

IN THE INCOME TAX APPELLATE TRIBUNAL "I" BENCH, MUMBAI

BEFORE SHRI G. S. PANNU, VP AND SHRI PAWAN SINGH, JM

आयकर अपील सं/ I.T.A. No.7163/Mum/2018

(निर्धारण वर्ष / Assessment Year: 2015-16)

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| IMG Media Ltd IMG Studios, 5 Longwalk Road, Stockley Park, Uxbridge, UB111FE, England 608, Western Express Highway Service Road, Bandra (E), Mumbai- 400051. | बनाम/ Vs. | DCIT (International Taxation) Circle 2(2)(1), Air India Building, Nariman Point, Mumbai.-400021. |
| स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AACCI4811L | | |
| (□ पीलार्थी /Appellant) | .. | (प्रत्यर्थी / Respondent) |

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| Assessee by: | Shri Aliasgar Rampurwala Ms. Shobita Sardana |
| Revenue by: | Shri V. Sreekar (DR) |

सुनवाई की तारीख / Date of Hearing: 07/05/2019
घोषणा की तारीख /Date of Pronouncement: 12/06/2019

आदेश / ORDER

PER PAWAN SINGH, JM:

This appeal by the assessee is directed against the assessment order dated 30.10.2018 passed u/s 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961, passed in pursuance of the direction of Disputes Resolution Panel -1, Mumbai [hereinafter referred to as the "DRP"] u/s 144C(1) of the I.T. Act, 1961 dated 19.09.2018 for A.Y. 2015-16.

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

“1. On the facts and in the circumstances of the case & in law, the Ld. Deputy Commissioner of Income Tax ("IA. MY") erred in following the directions of the 14. Dispute Resolution Panel (DRP") and assessing the income of the appellant at Rs. 34,29,42,760/- instead of Rs. 2,23,65,880/-.

2. On the facts and in the circumstances of the case & in law the 14. DRP erred in not following its earlier year's order for Assessment Year 2009-10 and 2011-12.

3 **Royalty**

That on the facts and circumstances of the case & in law;

3.1. On the facts and in the circumstances of the case & in law, the Ld. DRP/Ld. AO grossly erred in concluding that the production work undertaken by the Appellant qualify as "Royalty" under the provisions of Section g(I)(vi) of the Act as well as Article 13 of the DTAA.

3.2. On the (acts and in the circumstances of the case & in law. the Ld. DRP/ Ld. AO. erred in not appreciating that the issue under consideration has authoritatively been decided by the ITAT, Mumbai in favour of the Assesses in AY 2009-10 to AY 2012-13 and AY 2014-15 observing that the production work undertaken is a live coverage of event and hence the income earned therefrom would not qualify as "Royalty" under the provisions of the Act and the DTAA.

3.3. On the facts and in the circumstances of the case & in law, the 14 DRP / IA. AO erred in alleging that the Appellant received consideration for allowing it to use copyright in its scientific work, being the feed, which would qualify as Royalty" both under the provisions of (lie Act and the India- UK DTAA.

Fees for Technical Services

4.1. On the facts and in circumstances of the case & in law, the IA DRP/Ld. AO has erred in characterizing the services provided by the assessee as "Fee for Technical Services" (FES) under the provisions of section q(1)(vii) of the Act as well as Article 13 of DTAA.

4.2. On the facts and in the circumstances of the case & in law, the Ld DRP / Ld. AO, erred in not appreciating that the issue under consideration has authoritatively been decided by the ITAT. Mumbai in favour of the assessee in AY 2009-10 to AY 2012-13 and AY 2014-15.

4.3. On the facts and in circumstances of the ease and in law, the IA DRP/ Ed. AO has erred in ignoring that the activity of live audio and video coverage of events constitute production of programmes and falls under the definition of "work" provided under Explanation (iv) to Section 194C of the Act and hence the same would not qualify as "service" and consequently will not be taxable as "FTS" under Section 9(1)(vii) of the Act.

4.4. On the facts and in circumstances of the case and in law, the IA DRP/ IA. AO has grossly erred in concluding that the services rendered by the assessee do not make available any technical knowledge, experience, skill, know-how etc. and in doing so, has clearly ignored the true nature of activities carried out by the assessee.

