the agreement (i.e rendering of services) and was inserted only with the limited purpose of protecting the interest of Endemol India Pvt. Ltd. from anyone ever claiming any rights under any law in the world in the contributions or underlying works for any reason. The ld.

A.R taking support of Section 17 of the Indian Copyright Act, 1957 and the South Africa Copyright Act No. 98 of 1978 submitted, that as per the aforesaid laws the person who commissions the making of a cinematograph film, shall be the owner of the copyright subsisting in the work made in pursuance of that commission. Thus, it was the contention of the ld. A.R, that as in the present case the television series viz. "Fear Factor" was commissioned by Endemol India Pvt. Ltd under the contract of service, thus it would be the first owner of the work produced by the assessee, and also the owner of the copyright. On the basis of her aforesaid submissions, it was contended by the ld. A.R that as Endemol India Pvt. Ltd. was the owner of the copyright, as per law, thus, there could have been no occasion for the assessee to have transferred the same to it. Lastly, it was averred by the ld. A.R that even if the version of the lower authorities that the assessee had transferred the copyright to Endemol India Pvt. Ltd was considered (not admitted), even then the amount received by the assessee could not be brought within the definition of "royalty", as provided in Article 12 of the India-South Africa tax treaty. In order to drive home her aforesaid contention, it was submitted by the ld. A.R, that as the definition of "royalty" in Article 12 took within its sweep the consideration received by an assessee for "the use of, or the right to use, any copyright", thus, the consideration assumed by the A.O/DRP to have been received by the assessee for 'transfer' of its copyrights to Endemol India Pvt. Ltd., would even on the said count not fall within the realm of the definition of "royalty", as per the India-South Africa tax treaty. On the basis of her aforesaid contentions, the ld. A.R averred that as the A.O/DRP had wrongly characterised the amount of Rs. 9,60,23,838/- received by the assessee for providing Line production services as "royalty" and "FTS", therefore, assessment framed by the A.O, wherein the aforesaid amount was brought to tax at the rate of 10% under Article 12 of the India-South Africa tax treaty could not be sustained and was liable to be vacated..

11. Per contra, the ld. Departmental Representative (for short D.R) relied on the orders of the lower authorities. It was submitted by the ld. D.R, that

as the assessee had provided managerial and technical services, along with other coordination activities forming part and parcel of such services, as well as assigned its copyrights in the programmes, thus, the lower authorities had rightly held that the same was liable to be taxed in India as per Article 12 of the India-South Africa Tax Treaty. The ld. D.R averred that as the appeal of the assessee did not merit acceptance, thus, the same may be dismissed.

12. We have heard the authorized representatives of both the parties, perused the orders of the lower authorities and the material available on record. We find that our indulgence in the present appeal, has been sought by the assessee to adjudicate as to whether the A.O/DRP had rightly concluded that the services rendered by the assessee in relation to the shooting of the episodes of the television series viz. 'Fear Factor' by Endemol India Pvt. Ltd. in South Africa, was in the nature of "FTS" as also "royalty", and thus taxable in India. We find that Endemol India Pvt. Ltd. was commissioned to produce the television series viz. 'Fear Factor', based on the US version/format of the same for broadcast in India on the "Colors channel". The show involved filming of episodes in various locations of Cape Town, South Africa. It is the contention of the ld. A.R, that Endemol India Pvt. Ltd. for shooting the Episodes in South Africa, had vide agreement dated 19.04.2011, hired the assessee viz. Endemol South Africa (Pty) Ltd. for carrying out Line Production Services in South Africa on work-for-hire basis. We find that the claim of the assessee, that it was hired to provide services as a facilitator and coordinator for filming of the aforesaid television series in South Africa can safely be gathered from a perusal of the aforesaid agreement. It is the claim of the assessee, that the facilitation/production fee of Rs.9,60,23,838/- received for the Line Production Services provided by the assessee to Endemol India Pvt. Ltd., not being in the nature of "rofyalty" and FTS, was thus not taxable in India. However, the aforesaid claim of the assessee did not find favour with the A.O. It was observed by the A.O that the role of the assessee was not as that of a mere facilitator/coordinator, as

provided in the agreement, but rather, it had received "royalty" and fees for rendering managerial/technical services from Endemol India Pvt. Ltd.