5. On the facts and circumstances of the case & in the alternative

5.1. the IA. DRP/ IA. AO grossly erred in making adhoc attribution of total profit of appellant between PE and head office in ratio of 75:25 ignoring the transfer pricing methodology followed by the Assessee after due FAR analysis.

5.2. the IA. DRP/ AO has grossly erred in attributing the additional profit of Its. 52,60,570 to the assessee PE without appreciating the fact that the assessee has followed the same transfer pricing methodology for attributing the income to its PE in the relevant year as followed in earlier years, which was duly accepted by the TPO/Ld. AO in earlier years.

That the above grounds of appeal are without prejudice to each other.

That the appellant reserves its right to add, alter, amend or withdraw any ground of appeal either before or at the time of hearing of this appeal."

3. The brief facts of the case are that the assessee is a company incorporated and tax resident of the United Kingdom (UK). The assessee is a world leader in the field of Multimedia Coverage of Sports event, including Cricket. The Board of Control of Cricket in India (BCCI) entered into an agreement dated 15.04.2009 read together with the addendum to the production agreement dated 24.09.2009, with the assessee for the production of live audio and video of the matches for India Premier League (IPL) 2014 in India, for the events held during the period between April, 2014 to June, 2014 in India. The assessee engaged another group entity i.e. IMG Advisory Private Limited (IMGGA) vide service agreement dated 20.03.2014 to provide assistance activities of production and delivery of live audio-visual coverage of the matches for Hockey India League (HIL) which was amended vide agreement w.e.f. 07.07.2014 to include other sports events.

4. The assessee filed its return of income for the A.Y. 2015-16 on 30.11.2015 declaring total income to the tune of Rs.2,23,65,880/-. The return of income was

selected for scrutiny. The assessee has shown the income received and income attributed to its PE in the following manner.: -

| From | Gross Receipts | Attributed to PE |
|--------------------------------|----------------|------------------|
| BCCI-Production agreement | 30,72,96,551 | 21,88,68,771 |
| IMG Advisory-Service Agreement | 3,56,45,205 | 1,91,44,602 |
| Total | 34,29,42,756 | 23,80,13,373 |

5. As per the assessee's receipt have been attributed to Indian Permanent Establishment (PE) of the assessee on account of function/activity carried by Indian PE as per Transactional Net Margin Method (TNMM). The assessee claimed that an amount was attributed to PE after a mark of 10% and 15% on cost of production agreement and service agreement respectively. The assessee has computed its income u/s 44DA and attributed receipts of Rs.23,80,13,373/- whereas the total receipts as per contracts of Rs.34,29,42,756/-. The AO issued show-cause notice vide sheet entry dated 15.12.2017 making show-cause to assessee as to why the entire receipt be not attributed to AE as the contract in India. The AO recorded that the assessee made their submission only by taking grounds that the receipt be taxed as per the 'Fee for Technical Services' and no submission was made regarding entire receipt being attributed. The AO while passing the draft assessment order brought to entire receipt of Rs.34,29,42,756/- as taxable as per the provisions of Section 44DA.

6. On receipt of the draft assessment order the assessee exercise his option to filed objection before DRP. Before DRP, the assessee raised objection for characterizing the services providing by the assessee as 'Fee for Technical Services'/royalty under the provisions of Section 9(1)(vii) of the Income- tax act as well as Article 13 of the India-UK Double Taxation Avoidance Agreement (India-UK DTAA) and not attributed balance receipt to PE i.e. total receipt of Rs.34,29,42,756/- 23,8013,373/- (already attributed to pay) of Rs.10,49,29,383/- without referring the matter to TPO. The objection of assessee was overload by DRP overload/partly allowed by DRP of its direction/order dated 19.02.2018. The relevant para of direction of DRP extracted below:-

“6.12. The submission made by the assessee has been examined. It is seen that there is no dispute oil issue of the amount as being in the nature of ITS as far as Income tax Act is concerned. There is also no dispute with respect to existence of it PE of the assessee iii India. Accordingly, the assesses has filed the PR's return under section 44DA of the Act. However, it has allocated the total receipts of the contract between the PE and the HO by treating the PE as a pure service provider liable to be compensated at cost plus suitable margin. It has held that all the assets and risks have been assumed by the HO and most of the significant functions have been performed by the HO while the Ni has provided routine services.

The AO has held the amount to be in the nature of royalty/FTS as contemplated under the Act as well as Article 13 of the Treaty. However, during this year. the AO has deviated from preceding year by accepting the position of the assessee that the FTS/royalty is effectively connected with the PE and hence liable to be accounted in the hands of the PE. To this extent. the AO has accepted the action of the assessee iii filing its return of income u/s 44DA of the Act. However, she has not accepted the

apportionment of income to the AE as computed by the assessee. She has proceeded to include the entire Indian receipts totaling Rs.34,29,42,756/- as being attributable to the Ni and hence liable to the accounted as turnover of the PR. In this regard, she has also alluded to the expenses HO amounting to Rs.13,88,73,648/- which have been claimed as deduction in the hands of the PE as expenditure of the HO connected with the PE. She has claimed that since all expenses have been included in the hands of the PE, all income also should be included in the hands of the PE.

6.14. The DRP has gone into (lit past stand of the Revenue with respect to taxation of the receipt in the hands of the assessee which has been taxed in accordance with the rate' in DTAA on gross basis treating the same as being of the nature of FTS as per Article 13 of India UK DTAA. The AO has neither provided any reason for deviating from the above stand nor has brought on record any change in facts to hold that now the FTS is effectively connected in the PE while it was not so in earlier years. In absence of such finding, the DRP holds that the AO is to be directed to tax the amount on a gross basis as done in earlier years. It has already been held while deciding the ground no. 2 that the amount is liable to be taxed under Article 13 of the India UK DTAA. It is so held. The present action of the AO in treating the amount as being connected to the PE and hence, liable to be taxed in India as income of the PE is decided by the DRP as an alternate issue in case the issue of the amount falling under Article 3 of the Treaty is decided against the Revenue.

6.15 During this year, the AO has accepted the position of the assessee with respect to the return under section 44DA. There is no doubt that the entire technical service is being rendered in India by the persons of PE who are technically competent to render such service. The services are being rendered using equipment and technical knowledge available with the PE. Hence, the claim of the AO that the services are effectively connected with the PE and hence fall within the ambit of Article 13(6) of the Treaty.

6.16. The DRP has also examined the allocation procedure adopted by the assessee. The assessee is not correct in contending that no assessment can be made by the AO in respect of a HO PE instance without referring the issue to a TPO. Its reliance on the Supreme Court decision in the case of Morgan Stanley (supra) is not found correct. The

only observation of the Court in this case was that once the Indian party was compensated at arm's length for its FAR, nothing further would be attributable to it even if a PE was constituted. However, it did not restrain the AO from examining whether additional functions were performed or additional assets were utilized or additional risks were taken by the Indian party in its capacity as PE or whether the character of the transaction was as presented by the assessee. The AO was free to determine fair compensation for these additional functions/assets/risks at his own level without reference to the TPO

6.17 The AO is also perfectly justified in clubbing all the income and all the expenditure for the purpose of computing net profits arising out of the contract. In fact, this is the mandate provided to the AO under Rule 10. The mandate of the Rule is allocation of the profit and not allocation turnover. There is no doubt that the entire receipts of the assessee originate in India and hence such turnover is liable to be clubbed together to determine the profits of the contract for the purpose of allocation.

6.18 However, the DRP notes that the AO has failed to attribute profit to the PE and the HO based on a reasonable analysis of functions performed, assets utilized and risks taken. The AO is not justified in holding that the entire profits are to be appropriated by the PE since all expenses have been claimed by it. The profit is to be allocated based on the functional analysis, depending on the extent of functions performed, assets utilized and risks assumed. Rule 10 allows the AO necessary freedom to allocate reasonable profit to HO and PE. In our view, the AO is not correct in not analyzing the FAR of both the parties and bringing the entire amount to tax in the hands of the PE.

6.19. In this regard, the claim of the assessee with respect to FAR analysis carried out by k in its transfer pricing documentation has been examined. The assessee has characterized the PE as a routine service provider while it has characterized the HO as assuming all the risks, providing all the assets and key functions. The assessee has accordingly compensated the PE on a cost plus basis on local costs and has retained the remaining amount with the HO.