13. We have deliberated at length on the issue under consideration in the backdrop of the contentions advanced by the authorized representatives of both the parties. We find, that from a perusal of the various clauses of the agreement dated 19.04.2011, it can safely be gathered that the same is a contract for providing services, and not for granting a right in any copyright. We shall now deliberate on the observations of the lower authorities that the assessee had traversed beyond the terms of the aforesaid agreement dated 18.04.2011, and had rendered managerial/technical services to Endemol India Pvt. Ltd. We find, that the A.O/DRP had brought the amount of Rs.9,60,23,838/- to tax by concluding that the said sum received by the assessee was taxable as "FTS" as also "royalty", both under the Act and the India-South Africa tax treaty. In the backdrop of the aforesaid observations of the lower authorities, we shall now look into the aspect as to whether the nature of services rendered by the assessee would bring them within the sweep of "FTS" and "royalty", or not.

14. We shall first look into the characterisation of the fees received by the assessee, as FTS by the A.O/DRP. We find that in terms of Explanation 2 to Section 9(1)(vii) of the Act, the term "FTS" means any consideration (including any lump sum consideration) for the rendering of any managerial, technical or consultancy services (including the provision of services of technical or other personnel), but does not include consideration for any construction, assembly, mining or like project undertaken by the recipient or consideration which would be income of the recipient chargeable under the head "Salaries". Further, in similar terms, as per Article 12 of the India-South Africa Tax Treaty, the FTS is defined to mean payments of any kind received as a consideration for the services of a managerial, technical or consultancy nature, including the provision of services by technical or consultancy personnel. Thus, on a perusal of the definition of FTS, it emerges that the same encompasses consideration which is received for

rendering of services of a managerial, technical or consultancy nature. We may herein observe, that the assessee as a "Line Producer" had on a principal to principal basis rendered various coordination/facilitation services to Endemol India Pvt. Ltd., in producing the television series viz. 'Fear Factor', viz. arranging all production facilities and location filming services; providing a line producer, production staff, local crew for providing stunt services, transport necessary for stunts for production of the show; providing and arranging for a director, staff, art department and production staff to set up and film the series; providing for all required paper work and declaration regarding fair treatment meted out to animals, insects etc. during the production of the show etc; providing Film Producer's indemnity insurance for all resources including the filming of the stunts; and providing for an appropriate storage space for Endemol India Pvt. ltd to store the footage. In the backdrop of our aforesaid observations, we shall now deliberate on the aspect, that as to whether the services rendered by the assessee to Endemol India Pvt. Ltd can be characterised as services of a managerial, technical or consultancy nature, which therein would bring the same within the sweep of FTS. For this, we shall look into the scope and gamut of managerial, technical and consultancy services, as under:

(I) <u>Managerial Services</u>:

The term managerial services, ordinarily means handling management and its affairs. As per the concise oxford dictionary, the term managerial services means rendering of services which involves controlling, directing, managing or administering a business or part of a business or any other thing. However, the services provided by the assessee are clearly found to be in the nature of administrative services (such as making logistic arrangements etc.). Accordingly, the services rendered by the assessee would not tantamount to providing of any managerial or management functional services to Endemol India Pvt. Ltd. Thus, as the services rendered by the assessee in no way involves controlling, directing, managing or administering the business or part of a business of Endemol India Pvt. Ltd,

therefore, it can safely be concluded that the same does not fall within the realm of the term 'managerial services'.

(II) Technical Services:-

The term 'technical services' takes within its sweep services which would require the expertise in technology or special skill or knowledge relating to the field of technology. As per the concise oxford dictionary, the term technical services means belonging or relating to art, science, profession or occupation involving mechanical arts and applied sciences. We are of the considered view, that as the administrative services viz. arranging for logistics etc. by the assessee does neither involve use of any technical skill or technical knowledge, nor any application of technical expertise on its part while rendering such services, hence the same cannot be characterised as technical services.

(III) Consultancy Services:

The term consultancy services, in common parlance, means providing advice or advisory services by a professional. Usually consultancy services are professional services requiring specialized qualification, knowledge, expertise of a professional person, and are more dependent on skill, intellect and individual characteristics of the person rendering it. We are of the considered view that as the services rendered by the assessee do not involve providing of any advice or consultancy to Endemol India Pvt. Ltd., thus, the same cannot be brought within the purview of "consultancy services".