6.20 *The Panel has examined the functional profile of the PE. The PE is engaged in preparation of broadcasting feed while the IPL matches or other hockey kabaddi matches are on. Generally, the lag time between the live match and the actual transmission of feed is a few minutes. The manpower of the PE is technically competent and has all the necessary technical capability as well as equipment to It is noted that no assets have been provided by the HO during the course of rendering of service. Only the pre-production planning, the entering into of the contract and the brand value of the HO are the functions attributable to the HO while executing this contract. The functions of the I-10 are limited to pre-production work, generation of necessary technical competency and strategy formulation. The assets are limited to initial financial support provided to the PE and brand value. All of the subsequent assets and equipment are taken on hire basis by the PE itself. The entire risks are borne by the PE as the job involves on the spot decisions and execution of the work within a very limited frame of time while ensuring a high level of quality output. In a job requiring tremendous quality requirements which are key to successful feed creation, the entire risk is taken by the personnel executing such work, it is not correct for the assessee to claim that such risk is taken by the HO.*

5.21. *In light of the above discussion, it would be sufficient if' the 110 is allocated 25% of the profits computed by the AO while the remaining 75% are retained by the PE. It is held accordingly the AO is directed to split the total profit into 75:25 ratio and attribute only 75% profits to the PE for the purpose of taxation. The ground no. 3 is decided accordingly.*

6.22. *It is once again clarified that the above allocation as well as taxation of the amount in the hands of the PE is on an alternate basis."*

7. In pursuance of direction of DRP, the AO passed the final assessment order on 30.10.2018 u/s 143(3) r.w.s. 144C(13) of the I.T. Act, 1961. Aggrieved by direction of DRP/Additions in the assessment order. The assessee raised filed the present appeal before this Tribunal.

8. We have heard the rival submission of the parties and have gone through the orders of the authorities below. We have also deliberated on various case law relied by the Ld. AR of the assessee. The Ld. AR of the assessee submits that the main ground of appeal for adjudication in the present appeal is whether receipt of income from DTAA and other sports events is a normal business income of the PE. The PE assessing royalty u/s 13 of DTAA of Explanation-2 of Section 9(1)(v) of Income-tax Act. The Ld. AR further submits that this issue is recurring issue from the A.Y. 2009-10 onwards; wherein the coordinate bench of the Tribunal for decided that the receipt from DTAA is not royalty and was business income in the hands of assessee PE in India. The Ld. AR further submits that the DRP/AO has not followed the decision of Tribunal for earlier years. The Ld. AR submits that on similar ground of appeal for A.Y. 2010-11 in ITA. No.1513/M/2014 dated 26.08.2015 it was held that the payment raised by assessee from DTAA cannot be considered as royalty in terms of India at UK-DTAA as well as the payment received by assessee cannot falls within the purview of Section 9(1)(vi) of the Act. So far as the ground relates to existence of 'Permanent Establishment' the ground was restored to the AO for afresh adjudication with the direction to consider the decision of jurisdiction High Court in the case of **DIT Vs. NGC Network Asia LLC (313 ITR 187)**. The Ld. AR submits that the same decision was the order of Tribunal for A.Y. 2010-11 was followed in A.Y. 2009-10 and again in A.Ys. 2011-12 and 2012-13. The Ld. AR of

the assessee further submits that the DRP made allocation of the Ad-hoc basis in 75:25 ratios. The Ld. AR in alternative submission that the matter may be restored to the AO/DRP for consideration afresh with the direction to follow the decision of Tribunal in earlier years.

9. On the other hand, the Ld. DR for the Revenue supported the order of AO/DRP. The Ld. DR further submitted all the objections and submission of assessee was duly considered by lower authorities. On specific query by the bench if the ld. DR has any objection if the matter is restore to the file of AO to follow the directions of the Tribunal for AY 2010-11 in ITA. No.1513/M/2014 dated 26.08.2015.

10. We have considered the rival submission of the parties and have gone through the order of the authorities below. We have noted that on almost identical grounds of appeal, the issue of permanent establishment was restored to the file of AO in appeal for A.Y. 2010-11 in ITA. No.1513/M/2014 dated 26.08.2015. We have further noted that none of the parties have informed the status of order giving effect in the A.Y. 2010-11. On the taxability of receipt it was held that the payment raised by assessee cannot be considered as royalty in terms of India at UK DTAA as well as u/s 9(1)vi) of the Act. The coordinate bench passed the following order read as under.:-

“4. We heard the parties on this issue. On a careful perusal of the facts brought out by the tax authorities, we notice that the assessee possesses required expertise in live audio-visual coverage of matches (called “feed”) and hence, the BCCI has engaged the assessee to produce and deliver live audio-visual coverage of the IPL-2008 & IPL-2009 cricket Matches conducted by BCCI. According to the agreement, the assessee shall produce the feed and deliver the same to the broadcasters, who are called licensees. Thus, it is noticed that the job of the assessee shall come to an end, once the feed is produced and delivered to the licensed broadcasters in the form of digitalized signals. As per the agreement, the BCCI shall supply the equipments like cameras, microphones etc. of the required quality to the assessee. 5. The question that arises is as to whether such kind of production of feeds would result in provision of technical services by the assessee to BCCI in terms of Indo-UK DTAA?. Article 13(4)(c) of the DTAA defines the terms “Fee for technical services” and for the sake of convenience, the same is extracted below:

“4. For the purpose of paragraph 2 of this Article, and subject to paragraph 5 of the Article, the terms “Fees for technical services” means payments of any kind of any person in consideration for rendering of any technical or consultancy services (including the provision of services of technical or other personnel) which : a) are ancillary and subsidiar “Generally speaking, technology will be considered „made available“ when the person acquiring the same is enabled to apply the technology.

The fact that the provision of the service may require technical input by the person providing the service does not per se mean that technical knowledge, skills etc., are made available to the person purchasing the service within the meaning of paragraph 4(b). Similarly, the use of a product which embodies technology shall not per se be considered to make the technology available.”

He submitted that the concept or principle of “Make available” can be conveniently applied in the case of India-UK DTAA also. Accordingly, he submitted that the assessee herein did not “make available” any technology/know how relating to the production of

live coverage of audio video visuals of the cricket matches, but only supplied the “program content” produced by it. Accordingly, he submitted that the amount received by the assessee from BCCI cannot fall under the category of “Fee for technical services” in terms of Article 13(4)(c) of India-UK DTAA.

6. We notice that the Article 13(4)(c) of the India-UK DTAA also uses the expression “make available”. Though the said expression has not been explained in the context of India-UK DTAA, it is the plea of the assessee that the principle or concept of „make available“ explained in the India-US protocol should also be applied in respect of India-UK treaty also. Before us, the revenue could not submit any other decision or material to oppose the above said plea of the assessee. Since the India-UK DTAA and also India-US DTAA uses the same expression, i.e., “make available” in the context of “Fee for technical services”, we are of the view that the principle or concept of „make available“ explained in the context of IndiaUS DTAA can be imported to understand the provisions of Article 13(4)(c) of the India-UK DTAA also.

7. Now we shall examine the question on the basis of discussions made in the earlier paragraphs. We notice that the assessee produces the feed 11 ITA No.1513/Mum/2014 (program content) of live coverage of audio-video visuals of the cricket matches by using its technical expertise. After that it delivers the feed (program content) in the form of digitalized signals to the licensees (broadcasters). There should not be any dispute that the licensees (broadcasters) receive the feed on behalf of the BCCI. We notice that what is delivered by the assessee is a “final product in the form of program content” produced by it by using its technical expertise, i.e., the assessee does not deliver or make available any technology/ knowhow to the BCCI. There should not be any dispute that the production of “program content” by using technical expertise is altogether different from the provision of technology itself. In the former case, the recipient would receive only the product and he can use the product according to his convenience, where as in the later case, the recipient would get the technology/knowhow and hence he would be able to use the technology /knowhow on his own in order to produce any other program content of similar nature. In the later case, the technology/knowhow

would be “made available” to the recipient, in which case the payment given would fall under the category of “Fee for technical services”. However, in the former case, there is no question of making available of any technology/knowhow and hence the payment given would be in the nature of payment made for production of “Program content or live feed” and not for supply of technology.