15. We thus, in terms of our aforesaid observations, are of the considered view that as the various coordination/facilitation services rendered by the assessee viz. arranging for locational crew, producer, transportation, paper work for various stunts to be performed and other requirements for setting up and filming the series etc, are in the nature of Line Production Services, thus, the same cannot be termed as technical, managerial or consultancy services. Thus, the consideration received by the assessee for rendering of the aforesaid services, which are purely administrative in nature, cannot be

brought within the sweep of the definition of "FTS" within the meaning of Explanation 2 to Sec.9(1)(vii) of the Act or Article 12 of the India-South Africa tax treaty. We thus, in the backdrop of our aforesaid deliberations are of the considered view, that the amount received by the assessee for rendering of the aforesaid administrative services cannot be characterised as "FTS".

16. We may herein observe, that a similar view had earlier been arrived at by the ITAT, Mumbai, in the case of Yashraj Film Pvt. Ltd. Vs. ITO (IT) (2012) 231 ITR (T) 125 (Mum.). On a perusal of the facts involved in the aforementioned case, it emerges that the Tribunal had observed that as the services rendered by the non-resident service providers for making logistic arrangements were in the nature of commercial services, thus, the same cannot be treated as managerial, technical or consultancy services within the meaning given in Explanation 2 to Sec. 9(1)(vii) of the Act. In the aforementioned case, the assessee had made payments to various overseas services providers belonging to U.K, Poland, Brazil, Canada & Australia for services availed in connection with the shooting of different films. The services rendered by the aforementioned non-resident service providers included arranging for extras, arranging for the security, arranging for locations, arranging for the accommodations for the cast and crew, arranging for necessary permissions from local authorities, arranging for makeup of the stars, arranging for insurance cover etc. The Tribunal after deliberating on the nature of the aforementioned services concluded, that as the same were purely commercial services falling in the category of logistic arrangement services, thus, the consideration received as regards rendering of such services would constitute business profits of the said overseas service providers. It was further observed, that as the said service providers had no Permanent Establishment (P.E) in India during the year under consideration, hence the business profits were not taxable in India in their hands as per Article 7 of the respective tax treaties between India and the abovementioned countries. We have deliberated at length on the facts involved in the case before us, and find that the nature of services rendered

by the overseas service providers in the aforementioned case of Yashraj Films Pvt. Ltd.(supra) are somewhat similarly placed and rather overlapping to some extent, as in comparison to the services rendered by the assessee in the case before us. In terms of our aforesaid observations, we find that our view that the services rendered by the assessee are administrative services and not in the nature of managerial, technical or consultancy services, also stands fortified by the aforesaid order of the coordinate bench of the Tribunal. We thus, in the backdrop of our aforesaid deliberations, and finding ourselves to be in agreement with the view taken by the Tribunal in the aforesaid case viz. Yashraj Films Pvt. Ltd. (supra), herein conclude that the consideration received by the assessee for rendering of the services to Endemol India Pvt. Ltd. cannot be held as "FTS".

17. Still further, we also find that the issue of taxability of amount received outside India for rendering Line production services to the assessee company viz. Endemol India Pvt. Ltd, had also been considered and decided by the Hon'ble Authority for Advance Ruling (for short 'AAR'), vide its rulings rendered in the case of Endemol Argentina (Non-resident) [AAR No. 1082 of 2011; dated 13.12.2013] and Utopia Films (Non-resident) [AAR No. 1081 and 1082 of 2011; dated 19.02.2014]. In the aforementioned rulings, it was observed, that the consideration received outside India by the concerned overseas service providers by providing line production services to the assessee, viz. providing line producer, local crew, stunt services, transport etc. would not qualify as "FTS" under the Act. We find that in the present case, the A.O/DRP had declined to rely on the aforesaid rulings of the AAR, for the reasons viz. (i). that as per Sec. 245S, the advance ruling is pronounced on the basis of facts of a particular case and hence, it is binding on only the applicant in respect of the transactions in relation to which advance ruling was sought; and (ii). that the ruling was rendered by the Hon'ble AAR in context of different DTAA's, as against that involved in the case of the assessee. We have deliberated at length on the aforesaid observations of the lower authorities and are unable to persuade ourselves to accept the same. We find that though it is an admitted fact that an

'advance rulings' having been rendered on the basis of the facts of a particular case, thus, would only be binding on the applicant, and that too in respect of the transactions in relation to which the same was obtained, however, such ruling would still have a persuasive value in respect of other parties as well and accordingly, may be relied upon by the authority itself or by the applicant/department. We find that our aforesaid view is fortified by the judgment of the Hon'ble Supreme Court in the case of Columbia Sportswear Company Vs. DIT, Bangalore (2012) 346 ITR 161 (SC). We are further of the considered view, that though the lower authorities had declined to take cognizance of the observations of the Hon'ble AAR on the ground that the 'tax treaties' involved in the said case were different as against that involved in the present case, however, there is no mention of any such material fact which could persuade us to conclude that the definition of "FTS" in the said respective tax treaties would be absolutely unworkable, and hence could not be applied in the case before us. We thus, are of the considered view, that the lower authorities had erred in failing to appreciate that the ruling rendered by the Hon'ble AAR in the case of Endemol Argentina and Utopia Films, though was not binding, but did have a persuasive value while adjudicating the issue under consideration. Be that as it may, we are not impressed by the outright scrapping by the lower authorities of the aforesaid rulings rendered by the Hon'ble AAR in context of taxability of Line production services provided by the overseas service providers viz. (i). Endemol Argentina (Non-resident);and (ii). Utopia Films (Non-resident) to the assessee company viz. Endemol India Pvt. Ltd. However, we are of the considered view, that as we have already observed that the services rendered by the assessee to Endemol India Pvt. Ltd. are not in the nature of a managerial, technical or consultancy services, therefore, we refrain from further adverting to and adjudicating upon the observations arrived at by the A.O/DRP in context of the rulings of the Hon'ble AAR.

18. We shall now advert to the observations of the A.O/DRP that the sum received by the assessee company was also in the nature of "royalty", both under the Act and the India-South Africa tax treaty. We find that the A.O

has stated in his order that the consideration received by the assessee was towards "royalty" for copyright. On the other hand, it is contended by the assessee that the consideration received from Endemol India Pvt. Ltd., cannot be construed as "royalty" within the meaning of Article 12 of the India-South Africa tax treaty. We find that the assessee has assailed the treating of the consideration received by the assessee as "royalty" by the lower authorities on various grounds viz. (i) the agreement in lieu whereof consideration was received by the assessee was a contract for providing services and not for granting of any rights in a programme; (ii) it is in consideration for such services rendered that it was agreed by the parties that the assessee will be remunerated by way of production fee/production cost; (iii) that as per the terms agreed between the parties in the agreement the entire payment was towards production cost/production fees, and not for licensing of rights in any programme; (iv) that assuming (without admitting) that there was also a grant of copyright, then in the absence of any mention of consideration under the agreement which clearly states that the entire consideration is only for services rendered by the assessee, no part of such consideration could be related to royalty for copyright; (v) that by assuming that the payment received by the assessee was for 'transfer' of rights in the programme, the same would tantamount to re-writing of the contract; (vi) that as per Sec. 17 of the Indian Copyright Act, 1957 and South Africa Copyright Act No. 98 of 1978, where the work is specifically commissioned under the contract of service at the instance of a person, such person shall be the first owner of the copyright, thus, now when the work viz. the television series 'Fear Factor' is commissioned by Endemol India Pvt. Ltd. under the contract of service, therefore, it would always be the first owner of the work produced by the assessee and the owner of the copyright and the question of assigning any copyright under the copyright law would not arise; and (vii) that as the term "royalty" defined in Article 12 of the India-South Africa Tax Treaty includes only payment for use and right to use any copyright, thus, the claim of the A.O/DRP that the consideration received by the assessee was for "transfer" of the copyrights by the assessee

to Endemol India Pvt. Ltd. would not fall within the realm of the definition of "royalty" in the tax treaty.