8. The Ld DRP has observed that the agreement entered between the assessee and BCCI prescribes the quality standards in minute details and the same results in total exchange of technical plans and designs between the assessee and the broadcasters. In our view, there is a fallacy in the view taken by Ld DRP. The object of the production of live feed is to offer quality coverage of the live cricket matches to the viewers. The assessee’s job is restricted to production of live coverage and the job of broadcasting the same is undertaken by the BCCI. The BCCI, in turn, has given license to certain companies (called licensees) and they have undertaken the job of broadcasting the live coverage of cricket matches on behalf of BCCI. Since the assessee is supplying the live coverage in the form of digitalized signals, it has to ensure that the broad casters also do have the compatible technology and equipment so that the live coverage can be broadcast without compromising the quality. Thus, in our view, the technical aspects are specified in the agreement in order to ensure that the program content is broadcast at the same quality in which it was produced. The same was sought to be achieved by synchronizing the quality of technical equipment between the assessee and the broadcasters (licensees). Such kind of synchronization of technology would ensure seamless function and complete coordination between the assessee and the broadcasters. Thus, there is a difference between the technology involved in the production of live coverage feed of cricket matches and the technology required to broadcast the same in the required quality. Hence, in order to ensure and maintain quality of live coverage feed, it becomes necessary on the part of the assessee to specify or oversee the technology available with the broadcasters so that the same does not compromise on the quality and compatibility. The specification of the technical requirements does not mean that the assessee has supplied the technology involved in

the production of live coverage feed to the broad casters. If that be the case, the broadcasters should be in a position to use the technology in order to produce the live feed on their own. We notice that the revenue has not established that the broadcasters (who are acting on behalf of the BCCI) or the BCCI itself has acquired the technical expertise from the assessee which would enable them to produce the live coverage feeds on their own after the conclusion of IPL 2008 and IPL 2009 cricket matches. In that case the essential condition of “make available” clause fails and hence the amount received by the assessee cannot be considered as “Fee for technical services” in terms of Article 13(4)(c) of the DTAA entered between India and UK.

9. The Id DRP has observed that the live coverage of cricket matches involve instant and continuous production and broadcasting of live matches. The existing program would keep merging with the new work. Further, the broadcasters are able to split the program content in order to insert advertisements. All these aspects, in our view, would not bring the payment under the category of “Fee for technical services”. It only shows the technical expertise of the assessee to produce a flexible program content to give enhanced quality of viewing the live matches. 10. Before us, the Ld D.R placed reliance on the decision rendered by the Delhi bench of Tribunal in the case of Nimbus Sport International Pte Ltd (2012)(18 taxmann.com 105), wherein the Tribunal had held that the services or production and generation of live television signal were in the nature of technical services. The Ld A.R contended that the Delhi Tribunal did not examine the principle of „make available“. We notice that the case of Nimbus Sport International Pte Ltd is covered by India-Singapore DTAA and it also uses the expression “make available” in the definition of “Fee for technical services”. In the case of Nimbus sports International (supra), the principle or concept of „make available“ has not been examined by the Tribunal. Accordingly, we agree with the contentions of the assessee that the said decision is distinguishable.

11. Since the amount received by the assessee is held to be not in the nature of “Fee for technical services” as per the definition of Article 13(4)(c) of the India-UK DTAA, in our

view, there is no necessity to examine about its taxability u/s 9(1)(vii) of the Income tax Act, 1963.

12. The AO/Ld DRP have also expressed the view that the payment received by the assessee would fall under the category of “Royalty” also. The relevant observations made by Ld DRP are extracted below:-

“5.5 Additionally, we find that the said services would also be in the nature of Royalty as per the provisions of section 9(i)(vi) of the Act and Article 13 of the DTAA between India and UK. The reasons for the same are, as under:

(1) On a perusal of the agreement, it is clear that for doing this work, the assessee is required to bring in equipments for capturing the live feed. The same has been given in clause 1.3 of the agreement which is reproduced as under:

“1.3 IMG shall be responsible for ensuring that equipment that it introduces into the Match venues complies with international standards of health and safety, it being acknowledged and agreed that IMG shall not be responsible for the compliance of the Match venues and their infrastructure with such international standards of health and safety” This makes it clear that the assessee is required to bring and use some equipment for recording live audio-visual feed of the matches. In schedule 2 of the said agreement as well, various minimum camera and equipment specification has been given. The same is also reproduced as under-

(iii) Minimum camera and equipment specification (1) The feed shall be produced using 29HD cameras (of which 14 will be manned) HD, VT & graphics equipment along with Cricket Sound package. All of this equipment will be supplied by Zoom (please note section (d)(ii) below)”. Likewise, in Schedule 4 to this agreement, the details of production budget have been specified. In this budget also, various heads of expenses have been identified and costs assigned. In this also, a lot of these relate to use of equipments like production equipments, maintenance of equipments, setting up of a studio in India, broadcast from outside etc. All these clearly establish that the assessee

would be using equipments to carry out this work which is nothing but equipment royalty as per the Act as well as the DTAA.

5.5.1 On a perusal of this agreement, it is also observed that the assessee company is the world leader in this field and has developed commercial and scientific experience in the field of commercial and scientific experience. It has also developed a "process" which is unique to this company and the same process is being used for rendering these services. This is also because of the fact the assessee has been given this contract every year as it has a unique process for producing the live feed of matches. In this type of events the most important part that leads to generation of revenue for BCCI from IPL event is the seamless/uninterrupted production and broadcasting of the complete match. During such production process, a new work is created within a split of few macro seconds and the existing for keeps on merging with the new work being created. The activity which leads generation of revenue is the complete work being taken into consideration and therefore it would be incorrect to state that the payments received by assessee is for the live work and not for any work being in existence. Also, the production work being undertaken by the assessee is specialised in nature and the final signals being delivered by the assessee tantamount to use of process by the BCCI/its broadcasters. This is also evidenced with various clauses of the agreements. The relevant clauses are reproduced as under:

5. Producer Credit BCCI agrees that on each occasion that the coverage of the IPL is broadcast, there shall appear at the end of' each such broadcast, a credit stating "Produced by IMG Sports Media", or such other credit agreed between the BCCI and IMG" As per this clause, the assessee company is taking the credit for this creation. Had this not been a unique creation which is of world standard, the assessee company would not claim the credit. By taking this credit, it is being demonstrated by the assessee that it is a unique product which has been created by following a unique product and that's why they are demonstrating before the world that it is created by the assessee company. Hence, in a way the assessee is claiming copyright in at least producing this feed. Clause 14 is also relevant which is also being reproduced as under

Clause 14 Assignment This Agreement may not be assigned by either party without the express written consent of the other, however IMG shall be, entitled to perform 16 ITA No.1513/Mum/2014 its obligations hereunder through any of its associated companies within the International Group of Companies..”

As per this clause, the assessee cannot assign this work to any other party except its Associated Enterprises. This clearly shows that BCCI has given this work only to the assessee company and does not want it to assign this work to anybody else as it has got a unique process of producing the live feed. This also establishes that it has developed commercial and scientific experience in this field which is being used for proving these services. 5.5.2 In view of the above discussions, it is held that the payments would be taxable as “Royalty” both under the provisions of Section 9(i)(vi) of the Act and Article 13 of the DTAA. The judgments related upon by the assessee have not been taken the above facts into consideration and hence the benefit of the same cannot be granted to the assessee.”

13. We have noticed earlier, the assessee was engaged by BCCI to produce live coverage of audio and video visuals of cricket matches. The assessee shall produce the program content, which is broadcast through the broadcasters appointed by BCCI. The job of the assessee ends upon the production of the „program content“. According to the assessee, the program content shall become the property of the BCCI. We notice that the revenue has not brought any material on record to show that the assessee has kept the ownership rights over the program content. The Ld DRP has noticed that the BCCI is required to supply certain equipments and hence the Ld DRP has held as under:-

“...the assessee would be using equipment’s to carry out this work which is nothing but equipment royalty as per the Act as well as the DTAA.” We are unable to understand the rationale behind this observation. If the assessee was using the equipment’s belonging to BCCI and if that activity is examined in isolation, then the assessee should be paying money to BCCI for using the equipment’s. In the instant case, the assessee has received the money for producing live coverage of cricket matches. The equipments

required for the said purpose may be brought by the assessee itself or it may be provided by the BCCI. Under commercial terms, if the assessee was required to bring the equipments, then the consideration payable for the production of live coverage of cricket matches should go up. Thus, in our view, it was a simple case of commercial agreement entered between the parties with regard to the modalities to be followed and the same is not a determinative factor to decide about the nature of payment received by the assessee.