19. We have given a thoughtful consideration to the issue before us, in the backdrop of the contentions raised by the authorized representatives of both the parties and the material available on record. We find, that the term royalty as defined in Article 12 of the India-South Africa tax treaty, reads as under:-

> *"3. The term "royalties" as used in this Article means payments of any kind received as a consideration for the use of or the right to use, any copyright of literary, artistic or scientific work (including cinematograph film and film, tapes or discs for radio or television broadcasting), any patent, trade mark, design or model, plan, secret formula or process, or for the use of, or the right to use, industrial, commercial or scientific equipment, or for information concerning industrial, commercial or scientific experience."*

It is the contention of the assessee that the consideration received in terms of the agreement was for rendering of the Line Production Services, and not for granting any right in any copyright to Endemol India Pvt. Ltd. We find that admittedly, as per the agreement between the assessee and Endemol India Pvt. Ltd., the entire consideration to be paid to the assessee was in respect of the production cost or production fees and not for any licensing rights in any programme. Further, Clause 1 to 6 of the agreement, specifically spells out the various coordination/facilitation services which were to be rendered by the assessee as line producer viz. arranging for locational crew, producer, transportation, paper work for various stunts to be performed and other requirements for setting up and filming the series etc. In sum and substance, the agreement was for rendering of line production services by the assessee to Endemol India Pvt. Ltd., in order to facilitate and enable the latter to produce the television series viz. "Fear factor". We also find that Sec. 17 of the Indian Copyright Act, 1957 states, that where the work is specifically commissioned under the contract of service at the instance of a person, then such person would be the first owner of the copyright. Further, as per the South Africa Copyright Act No. 98 of 1978, the person who commissioned the making of a cinematograph

film shall be the owner of the copyright subsisting in the work made in pursuance of that commission. In the backdrop of the aforesaid mandate of law, we are of the considered view that since the work (that is the television series) was commissioned by Endemol India Pvt. Ltd. under the contract of service thus, as averred by the ld. A.R, Endemol India Pvt. Ltd. shall be the first owner of the work produced by the assessee, and the owner of the copyright. We find substantial force in the aforesaid contention of the assessee, that now when as per the mandate of law the ownership of the copyright remains vested with Endemol India Pvt. Ltd, hence the question of assigning of the same by the assessee in favour of Endemol India Pvt. Ltd would not arise at all. We thus, are of the considered view that now when in terms of our aforesaid observations, it can safely be concluded that there would be no occasion for assigning of any copyright by the assessee to Endemol India Pvt. Ltd. (i.e the first owner of the copyright), therefore, no payment of consideration in lieu of transfer of any copyright can be comprehended.

20. We further find that the A.O/DRP had brought the consideration received by the assessee within the sweep of the term of royalty, on the ground that the assessee had transferred the copyright in the program viz. 'Fear Factor' to Endemol India Pvt. Ltd. The assessee has vehemently assailed the said observations of the lower authorities. It is the contention of the assessee, that as the amount received from Endemol India Pvt. Ltd. was in lieu of line production services rendered, and not for licensing of rights in any programme, thus, the consideration received by the assessee was wrongly assumed by the A.O/DRP to have been received in respect of transfer of copyright. Be that as it may, we are of the considered view that as the term royalty under Article 12 of the India-Sought Africa Tax Treaty, takes within its sweep only consideration received for the use or right to use, any copyright, thus, the observations of the lower authorities that the consideration received by the assessee was for 'transfer' of the copyright to Endemol India Pvt. Ltd., in any way, would on the said count also fall beyond the sweep of the term "royalty" as defined in Article 12 of the India-

South Africa tax treaty. We thus, after deliberating on the contentions advanced by the assessee to buttress its claim that the lower authorities had wrongly characterised the amount received from Endemol India Pvt. Ltd. as 'royalty", are inclined to accept the same.

21. In terms of our aforesaid observations, we are of the considered view that the lower authorities had erred in characterising the consideration received by the assessee for providing Line production Services as "royalty" and "Fees for technical services". We thus, set aside the order of the A.O and delete the addition of Rs. 9,60,23,838/-.The **Grounds of appeal No. 1 and 2** are allowed in terms of our aforesaid observations.

22. The appeal of the assessee is allowed.

Order pronounced in the open court on 03.10.2018

Sd/-	Sd/-
(SHAMIM YAHYA)	(RAVISH SOOD)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

मुंबई Mumbai; दिनांक 03.10.2018
Ps. Rohit

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई **/ ITAT, Mumbai**