14. The Ld D.R.P. has further observed that the assessee has developed commercial and scientific experience in the field of commercial and scientific experience. The term “royalty” is defined as under in the India UK DTAA:-

3. For the purposes of this Article, the term “royalties” means: (a) Payments of any kind received as a consideration for the use of, or the right to use, any copyright of a literary, artistic or scientific work, including cinematography films or work on films, tape or other means of reproduction for use in connection with radio or television broadcasting, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience; and (b) Payments of any kind received as consideration for the use of, or the right to use, any industrial, commercial or scientific equipment, other than income derived by an enterprise of a Contracting State from the operation of ships or aircraft in international traffic.” A careful perusal of the definition of „royalties” extracted above, would show that the payment, in order to constitute royalty, should have been made “for the use of, or the right to use any copyright etc”.

In the instant case, we have noticed that the payment was made by BCCI to the assessee for producing the program content consisting of live coverage of cricket matches. Further, we have noticed that there is nothing on record to show that the assessee had retained the ownership of the program content. The Hon“ble Delhi High Court had an occasion to examine an identical issue in the case of CIT Vs. Delhi Race Club (2015)(273 CTR 503) in the context of the provisions of sec. 194J of the Act. In the

above said case, the assessee was engaged in the business of conducting of horse races and it made payment for live telecast of races. The AO held that the said payment would fall under the definition of „royalty“ falling within the purview of the provisions of sec. 194J of the Act and hence disallowed the payments u/s 40(a)(ia) of the Act. The Hon“ble Delhi High Court observed as under:-

“16. A live T.V coverage of any event is a communication of visual images to the public and would fall within the definition of the word „broadcast“ in Section 2(dd) (of the Copyright Act). That apart we note that Section 13 does not contemplate broadcast as a work in which „copyright“ subsists as the said Section contemplates „copyright“ to subsist in literary, dramatic, musical and artistic work, cinematograph films and sound recording. Similar is the provision of Section 14 of the Copyright Act which stipulates the exclusive right to do certain acts. A reading of Section 14 would reveal that „copyright“ means exclusive right to reproduce, issue copies, translate, adapt etc., of a work which is already existing...

18. In view of the aforesaid position of law which brought out a distinction between a copyright and broadcast right, suffice would it be to state that the broadcast or the live coverage does not have a „copyright“. The aforesaid would meet the submission of Mr. Sawney that the word „Copyright“ would encompass all categories of work including musical, dramatic, etc. and also his submission that the Copyright acknowledges the broadcast right as a right as a right similar to „copyright“. In view of the conclusion of this Court in ESPN Star Sports case (supra), such a submission needs to be rejected.”

Though the above said decision was rendered in the context of provisions of sec. 194J of the Act, yet section imports the definition of the term „royalty“ from Explanation 2 to sec. 9(1)(vi) of the Act. Under the definition given in the above said provision also “royalty” means consideration for the transfer of all or any rights (including the granting of a licence) in respect of a patent, invention, model, design, secret formula or process or trade mark or similar property.

15. In the instant case, we have noticed that the BCCI becomes the owner of the program content produced by the assessee. The job of the assessee ends upon the production of the program content and the broadcasting is carried out by some other entity to which license was given by the BCCI. Hence, in our view, the question of transfer of all or any right does not arise in the facts and circumstances of the instant case. Hence, we are of the view that the payment received by the assessee cannot be considered as „royalty“ in terms of the India-UK DTAA. Though, it is not necessary to examine about the applicability of provisions of sec. sec. 9(1)(vi) of the Act, yet the facts discussed above would show that the payment received by the assessee cannot fall within the purview of sec. 9(1)(vi) of the Act also.”

11. Considering the above factual discussions and decision of Tribunal in assessee’s own case for AY 2010-11, the grounds of appeal raised by the assessee are restored to the file of assessing officer to pass the order afresh after following the order of the Tribunal dated in ITA. No.1513/M/2014 dated 26.08.2015. Needless to order that before passing the order afresh the AO shall grant opportunity of hearing to the assessee. In the result the grounds of appeal raised by the assessee are allowed for statistical purpose.

In the result, the appeal filed by the assessee is allowed for statistical purpose.

Order pronounced in the open court on 12/06/2019

Sd/-
(G. S. PANNU)
VICE PRESIDENT
मुंबई Mumbai; दिनांक Dated : 12/06/2019
Vijay/Sr. PS

Sd/-
(PAWAN SINGH)
JUDICIAL MEMBER

आदेश की प्रतिलिपि ँ ग्रेषित/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.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार / (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai