

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES : I-2 : NEW DELHI

BEFORE SHRI R.S. SYAL, ACCOUNTANT MEMBER
AND
SHRI KULDIP SINGH, JUDICIAL MEMBER

ITA No. 954/Del/2016
Assessment Year : 2011-12

Reebok India Company,
C/o PricewaterhouseCoopers Pvt Ltd,
Sucheta Bhawan, Gate No. 2,
1st Floor 11-A, Vishnu Digambar Marg
New Delhi.

Vs.

DCIT,
Circle-2(1),
New Delhi.

PAN: AAACR 3007K

ITA No. 1620/Del/2016
Assessment Year : 2011-12

DCIT
Circle – 2(1)
New Delhi

Vs.

Reebok India Company,
C/o PricewaterhouseCoopers Pvt Ltd,
Sucheta Bhawan, Gate No. 2,
1st Floor 11-A, Vishnu Digambar Marg
New Delhi.

PAN: AAACR 3007K

(Appellant)

(Respondent)

Assessee By : Shri Kanchan Kaushal, AR
Department By : Shri T.M. Shivakumar, CIT, DR

Date of Hearing : 14.03.2017
Date of Pronouncement : 20.03.2017

ORDER

PER R.S. SYAL, AM:

These two cross appeals – one by the assessee and the other by the Revenue – arise out of the final order dated 27.01.2016 passed by the Assessing Officer (AO) u/s 143(3) read with section 144C of the Income-tax Act, 1961 (hereinafter also called 'the Act') in relation to the assessment year 2011-12.

2. The first issue raised by the assessee in its appeal is against the addition of Rs.80,48,09,781 made by the AO on account of transfer pricing adjustment of Advertising, marketing and promotion expenses (AMP expenses). The Revenue is also aggrieved against certain directions given by the Dispute Resolution Panel (DRP) in the manner of computation of transfer pricing addition on this issue.

3. The ld. AR submitted that the incurring of AMP expenses is not an international transaction at all and, hence, there can be no question of determining the arm's length price of this transaction or making any addition thereon. He relied on the judgments of the Hon'ble Delhi High Court in *Maruti Suzuki India Ltd. & Another vs. CIT (2015) 129 DTR 25 (Del)* and *CIT vs. Whirlpool of India Ltd. (2015) 94 CCH 156 DEL-HC* to contend that the AMP expenses could not be considered as an international transaction. In the light of these judgments and some other Tribunal orders, it was submitted that there was no international transaction of AMP expenses on the basis of principles laid down in these judgments and, hence, the entire exercise of determining its ALP and, consequently, making transfer pricing adjustment, be set aside.

4. Before taking up the issue, it is relevant to summarily mention that the ld. AR argued the issue of AMP expenses on similar lines as has been argued in different cases, including the case of *Nikon India Pvt. Ltd. vs. DCIT (2016) 47 CCH 0458 DelTrib* contending that the incurring of AMP expenses is not an international transaction. The

tribunal vide its order dated 15.7.2016 in the case of *Nikon (supra)* has not accepted such contention at its level and remitted the matter to the file of AO/TPO for a fresh determination.

5. The ld. DR, similar to *Nikon's case (supra)*, relied on the judgment of the Hon'ble Delhi High Court in *Sony Ericson Mobile Communications (India) Pvt. Ltd. vs. CIT (2015) 374 ITR 118 (Del)* in which AMP expenses have been held to be an international transaction and the matter of determination of its ALP has been restored. It was contended that the instant assessee is a part of the batch of appeals decided by the Hon'ble High Court in the lead case of *Sony Ericson Mobile Communications (supra)*. He also relied on a later judgment of the Hon'ble jurisdictional High Court in *Yum Restaurants (India) P. Ltd. vs. ITO (2016) 380 ITR 637 (Del)* and still another judgment dated 28.1.2016 of the Hon'ble Delhi High Court in *Sony Ericson Mobile Communications (India) Pvt. Ltd.* (for the AY 2010-11) in which the question as to whether AMP expense is an international transaction has been restored for a fresh determination. It was argued, similar to *Nikon's*

case (supra), that the judgment in the case of *Yum Restaurants and Sony Ericson (for AY 2010-11)* delivered in January, 2016 is later in point of time to the earlier judgments in the case of *Maruti Suzuki and Whirlpool, etc.*, and, hence, the matter should be restored for a fresh determination. Similar to *Nikon's case (supra)*, it was submitted that there is no blanket rule of the AMP expenses as a non-international transaction. He further stated that the Hon'ble High Court in *Whirlpool (supra)* has made certain observations, which should be properly weighed for ascertaining if an international transaction of AMP expenses exists. It was argued that the Tribunal in several cases has restored this issue to the file of TPO to be decided afresh in the light of the judgment of the Hon'ble Delhi High Court in *Sony Ericson Mobile Communications (India) Pvt. Ltd. vs. CIT (2015) 374 ITR 118 (Del)* and others. He also relied on still another judgment dated 28.1.2016 of the Hon'ble Delhi High Court in *Sony Ericson Mobile Communications (India) Pvt. Ltd.* (for the AY 2010-11) in which the question as to whether AMP expenses is an international transaction, has been restored for a fresh determination. Similar to *Nikon's case (supra)*, he still

further referred to three later judgments of the Hon'ble Delhi High Court, viz., *Rayban Sun Optics India Ltd. VS. CIT* (dt. 14.9.2016), *Pr. CIT VS. Toshiba India Pvt. Ltd.* (dt. 16.8.2016) and *Pr. CIT VS. Bose Corporation (India) Pvt. Ltd.* (dt. 23.8.2016) in all of which similar issue has been restored for fresh determination in the light of the earlier judgment in *Sony Ericsson Mobile Communications India Pvt. Ltd. (supra)*. The ld. DR argued that the Hon'ble Delhi High Court in its earlier decision in *Sony Ericson Mobile Communications (India) Pvt. Ltd. vs. CIT (2015) 374 ITR 118 (Del)* has held AMP expenses to be an international transaction. It was argued the matter should be restored for a fresh determination.

6. We have heard the rival submissions and perused the relevant material on record. It is a matter of record that the Hon'ble High Court in assessee's own case [with the lead order in *Sony Ericsson (supra)*] has held AMP expenses as an international transaction. It can be seen that in some later decisions, view taken is at variance. Equally, the tribunal is also not consistent in its stand. When the TPO in the instant case held

AMP expenses to be an international transaction, he did not have any occasion to consider the *ratio* laid down in several judgments of the Hon'ble jurisdictional High Court, which is now available for consideration. Respectfully following the predominant view taken in several Tribunal orders of co-ordinate benches, we are of the considered opinion that it would be in the fitness of things if the impugned order is set aside and the matter is restored to the file of TPO/AO for a fresh determination of the question as to whether there exists an international transaction of AMP expenses. If the existence of such an international transaction is not proved, the matter will end there and then, calling for no transfer pricing addition. If, on the other hand, the international transaction is found to be existing, then the TPO will determine the ALP of such an international transaction in the light of the relevant judgments of the Hon'ble High Court, after allowing a reasonable opportunity of being heard to the assessee. Similar view has been recently taken by the Delhi tribunal in its order dated March, 2017 in the case of *Louis Vuitton India Retail P. Ltd. vs. DCIT* (ITA No.775/Mum/2015).

7. Next ground raised by the assessee in its appeal is against the making of addition of Rs. 22,53,91,889/- on account of suppressed sales. Briefly stated, the facts of this ground are that a survey operation was carried out by the DDIT [Inv] on 02.05.2012 on the premises of the assessee on the basis of media report about the financial irregularities amounting to Rs. 870 crore noticed over the years. In its report, the Inv. Wing, *inter alia*, observed that there was difference in balance of some of the customers in the books of account of the assessee *vis-à-vis* balance of the assessee in the books of accounts of such customers. The customers stressed that their books of accounts were true. On the basis of such report of the DDIT, the A.O prepared a list of such customers whose closing balances did not match with the balances shown by the assessee in its accounts. Such list of closing balances was supplied to the assessee. It was put forth on behalf of the assessee that the difference was due to various claims made by the customers/franchisees but not accepted by the assessee and as such not recorded in its books of account. It was further asserted that in subsequent years, the assessee entered into negotiations and settled these claims of the customers based on mutually

agreed terms. The AO accepted the explanation of the assessee in the cases where the debit balance of the parties was more in the books of the assessee company than the balance in the books of account of customers/franchisees. However, where the debit balance in the books of accounts of the assessee was less than the balance in the books of the parties/franchisees, such an explanation was not accepted. On this basis, the AO drew a Table on pages 14 and 15 of the final assessment order computing difference between the closing balance as per the customers books and closing balance as per assessee's books in respect of four parties with total difference of Rs. 22,53,91,889/-. An addition was made for this amount, against which the assessee is aggrieved.

8. We have heard the rival submissions and perused the relevant material on record. It is found that the A.O. made the addition on the basis of difference in the closing balance of the assessee as shown by the four customers in their books of account and the closing balance of such customers as shown by the assessee in its books of account. The assessee contended before the Dispute Resolution Panel (DRP) that the

copies of such accounts maintained by the customers were not made available to it before making the addition. It was requested that full copies of account be provided by the DRP. The assessee further stated that the difference was reconciled and settled in subsequent years. The DRP directed that the impact of reconciliation should be verified by the A.O. as per law in such periods as these take effect on case to case basis subject to verification by the AO but the outstanding amounts in this period should be treated as suppressed sales. That is how, the AO made addition for this amount. It is simple and plain that before making any addition, it is incumbent upon the authorities to confront an assessee with material/evidence which is likely to be used against it. Only when the assessee is confronted with such adverse material/evidence and he is not in a position to explain its stand, that an addition can be made for the correct amount. Here is a case in which the A.O. has simply supplied a sheet of the closing balance of the assessee shown by the four customers in their respective books of accounts without giving full copies of accounts. There can be several reasons for difference in closing balance of a party in the books of account of another. Unless the

assessee is made aware with complete copy of account, there can be no question of jumping to the conclusion that the difference between the closing balances is assessee's suppressed sale. The ld. DRP directed the AO to make full addition in this year but allow adjustment in the year in which settlement took place. This is not a wholly correct proposition. If there are certain items of sales made by the assessee and recorded by these parties in their books of account, which have not been included by the assessee in its books of account, then, of course, addition should be considered for such amounts in this year. But, if there are certain other items of differences which are capable of reconciliation and do not involve any suppressed sales, those cannot be treated as a part of suppressed sales. Under these circumstances, we set aside the impugned order and remit the matter to the file of the A.O. with a direction to supply copies of accounts of these four parties and allow an opportunity to reconcile the difference, if any and thereafter, make the addition in the terms discussed above.

9. Next ground of the assessee's appeal is against the making of disallowance of Rs.8,27,00,000/- on account of 'Store closure expenses'. Facts apropos this ground are that the assessee claimed deduction for a sum of Rs. 8.27 crore towards 'Store closure expenses' by means of a revised return. It was contended that this amount, recorded in the books of accounts for the succeeding A.Y. 2012-13, was classified as a 'Prior period expense' and voluntarily disallowed in the computation of income for such later year. A revised return was filed for the year under consideration claiming deduction for such expense pertaining to the instant year. The A.O did not allow this expenditure. The DRP observed that the closing of stores had a trait of permanency and, as such, it was a capital expenditure. The A.O made addition for this sum and the assessee has come in appeal before us.

10. Having heard the rival submissions and perused the relevant material on record, it is seen that the assessee has placed on record an Annexure running into 6-7 pages which contains details of store closure expenses. This Annexure has columns, such as, Name of the store,

Status as on 31.3.2012, Franchisee name, Date of opening, Date of closure, Interior cost, Running months and Value of interior etc. Sum total of the column `Interior cost' is Rs. 8.27 crore, which the assessee claimed as deduction. The business model of the assessee is that it opens show rooms through franchisees at various places all over India. The Annexure is a list of those franchisees who were regularly incurring losses and the assessee opted for closing these franchisees by settling a certain compensation to be paid to them for the loss incurred by them in establishing these stores. We are unable to comprehend as to how this amount can be considered as a capital expenditure. This is a cost which the assessee has incurred for closing stores of franchisees which were running into losses. The Hon'ble Supreme Court in the case of *Empire Jute Company Limited Vs. CIT [1980] 124 ITR 1 [SC]* has held that if the advantage by payment consists merely in facilitating the assessee's trading operations or enabling the management and conduct of the assessee's business to be carried on more efficiently or more profitably while leaving the field capital untouched, the amount so incurred is revenue expenditure. The position before us is similar in as

much as the assessee paid compensation as a *quid pro quo* to the stores/franchisees for their closure which were incurring losses and not running efficiently. The only purpose was to get rid of loosing propositions and consolidate the profitability in future. In our considered opinion, such an expense is revenue in nature and warrants deduction in principle.

11. However, we find that this Annexure of 6-7 pages is not backed by any supporting documents showing how such figure of loss was determined on case to case basis. Further, no receipts of franchisees have been placed on record to evidence that this was actually the amount paid by the assessee on such account. We, therefore, set aside the impugned order on this score and remit the matter to the file of the A.O for examining the details of such store closure expenses. It is hereby directed that the deduction should be allowed to the extent the assessee satisfies the A.O. with the amount of such expenditure actually incurred.

12. The next ground of the assessee's appeal is against the disallowance of certain expenses. The assessee claimed deduction of

Rs.5,75,66,299 under the head 'Legal and professional expenses'. On perusal of its details, the AO noticed that certain discharges included under this head had no relation whatsoever with 'Legal and professional charges'. A chart with total of Rs. 28.90 lac has been drawn of such items at pages 19 to 21 of the assessment order. This amount comprises of Rs.6,84,487/-, being TDS and interest paid on revision of TDS return; and Rs. 22,05,516/-, which is in small parts having narrations, such as, Gym maintenance charges, CST demand, Screening charges of movie 'My name is Khan', Running club classes. It was opined that the amount of Rs.28.90 lac was not in the nature of 'Legal and professional charges' and hence no deduction was warranted. Addition was made for this sum. The assessee is aggrieved against this disallowance.

13. Having heard both the sides perused the relevant material on record, we find that the Table drawn by the A.O on pages 19 to 21 of the assessment order contains details of expenses which are obviously not in the nature of legal and professional expenses. But the fact that a particular expense has been wrongly classified in the accounts, does not

lose deduction, if it is otherwise deductible as per law. Since there are several items noted on these three pages as details of this amount, we consider it expedient to set aside the assessment order and remit the matter to the file of the A.O for examining the deductibility or otherwise of the each of them as per law, uninfluenced by the heading of 'Legal and professional charges' given by the assessee. Needless to say, the assessee will be allowed a reasonable opportunity of being heard before drawing any conclusion in this regard.

14. The next component of this ground is the disallowance of Rs. 24.02 lakh on account of store audit. The assessee was called upon to furnish copies of individual details of Legal and professional charges, which *inter alia*, contained Store audit expenses amounting to Rs. 24,02,078/-. In the absence of any bill furnished by the assessee for such an amount, the A.O made the addition.

15. Having heard both the sides perused the relevant material on record, we find that the disallowance has been made for lack of evidence in support of such expense. The ld. AR, in all fairness, conceded that the

bill for Rs. 24.02 lakh was not available right now with him. He, however, undertook to place it before the A.O. if another opportunity was granted. Under these circumstances, we set aside the impugned order on this score and direct the assessee to produce such bill before the A.O. in the fresh proceedings. It is hereby directed that if the assessee fails to produce such bill even in the resulting proceedings, the A.O will be justified in making addition to this extent.

16. The last component of this ground is the disallowance of proportionate interest of Rs.23,60,71,053/- on unsecured loans amounting to Rs.502.69 crore. It was observed by the AO that the assessee claimed to have paid interest, *inter alia*, on unsecured loans amounting to Rs.502.69 crore. The AO noticed that there were outstanding advances to the tune of Rs.172.59 crore on which no interest was charged by the assessee. The A.O. made proportionate disallowance of interest of Rs. 23.60 crore by multiplying the amount of Advances given with the amount of Finance cost and then dividing it

with the amount of Unsecured loans. The assessee is aggrieved against this addition.

17. Having heard both the sides perused the relevant material on record, we find from Schedule 8 of the assessee's balance sheet, which contains details of Loans and advances, that as against the closing balance of advances amounting to Rs. 172.59 crore, the balance in the preceding year ending on 31.3.2010 stood at Rs. 173.41 crore. This shows that the amount of advance has come down slightly *vis-a-vis* the preceding year. The Id. AR contended that no disallowance of interest on such outstanding brought forward Loans and Advances receivable was made in the preceding year. This contention has not been controverted on behalf of the Revenue. We find that the A.O has simply computed the disallowance of interest in proportion to the amount of interest bearing unsecured loans obtained amounting to Rs.502.69 crore and interest free advances given amounting to Rs. 172.59 crore. The fact that the assessee did pay interest on such unsecured loans has not been disputed. In view of the fact that the assessee paid interest on

unsecured loans and did not earn any interest on advances given, we cannot disallow proportionate interest genuinely paid on unsecured loans taken for business purpose. Section 36(1)(iii) simply provides that deduction is allowable for 'the amount of interest paid in respect of capital borrowed for the purpose of business.' As the assessee paid interest on capital borrowed for the business purpose and it is not the case of the AO that the assessee diverted such unsecured loans for a non-business purpose, the disallowance of interest cannot be countenanced. We, therefore, allow deduction of Rs. 23.60 crore.

18. The only other issue left from the Revenue's appeal is a challenge to the deletion of disallowance of Rs.4,56,58,787 made u/s 40(a)(i) of the Act. Succinctly, the factual matrix of this ground is that the assessee paid the above sum to ICC without deducting tax at source. The AO formed a view that such payment is in the nature of Royalty or Fees for technical services requiring deduction of tax at source. On being called upon to explain as to why remittance was made to ICC without tax withholding, the assessee submitted that as per terms of the Agreement

dated 11.09.2007, ICC allowed Reebok to associate with it as 'Official Partner of ICC'. It was stated that the Agreement consisted of bundle of rights wherein ICC listed the manner in which Reebok could advertise/market its products during the ICC events for a consolidated consideration. The assessee also submitted that ICC did not provide any technical, industrial, commercial or scientific knowledge to it. It was also put forth that similar facilities were also provided to other companies entering into similar arrangement with ICC for promoting their respective products. The sum and substance of the assessee's submissions before the Assessing Officer was that the Agreement made with ICC did not result into any income in the nature of the Royalty or Fee for technical services in their hands and as such, there was no need for deducting tax at source. The Assessing Officer noticed that as per the terms of the Agreement, the assessee was allowed right to use Designations, Marks and ICC logo etc., which in his opinion fell under the definition of 'Royalty' as defined u/s 9(1)(vi) of the Act. He further held that such payment was also in the nature of 'Fees for technical services', as the services provided by ICC were in the nature of

`Managerial services'. In the absence of the assessee having deducted tax at source from the payment made to ICC, the AO proposed disallowance u/s 40(a)(i) of the Act in the draft order. The assessee challenged such proposed disallowance before the DRP, who vide its direction dated 16.12.2015, held that: `the benefits availed by the assessee from ICC did not fall within the ambit of Royalty or FTS' and accordingly no disallowance was called for. The Revenue is aggrieved against this direction.

19. We have heard the rival submissions and perused the relevant material on record. The AO proposed disallowance of the amount u/s 40(a)(i) in the draft order, as in his opinion, the assessee made payment of royalty or alternatively, fees for technical services to ICC without deduction of tax at source, on which tax withholding was warranted.

Section 40(a)(i) of the Act provides that notwithstanding anything to the contrary in sections 30 to 38, no deduction shall be allowed in computing the income chargeable under the head "Profits and gains of business or profession" of royalty, fees for technical services or other

sum chargeable under this Act, which is payable outside India; or in India to a non-resident, not being a company or to a foreign company, on which tax is deductible at source under Chapter XVII-B and such tax has not been deducted or, after deduction, has not been paid on or before the due date specified in sub-section (1) of section 139. Explanation to this provision stipulates that : `For the purposes of this sub-Clause, (A) "royalty" shall have the same meaning as in Explanation 2 to Clause (vi) of sub-section (1) of section 9; (B) "fees for technical services" shall have the same meaning as in Explanation 2 to Clause (vii) of sub-section (1) of section 9'. It transpires from the above provision, to the extent it is relevant for our purpose, that for attracting disallowance u/s 40(a)(i), it is *sine qua non* that the payment by the assessee must be in the nature of royalty or fees for technical services taxable as such in the hands of the non-resident and such payment should have been made without deduction of tax at source. Both the above conditions should be cumulatively satisfied for attracting the mischief of this provision. Admittedly, the assessee did not deduct any tax at source. Now, let us

examine if the amount is chargeable to tax in the hands of ICC as 'Royalty' or 'Fees for technical services'.

20. ICC is a resident of British Virgin Islands and hence a non-resident under the Act. Section 5(2) contains the scope of total income of a non-resident. It provides that the total income of any previous year of a person who is a non-resident includes, *inter alia*, all income which is deemed to accrue or arise to him in India during such year. Section 9 defines 'Income deemed to accrue or arise in India'. Sub-section (1) of this section lists certain items of incomes which shall be deemed to accrue or arise in India. Clause (vi) states that income by way of royalty payable, *inter alia*, by a person who is a resident, except where the royalty is payable in respect of any right, property or information used or services utilised for the purposes of a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India, shall be deemed to accrue or arise in India. Similarly, Clause (vii) provides that income by way of fees for technical services payable, *inter alia*, by a person who is a resident, except where the fees are payable in respect of services utilised

in a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India, shall be deemed to accrue or arise in India. On a reading of section 5 in juxtaposition to section 9, it is unequivocal that income from royalty and fees for technical services is chargeable to tax, subject to other conditions, in hands of a non-resident when it is paid, *inter alia*, by a resident. This manifests that if the payment made by the assessee in India to a non-resident ICC gets covered within the scope of 'royalty' or 'fees for technical services', it will be chargeable to tax in India under the Act, thereby fixing liability on the assessee to deduct tax at source. Failure of the assessee to deduct tax at source from such payment, in that eventuality, would entail disallowance u/s 40(1)(ia) of the Act to mar the claim of such deduction in its hands.

21. Now we will examine if the payment made by the assessee to ICC is in the nature of royalty as per 9(1)(vi) or fees for technical services under section (9)(vii) of the Act. In order to determine the correct nature of payment it is relevant to consider the relevant clauses of the Official Partner Agreement dated 11.09.2007 entered into between the assessee

and ICC Development (International) Limited (hereinafter referred to as 'the Agreement'). A copy of such Agreement has been placed on record. Preamble of the Agreement, styled as 'Background', states that ICC is the Official International Governing Body for Cricket and the assessee (referred to as 'the Company' in the Agreement) wishes to become an Official Partner for the ICC events. Clause C of the Background, which is relevant for our purpose, reads as under :-

“IDI is the commercial arm of the ICC and has agreed to grant, and Company has agreed to acquire, certain *promotional, advertising, marketing and other commercial rights* on a world-wide basis in connection with the ICC events on the terms of this Agreement.”

22. On going through the Clause C, it becomes apparent that IDI (Commercial Arm of ICC) agreed to grant to the assessee certain 'promotional, advertising, marketing and other commercial rights' on a worldwide basis in connection with the ICC events. Thus it is apparent that the assessee acquired broadly two types of rights, viz., 'promotional and advertising' and 'marketing' rights. Certain definitions have been given in the Agreement. The term 'Designations' has been defined in Clause 1 of the Agreement to mean the designations referred to in

paragraph 1 of Appendix 3, which, in turn, explains it to mean 'Official Partner of ICC', 'Official Partner of (Major event/Development Event) and 'ICC Official Cricket Equipment Supplier'. The term 'Marks' has been defined to : 'mean the ICC Corporate Logo, the Competition Logo and the Designations'. In all, there are two types of payments, which the assessee is supposed to make under the Agreement, namely, 'Rights fee' and 'Royalty', which have been defined in the Agreement as under:-

'Rights Fee' means the fee payable by Company to IDI in accordance with Clause 7 and Appendix 2

'Royalty' means the fee payable by Company to IDI for each Licensed Product sold, as specified in Appendix 4.

23. Thus what the assessee pays for the sale of licensed products is 'Royalty' and what it pays for the grant of Rights is 'Rights Fee'. The term 'Grant of rights' has been elaborated under Clause 2 of the Agreement, which reads as under:-

“2- GRANT OF RIGHTS

IDI grants to Company the promotional, advertising, marketing and other rights and opportunities as specified in this Agreement with respect to products for use in connection with the Brands in the Territory for the Term including:

(a) Appendix 3 with respect to ICC Events and specified ICC Functions; and

(b) Appendix 4 with respect to Apparel Rights.

The rights granted by IDI to Company under this Agreement:

(a) are exclusive in that IDI has not granted, and will not grant, substantially similar rights in relation to an ICC Event and the Product Category. Otherwise, all rights granted under this Agreement are non-exclusive; and

(b) represent the entire extent of the rights granted to it and are limited to Products. All rights and opportunities not expressly granted to Company under this Agreement are reserved by IDI.”

24. On going through the above Clause, it emerges that the assessee was granted : `promotional, advertising, marketing and other rights and opportunities’ with respect to the Products including Appendix 3 w.r.t. ICC events and specified ICC functions; and Appendix 4 w.r.t. Apparel Rights.

25. Clause 4, which is relevant for our purpose, reads as under:-

“4. APPROVALS AND USE OF MARKS

Company acknowledges that each and every use of a Mark requires IDI's prior written approval.

Company must submit to IDI for its prior written approval using IDI's approval system, complete and accurate representations of the final form samples (with an English translation where applicable) of any Advertising Materials, and any other proposed use of the Marks on or in connection

with Products, their packaging or on premium in each case at least twenty (20) business days prior to production. If requested by IDI, Company must also submit actual samples of such materials for approval. IDI will use its best efforts to respond within ten (10) business days of receipt of such representations or samples. Company must not release any such proposed use of the Marks or Advertising Materials without the express approval of IDI.

If Company distributes a Product or packaging bearing the Marks or a Premium or issues Advertising Material or otherwise uses the Marks without IDI's prior written approval, then without prejudice to any other remedy of IDI, Company must remove from circulation any such materials and discontinue any further use immediately on receipt of written notice from IDI and provide evidence to the satisfaction of IDI that it has done so.

Company must take all necessary actions to ensure that all Products and Premiums it promotes or advertises in conjunction with the Marks are of the highest quality standards and meets any requirements of Applicable Law.

Subject only to Clause 4.6 below, Company must not have a trade name, logo or other mark, denoting or identifying a third party person affixed to or as a part of Products, Product packaging that bears the Marks or on Premiums. If Applicable Laws require the inclusion of the identification of a third party on such Product, Premium or packaging, the size of such identification must not exceed that which is strictly necessary to comply with such Applicable Laws.

Company may undertake ICC Event-related promotions using the rights granted to it under this Agreement with the following third parties and subject to the Third Party guidelines (as specified in Appendix 6:

- (a) together with other Commercial Affiliates,
- (b) with Print Media;
- (c) with Retailers;

- (d) in combination with other similar sponsorship rights granted to it either by IDI or other sports rights-holders in connection with their competitions or events, and
- (e) using similar rights granted to it by individual players or ICC Members.”

26. The above Clause divulges that the assessee is entitled to use ‘Marks’ but with the prior written approval of IDI on advertising material or its product etc. Further, the assessee is also entitled to use the ‘rights granted to it’ in print media and other commercial affiliates etc.

27. Clause 7 of the Agreement defines ‘Rights fees and VIK’ as under:-

“7- RIGHTS FEE AND VIK

Company must:

- (a) pay to IDI the Rights Fees; and
- (b) provide to IDI the VIK,

in the manner and amount as specified in Appendix 2.

Any and all payments and contributions to be made under this Agreement by Company to IDI must be made in freely transferable US dollars free and clear of, and without deduction or liability for, any and all taxes (including VAT), set-offs, deductions and/or withholdings of whatsoever nature which may be applicable in respect of such payment.

All amounts payable hereunder that are not paid on the due date shall bear interest at the rate of three percent (3%) above the LIBOR (twelve months) rate for US\$, as published by the Zurich periodical "Finanz unter Wirtschaft prorated on a daily basis. The payment of such interest shall be in addition to and not in substitution of any and all other remedies available to IDI in respect of nonpayment.

Company must provide IDI with quarterly written reports during each year of the Term, setting out: (i) the aggregate value of VIK that Company has supplied; (ii) the corresponding retail value of that VIK supplied; (iii) the aggregate value of VIK that remains available; and (iv) such other details with respect to the value, supply and distribution of VIK as IDI requests.

Time is of the essence as regards any payment of Rights Fee and the provision of VIK.”

28. The assessee under the above Clause is obliged to pay to IDI the ‘Rights Fee’ and VIK in the manner specified as per Appendix 2.

Relevant part of this Appendix is as under:-

“APPENDIX 2
RIGHTS FEE AND VIK”

- 1 The Rights Fee is US \$4 million.
- 2 The Rights Fee must be paid by telex transfer into the following bank account or another bank account as instructed by IDI in writing:

Barclays Bank PLC

Isle of Man International Banking Centre Isle of Man

SwiftBIC : BARCGB22

I BAN : GB21 BARC 2026 7453 2783 11

Sort Code- 20-26-74

Account Number: 53278311

Account Name ICC Development (International) Ltd

- 3 The Rights Fee is due and payable in accordance with the payment schedule set out below. The consideration attributable to each ICC Event must be paid in four equal installments each due respectively no later than 120, 90, 60 and 30 days prior to the first Match of each ICC Event.

The amount for the first ICC Event is to be paid within 7 days of the signing of this Agreement.

ICC Events	Rights Fee (US Dollars)
World Twenty20 (September 2007, South Africa)	50,000
By January 2008 100,000 USD for World Twenty20 2007 & 150,000 USD by September 2008 Champion Trophy Pakistan	250,000
By January 2009 100,000 USD & 250,000 USD by World Twenty20 (May/ June 2009, England)	350,000
By January 2010 100,000 USD & 250,000 USD by Champions Trophy (April/May 2010, West Indies)	350,000
ICC Cricket World Cup (February/March 2011, Asia-India, Pakistan, Bangladesh, Sri Lanka)	1,000,000
By January 2012 100,000 USD & 150,000 USD by Champions Trophy/ Twenty20 (September 2012, Sri Lanka)	250,000
By January 2013 100,000 USD & 150,000 USD by Champions Trophy / Twenty20 (May/ June 2013, TBC)	250,000
By January 2014 100,000 USD & 150,000 USD by Champions Trophy / Twenty20 (April 2014,	

Bangladesh)	
ICC Cricket World Cup (February / March 2015, Australia / New Zealand	1,250,000
Total	4,000,000

4. Company must supply VIK as follows:-
- to IDI free of charge products together with the services of sufficient qualified personnel for the effective operation and satisfactory functioning of such product supply in accordance with the requirements specified in Appendix 4.
 - to an aggregate value over the Term of US\$3 million. The value of any item of VIK supplied must based on the lowest wholesale price at which company sells an equivalent product to any third party (including, where applicable, government purchasing agencies) and excluding any VAT or other taxes and
 - Product must be delivered free of charge to IDI's head office or the location to be specified by IDI.
5. Products must be available for purchase by IDI from time to time in the requested quantities at wholesale price.”

29. The above Appendix mandated upon the assessee to pay the `Rights fee' of US \$ 4 million in installments over the years as stipulated. Pursuant to this Appendix, the assessee was to pay during the year a sum of 10 lakh US\$ as `Rights fee' on account of ICC Cricket World Cup (Feb/ March 2011). The assessee paid this amount, which when converted into Indian currency, came to Rs.4,56,48,787/-. It is this amount which has been disallowed by the Assessing Officer u/s

40(a)(i) of the Act. VIK is a payment in kind, being the obligation of the assessee to supply to IDI free of cost Products together with the services to be used in conducting ICC events.

30. Appendix 3 to the Agreement contains 'Rights package', which is very crucial for the instant controversy. It reads as under:-

“APPENDIX 3
RIGHTS PACKAGE”

The rights are subject to Company meeting all required timeframes and obtaining IDI's prior written approval to each proposed use of a Mark.

1 DESIGNATIONS

1.1 The right to use the Designations listed below:

*Official Partner of ICC

*Official Partner of [Major Event/Development Event]

*ICC Official Cricket Equipment Supplier

1.2 Other variations or forms or combinations of designations (including translations of the same into other languages) are subject to IDI's prior written approval.

2. MARKS AND EVENT IDENTIFICATION

2.1 The right to use the Marks in connection with the manufacture, distribution, advertising, promotion and sale of products to indicate a sponsorship relationship with ICC Events and to use Marks on Licensed Product.

2.2 The right for Company logo to be placed at the base of cricket stumps used in an ICC Event subject to Company supplying those stumps.

3 TICKETS

- 3.1 The right to receive fifty (50) complimentary tickets for each Match of a Major Event and twenty (20) complimentary tickets for each Match of a Development Event.
- 3.2 The right to purchase on a preferential basis and in accordance with the sales method, procedures and timeframes specified by IDI:
- (a) fifty (50) tickets at face value to each Match (other than the final Match) of a Major Event;
 - (b) one hundred (100) tickets at face value to the final Match of each Major Event. Company must give written notice to IDI of the final order for the purchase of tickets on or before six (6) months before the final Match of the Major Event concerned. If Company does not give notice by this date, Company's entitlement under this paragraph is irrevocably and unconditionally waived in respect of that Major Event; and
 - (c) a reasonable number of tickets to a Development Event.
- 3.3 All tickets and passes must be used in accordance with the directions issued by IDI and their terms and conditions of use notified by IDI to Company. Company acknowledges and agrees that:
- a) tickets and passes may be used by Company only for hospitality and/or promotional purposes to promote Products in accordance with this Agreement and may not be sold/resold or offered for sale, and
 - (b) ownership of all tickets and passes remains with IDI and they cannot be transferred or dealt with except as specifically permitted by IDI
- 3.4 Company agrees that if required by reason of Applicable Law and/or the safety and security requirements related to an ICC Event, it will provide IDI with the names and such evidence of identification of the users of all its tickets and passes as is required.

4 BOARDS AND SIGNAGE

- 4.1 The right to have 7.5% of all on Match ground perimeter boards for each Match of a Major Event and each televised Match of a development Event, the exact position of which shall be based on an equitable distribution with other Official Partners in accordance with a formula to be developed by IDI.

- 4.2 The right to prescribed event or directional signage in equal proportion to the other Official Partners, including scoreboard, welcome towers, directional signage: net session backdrops and flag courts.
- 4.3 Company must submit to IDI for its approval the proposed text, design and layout (in the form of an original piece of finished and properly proportioned artwork containing exact colour specifications) of the advertising on the boards and signage, at least one hundred and twenty (120) days prior to the beginning of each ICC Event. IDI will advise Company of its approval or disapproval of such advertising in writing within 10 business days of receipt. In reviewing any advertising, IDI will take into consideration the technical television regulations applicable to each Major Event, the proposed colour combination and its relationship with adjacent boards and signage, recognising that colour is an integral part of Company's trade dress. If not approved, Company must re-submit to IDI.
- 4.4 IDI will pay the costs of the original production of each board and signage with the approved text design and layout. IDI is responsible for, and will pay the cost of, the installation, maintenance and removal of the boards and signage. IDI will use its best efforts to accommodate any reasonable request made by Company for any alteration to an approved board or signage provided the request is made in a timely manner and all costs in connection with such alterations are borne by Company.
- 4.5 Boards and signage belong at all times to IDI

5. ACCREDITATION AND PARKING PASSES

- 5.1 The right to receive free of charge an appropriate number of accreditations to permit Company to carry out its marketing programs for ICC Events and to exercise its rights under this Agreement
- 5.2 The right to receive free of charge, and subject to space and availability, an appropriate number of parking passes for Company and Company's VIP guests (as determined by IDI at its sole discretion and on an equitable basis with other Official Partners).
- 5.3 Company must ensure that all accreditations and parking passes are used in accordance with IDI Rules and IDI Guidelines

6. DEMONSTRATION. SALE AND DISPLAY OF PRODUCTS

6.1 In accordance with the requirements of the Host, and subject to agreement with the concessionaires at any Stadium, Company has the right to display and sell Licensed Product at a Stadium during a Major Event through the existing concessionaires

6.2 These rights are subject to security restrictions, space availability and compliance with Applicable Laws, and must always be exercised solely in accordance with IDI'S and/or the Host's requirements and guidelines, including corporate and/or brand identification guidelines applicable at the Stadiums. The erection and operation at the Stadiums of any display or demonstration booths or other facilities including related staffing, security and storage shall be at Company's cost. All materials and equipment necessary for such activities (including to ISDN lines, telephone lines and utilities connections) will be Company's responsibility at its expense. Company will maintain adequate liability insurance vis-a-vis such activities to cover any claim against IDI resulting from or arising out of such activities, whether or not such claim arises during the Term. Company must inform IDI eight (8) months prior to commencement of each Major Event of the extent to which Company wants to exercise such rights.

7. BACKDROPS

The right to identification on backdrops for post-match press conferences and other official press conferences concerning a Major event organised and controlled by IDI. The level of identification of Company on such backdrops will be commensurate with the level of Company's sponsorship rights and will be shared on an equal basis with the other Official Partners. Company must furnish IDI with the finished and properly proportioned artwork for such identifications within the time period notified to Company by IDI. The design of the backdrop will be decided by IDI.

8. IN STADIA VIDEOSCREENS

For Major Events, the right to have Company identification transmitted on the videoscreens of each Stadium (where such

equipment exists), during the build-up to the Match and at lunch and tea intervals (or the equivalent breaks in day/night Matches) for periods to be determined by IDI.

In addition, Company is entitled (if technically possible and subject to Company providing to IDI, at Company's expense, the appropriate videotape in the requested format), to show a thirty (30) second commercial during the pre-Match programming (if any) and during lunch and tea intervals (or the equivalent break in day/night Matches) of any Match. Company must provide such identification and/or advertising and commercials to IDI royalty-free and fully cleared of any third party rights necessary for such use.

9. HOSPITALITY

- 9.1 For a Major Event, IDI will provide ten (10) corporate hospitality places at each Match of free of charge (all alcoholic beverages, food and other incidental expenses are at Company's expense).
- 9.2 IDI will provide Company with a reasonable opportunity to purchase an additional ten (10) hospitality packages from the Host and/or official ICC Event hospitality provider prior to general public release.
- 9.3 Company must inform IDI of its initial and final plans for hospitality (including number of guests and desired hospitality concept for its hospitality on Stadium) for each Major Event after confirmation of Company's purchase ticket and hospitality allocation.
- 9.4 Where facilities exist, IDI will use its best efforts to procure four (4) complimentary VIP invitations for each Match of a Development Event for use by Company provided it gives IDI with sufficient notice.

10. PUBLICATIONS

- 10.1 The right to have, free of charge, one (1) half-page colour advertisement in the Official Program of each ICC Event (subject to its production for a Development Event). IDI will give Company sixty (60) days notice of the closing date of print orders in respect of such Official Program. Company must furnish to IDI the

finished and "in proportion" artwork for such advertising within such sixty (60) day period.

- 10.2 IDI shall notify Company of the availability of Official Programs and Company must inform IDI of the number of Official Programs it would like to purchase at cost on or before the date which is thirty (30) days after such notification.

11. MATCH FOOTAGE AND ARCHIVE

The non-exclusive right to use for internal use and promotional and advertising purposes, without payment of any fee to IDI (but subject to technical, duplication, shipping and handling costs);

- (a) up to thirty (30) minutes of past video (still and moving) of ICC events which took place prior to commencement of the term and in the ownership of IDI; and
- (b) up to two (2) minutes of footage from a Match not before than 72 hours after the end of that match

provided that no more than twenty (20) seconds of such footage is included in any television advertisement and subject to IDI's prior written approval of each proposed use. This right includes use for the production of television advertisements but does not include use for Premiums or any other audio-visual programming intended for transmission.

12. RESEARCH REPORTS

- 12.1 The right (subject to availability) to obtain copies of research reports where provided to IDI by Broadcasters with respect to Major Events showing (i) the countries that have taken the television signal, (ii) figures on the television audiences, (iii) an analysis of the time exposure on television of the boards and, if available, (iv) the stations on which broadcasts occur and (v) the time of such broadcasts. Company will receive copies of the preliminary results of such research reports where provided to IDI by Broadcasters within three (3) months of the final Match of each Major Event (to the extent IDI has, using its best endeavours, been able to obtain the same from Broadcasters at such time) and copies of the final research reports where provided to IDI by Broadcasters

six (6) months from the date of the final Match of each Major Event.

- 12.2 The right to obtain copies of research reports provided to IDI showing the page impressions for the Website and other data gathered by IDI regarding traffic to the Website.
- 12.3 Company and IDI will discuss together with the other Official Partners the development of other research tools to further evaluate the Major Events. Any additional services and research are subject to prior agreement in writing with IDI as to level of services and fee structure.

13. PREMIUMS

- 13.1 The right to use ICC event-related Premiums provided such use is only for the exclusive purpose of the advertisement and promotion of Products and only in accordance with this paragraph.
- 13.2 Before having manufactured a Premium, Company must submit its request, including relevant details (such as proposed product or merchandise, nature, quantity, distribution channels and territories), preliminary artwork and a pre-production sample to IDI for its prior written approval in the manner and form as specified by IDI.
- 13.3 If an Approved Supplier has been granted the rights in relation to the proposed product or merchandise, then Company must use that Approved Supplier. Otherwise, Company may source such proposed product or merchandise from a reputable third party.
- 13.4 Three (3) samples of each Premium must be submitted to IDI for archive purposes

14 CRICKET ZONES AND EVENT PROMOTIONS

- 14.1 IDI and/or Host may establish a separate area for fan entertainment during a Major Event (Cricket Zone). The right, at Company's expense, to operate branded interactive fan activities at any Cricket Zone in accordance with this paragraph.
- 14.2 IDI must notify Company at least nine (9) months prior to an ICC Cricket World Cup and six (6) months prior to each other Major Event of its intentions regarding the establishment of a Cricket

Zone. Company must meet with IDI not more than three (3) months prior to such events and outline to IDI the precise nature of its proposed activities and provide fully costed budgets, for approval by IDI in consultation with Company. Company activities must be principally directed towards fan entertainment or participation and not solely consist of Product retailing, promotion or branding.

- 14.3 Company is responsible for all necessary insurances, personnel, equipment and security to undertake its activities at the Cricket Zones.
- 14.4 The right to participate, at Company's expense but for no additional consideration, in any ICC Cricket World Cup promotional tour, trophy tour or road show, IDI will determine whether and where such tours are held at its sole discretion.

15 INTERNET PROMOTION

Company has the right to have its sponsorship of ICC Events promoted on the ICC Website and each ICC Event specific Website in the following manner;

(a) Sponsor Recognition Strip

The right to have Company's logo displayed on the homepage of the Website as part of the Sponsor Recognition Strip, in an equal manner to all Official Partners. IDI retains full editorial and navigation control over the Website provided that Company retains control over the look of its logo. Company may hyperlink to its own website.

(b) Microsite

The right of access to an xml feed containing editorial text taken from the Website for the purpose of creating a promotional microsite, which may utilise Company's name in its URL (Microsite) The purpose of the Microsite is to promote Company and its Products and must not compete with the Website. There must be a link between Microsite, Website, and Company's main website. IDI and Company must co-operate regarding the development, launch and operation of the Microsite. Company may not establish any links between any webpages on the Microsite and other websites without the prior written approval of IDI.

The following additional terms apply in relation to the Microsite:

- (i) the Microsite and any promotions must be approved by IDI prior to their launch,
- (ii) it must not include any audio, visual and/or audio/visual coverage of Matches:
- (iii) Company is responsible for all content (except content provided by IDI), including the obtaining of all necessary third party releases and permissions and ensuring the use of content does not infringe the intellectual Property Rights or privacy or other rights of any person;
- (iv) each webpage of such Microsite that contains ICC Event-related content (including photographs) provided by or on behalf of IDI must feature the statement "content powered by icc-cricket.com" (or such other similar statement as may be advised by IDI from time to time) in a clear and visible position together with the copyright notice to be provided by IDI;
- (vi) the Microsite may only display advertising of Products to the exclusion of any other products, services or entity unless the same is shown in accordance with the terms of the Third Party Guidelines;
- (vii) it must not contain any material which may reasonably be considered to be obscene, blasphemous or defamatory or which may reflect unfavourably on IDI, an ICC Event, or the sport of cricket; and
- (viii) Company is responsible for any non-compliance of the Microsite with any Applicable Laws.

(c) Advertising Opportunity

IDI (or its nominee) may exploit commercial opportunities on the Website in accordance with the following terms:

- (i) Company must be offered a first option to purchase the available commercial opportunities on the best available commercial terms. Such option must provide for an exclusive negotiation period of 30 days (except in the case of offers made in the period commencing 30 days prior to an ICC Event in which case the period shall be reduced to 7 days or if shorter the remaining time available until the relevant ICC Event), and

- (ii) no sponsorship or advertising opportunity relating to the Website may be offered to any person at a price which is less than that offered to Company without first re-offering to Company.

16. ICC AMBASSADORS PROGRAM

IDI will develop, at no additional cost to Company except as set out in paragraph (c) below, the ICC Ambassador Program being a group of event or former cricketers contracted by IDI to provide certain promotional services for IDI and sponsors. IDI will consult with Company as to the precise nature of the ICC Ambassador Program, but Company agrees that IDI will have final say over the appointment and budget for the ICC Ambassador Program. It is intended that such program will comprise the following rights for IDI and Commercial Affiliates:

- (a) the right to call on the services of at least one (1) current or former professional cricketer(s) for the purpose ICC Events and/or the promotion of Products (but not for use in Advertising Materials) for the Brand on not more than two (2) occasions in any year of the Term at no additional rights fee;
- (b) usage and promotional rights include limited rights to use the name, nickname, logo and appearance of the individuals concerned on terms to be notified by IDI and in accordance with IDI Guidelines, subject only to moral, religious and similar reasonable restrictions required by the individuals concerned. The rights may be non-exclusive and IDI may not be able to prevent such individuals from providing the same or similar services or rights to a Competitor; and
- (c) Where Company adheres to the IDI Guidelines it is not required to pay any fee for the usage rights granted by IDI, but Company will be liable for and pay any out of pocket expenses, accommodation and travel costs required in relation to any appearances.

17. ICC will help Reebok in facilitating the sale of Replica Merchandise to other ICC partners.

18. ADDITIONAL RIGHTS AND ICC FUNCTIONS

Company has the following additional rights:

- (a) the right, following official opening of the Dubai Sports City and the Global Cricket Academy, subject to availability and at least six months prior notice to IDI, to one (1) corporate events/conferences at IDI facilities at the Global Cricket Academy at Company's cost provided that no such conference/event may take place during or immediately prior to any ICC Event;
- (b) the right (and obligation) to attend an annual sponsor workshop (of which there may be two (2) in a year in which ICC Cricket World Cup takes place) at a location to be determined by IDI in the Host Country of an ICC Event or in Dubai. All parties attending will bear their own travel and accommodation expenses. The costs of the venue and refreshments for the workshop will be borne by IDI;
- (c) the right to use the trophy for each ICC Event for internal and external Company events provided that such use (i) is in compliance with the procedures established by IDI (including with respect to insurance and advance booking) and (ii) does not constitute and is not presented as a trophy tour; and
- (d) IDI will ensure that Company receives six (6) invitations per Major Event to any ICC official event function organised by or under the control of IDI),

19. ICC AWARDS

The ICC Awards are an event staged in each year of the Term at a place and time decided by IDI around the Major Event staged in such year and in the host country of each such event. Company has the following rights in respect of each ICC Awards:

- (a) the right to six (6) tickets free of charge in each year of the Term; and
- (b) an acknowledgment in any official program of the ICC Awards and on the board at the entrance to the event, in each case in a manner to be determined by IDI on an equitable

basis with other Official Partners (other than a naming rights sponsor).

20. COMMERCIAL AIRTIME

IDI will provide Company free of charge during each Match televised live and each day during the 30 day period prior to the start of each ICC event one 30 second promotional spot for promotion of the ICC official licensing programme, including licensed product. If requested by Company, IDI will consult with its broadcaster in relation to promotional spots being accumulated on days, rather than one each day.

21. ICC WORLD TWENTY 20 SOUTH AFRICA 2007

Company acknowledges that due to the imminent start of the ICC World Twenty20 South Africa some of the event rights specified in this Appendix 3 are not capable of delivery by IDI. IDI will use its best efforts to accommodate Company's board, stump branding, backdrop branding, accreditation, ticket and internet rights and will otherwise work closely with Company to maximise its exposure at the event. Company agrees that if certain rights or benefits are not provided, there will be no reduction in the Rights Fee.

31. We have noted above that the assessee was to pay 'Rights Fee' and 'Royalty' under the Agreement. Appendix 2 read with Appendix 3 divulges the obligation of the assessee to pay 'Rights fees' as per Appendix 2 for the 'Rights' bestowed upon it under Appendix 3. In addition, the assessee was also required to pay 'Royalty' for each Licensed product sold as specified in Appendix 4, whose relevant part reads as under:-

“ APPENDIX 4
APPAREL RIGHTS AND LICENSED PRODUCT

1. APPAREL RIGHTS

- 1.1 IDI grants Company the right to provide Product to ICC, including for development staff, office staff and staff working at ICC Events including the Umpires and Referees as specified in this Appendix 4.
- 1.2 IDI grants Company the right for the Company logo to appear on the Umpires and Referees;
 - (a) shirts for all ICC Events and FTP matches. The size of the logo is 6 square inches and the placement of logo will be determined by IDI;
 - (b) trousers and hats for all ICC Events and FTP matches at a size of 2 square inches each, and
 - (c) if provided by Company, off-field clothing, including travel to and from all ICC Events and FTP matches.
- 1.3 Company must supply Product to IDI in sufficient quantity and range for IDI to meet the requirements of Umpires and Referees and staff for each ICC Event in a manner and timeframe as advised by IDI.
- 1.4 For the avoidance of doubt, the Product supplied under this paragraph 1 forms part of the VIK.

2. LICENSED PRODUCT

- 2.1 IDI appoints Company as its exclusive licensee of Cricket Equipment on the payment of royalty by Company to IDI of 6% or wholesale price of cricket bats and 5% of wholesale price of Cricket Equipment (other than cricket bats).
- 2.2 For the avoidance of doubt, IDI may appoint licensees whose products are not designed for the playing of cricket matches, including miniature bats, key rings, soft bats and balls and other toys and playthings. Such product will be unbranded.
- 2.3 IDI appoints Company as its non-exclusive licensee of Sports Apparel on the payment of a royalty by Company to ID; of 12.5% of wholesale price.

- 2.4 Before starting manufacture of any Licensed Product, Company must submit its request to IDI for its prior written approval in the manner and form as specified by IDI, including relevant details (such as proposed product, distribution channels and territories), preliminary artwork and a pre-production sample.
- 2.5 Company must produce a range of Licensed Product for each ICC Event commensurate with status of that ICC Event. Company must consult with IDI on design, price and retail strategy.
- 2.6 Company must supply cricket stumps and match balls in sufficient numbers and quality for IDI to meet the cricket requirements for each ICC Event in a manner and timeframe as advised by IDI. For the avoidance of doubt, this equipment must meet the cricket and quality requirements of IDI and this supply does not form part of the VIK.
- 2.7 Company must work closely with IDI and any licensing representative to meet IDI's official merchandise program strategies and objectives, including to ensure a visible presence of Licensed Product in key territories and through key distribution channels.
- 2.8 Company must sell Licensed Product to IDI on request at wholesale price.

3. RECORDS AND REPORTING

- 3.1 Company must keep adequate records in sufficient detail to enable its compliance with this Agreement to be verified (Records)
- 3.2 During this Agreement and for 6 months after termination of this Agreement. IDI or its authorised representatives may enter Company's premises during regular business hours by giving notice to Company (by phone, mail or facsimile), to do any of the following.
 - (a) examine and copy Records;
 - (b) conduct an audit; and
 - (c) ascertain Licensee's compliance with its obligations under this Agreement.
- 3.3 Any audit will be at IDI's expense, except that if an audit establishes a deficiency of more than 3% between the amount found to be due to

IDI and the amount actually paid and reported, the cost of the audit shall be paid by Licensee together with the amount of the deficiency plus interest as specified in this Agreement.

- 3.4 Within 15 days of the end of each calendar quarter (or part thereof), Company will submit to IDI:
- (a) status of any Licensed Product development, distribution and sales;
 - (b) a full and accurate Royalty Statement showing all information relating to the Licensed Products sold or otherwise distributed during the preceding quarter (or part thereof) in the format as prescribed by IDI;
 - (c) forecast for the following quarter of expected Royalties; and
 - (d) any other information or developments concerning the licensing program as reasonably specified by IDI.

32. The Id. AR contended that the assessee paid only 'Rights fee' amounting to Rs.4.56 crore, which was disallowed by the AO u/s 40(a)(i) and no amount on account of 'Royalty' was paid during the year. This contention has not been controverted on behalf of the Revenue. And further, there is no averment in the assessment order about the payment of any 'Royalty' by the assessee on sale of the licensed products.

33. Thus we are left with to decide if the payment made by the assessee in the nature of 'Rights fee' can be categorized as 'Royalty' u/s

9(1)(vi) of the Act or 'Fees for technical services' u/s 9(1)(vii) of the Act.

34. Albeit, initially the ld. DR reiterated the stand of the AO that the payment of 'Rights fee' is both 'Royalty' as well as 'Fees for technical services', but during the course of proceedings, he candidly accepted that this payment is in the nature of 'Royalty' alone and not 'Fees for technical services'. In our considered opinion, the ld DR was fully justified in accepting that the payment of 'Rights fee' by the assessee can not be treated as 'Fees for technical services' because of the definition of 'fees for technical services' given in explanation 2 to Section 9(1)(vi) reading as under :-

Explanation 2.—For the purposes of this Clause, "fees for technical services" 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".

35. It is clear from the above definition that 'fees for technical services' is a consideration for the rendering of any managerial, technical or

consultancy services. We have gone through the relevant Clauses of the Agreement from which it is palpable that ICC has charged Rs. 4.56 crore not for rendering any managerial, technical or consultancy services, but as 'Rights fee' for assigning certain rights as per Appendix 3. In that view of the matter, we hold that the Id DR was fair enough in accepting that the payment by the assessee to ICC cannot be considered as 'fees for technical services'.

36. Now we espouse the examination of above payment as 'Royalty' within the ambit of section 9(1)(vi). Explanation 2 to this provision defines 'Royalty' as under :-

“Explanation 2.—For the purposes of this Clause, "royalty" means consideration (including any lump sum consideration but excluding any consideration which would be the income of the recipient chargeable under the head "Capital gains") for—

- (i) 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 ;
- (ii) the imparting of any information concerning the working of, or the use of, a patent, invention, model, design, secret formula or process or trade mark or similar property ;
- (iii) the use of any patent, invention, model, design, secret formula or process or trade mark or similar property ;

(iv) the imparting of any information concerning technical, industrial, commercial or scientific knowledge, experience or skill;

(iva) the use or right to use any industrial, commercial or scientific equipment but not including the amounts referred to in section 44BB;

(v) the transfer of all or any rights (including the granting of a licence) in respect of any copyright, literary, artistic or scientific work including films or video tapes for use in connection with television or tapes for use in connection with radio broadcasting, but not including consideration for the sale, distribution or exhibition of cinematographic films ; or

(vi) the rendering of any services in connection with the activities referred to in sub-Clauses (i) to (iv), (iva) and (v).”

37. The Id. DR contended that the payment made by the assessee is covered within the purview of Clauses (iii), (iv) and (vi) of the Explanation 2 to Section 9(1)(vi). Clause (iv) defines royalty as consideration for: ‘imparting of any information concerning technical, industrial, commercial or scientific knowledge, experience or skill.’ From the relevant terms of the Appendix 3 reproduced above, it is manifest that ICC has not imparted any information concerning technical, industrial, commercial or scientific knowledge etc to the assessee. As such, the application of Clause (iv) is ousted. Clause (iii) refers to any payment as royalty which is paid for : ‘the use of any

patent, invention, model, design, secret formula or process or trade mark or similar property.’ Clause (vi) to the Explanation encompasses the rendering of services in connection with the activities referred to in sub-clauses (i) to (iv), (iva) and (v), as the case may be. Since in the extant case, only Clause (iii) survives, naturally, services in connection with the use of any patent, invention, model, design, secret formula or process or trade mark or similar property will be covered within the ambit of this Clause. On a conjoint reading of Clause (iii) and (vi) of Explanation 2, it is vivid that any consideration will assume the character of ‘Royalty’ if it is paid for the use of any patent, invention, model, design etc or any services in connection with these.

38. Now we have to examine if the payment of Rs.4.56 crore made by the assessee as ‘Rights fee’ for availing the ‘Rights package’ as per Appendix 3 can be construed as ‘Royalty’ under Clause (iii) or (vi) of Explanation 2 to section 9(1)(vi) of the Act, being payment for use of any patent, invention, model, design or trademark or similar property

etc.; or services in connection with the use of patent, invention, design etc.

39. We have noticed above that 'Rights fee' is a package of rights conferred on the assessee as per Appendix 3 above. In all, there are 21 rights which have been awarded to the assessee. Having going through the nature of these rights enshrined in 21 Clauses of Appendix 3, we can safely classify them in two categories. First category comprises of rights of advertisement including the right to use Marks in connection with promotion and advertisement during ICC Events and the second category comprises of rights in connection with the manufacture and sale of licensed products. Clause 2 of Appendix 3 is unique from others as it is a combination of both such rights inasmuch as it allows the assessee 'to use the Marks in connection with the manufacture, distribution, advertising, promotion and sale of Products to indicate a sponsorship relations with ICC Events and to use Marks on Licensed Products.' In so far as a part of the right which relates to the use of Marks in connection with the 'manufacture and sale' of Products, it falls

in the above second category and the other part of the right which relates to the use of Marks in connection with the `advertising and promotion` falls in the above first category. Right under Clause 1 of the Appendix is the right to use Designations, which is meant only for advertisement and promotion and is not related to the manufacture and sale of the licensed products in the open market. Rights given under all the remaining Clauses, namely 3 to 21 of the Appendix fall in the first category of promotion and advertisement. These are `Tickets` as per Clause 3, `Boards and signage` as per Clause 4 under which the assessee acquired right to have 7.5% of any match ground perimeter boards, `Parking passes` as per Clause 5, `Demonstration, sale and display of products` as per Clause 6, `Backdrops` as per Clause 7, `Instadia video screens`, `Hospitality`, `Match footage and archive` etc. Clause 15 is a right of `Internet promotion`, by which the assessee acquired the right to have its sponsorship of ICC Events promoted on the ICC website. Then Clause 20 of the Appendix is a right of `Commercial airtime`, by which ICC provided the assessee one 30-second promotional spot for promotion during each match televised live. On a

meticulous reading of all the Clauses of the 'Rights package' as per Appendix 3, it becomes crystal clear that 20 out of 21 rights are exclusively for advertisement and promotion of the assessee in connection with ICC Events with or without the use of Designations and Marks etc. Only one part of right under Clause 2 of the Appendix is the right to use the Marks in connection with 'manufacture and sale' of licensed products. The other part of such right is again for advertisement and promotion. In so far as the rights of advertisement and promotion to the assessee without the use of Designations or Marks etc. are concerned, such as, Tickets (cl.3), Boards and Signage (cl.4), Demonstration, sale and display of products (cl.6), Instadia video screens (cl.8), these are purely in the nature of advertisement and hence payment for them cannot be considered as royalty in the hands of the recipient. As regards the rights of advertisement and promotion of the assessee with the use of Designation or Marks, such as, Internet promotion (cl.15), Designations (cl.1), part of Marks and Event Identification (cl.2), here again the use of Designations or Marks is limited to the use during the advertisement and promotion of the

assessee. These Marks etc. are used alongside the assessee's trademark or logo etc. for the purposes of advertisement and promotion and not for the sale of its licensed products. The Hon'ble Delhi High Court in *DIT Vs. Sheraton International Inc (2009) 313 ITR 267 (Delhi)* has held that the use of trademark, trade name etc. in rendering of advertisement, publicity and sales promotion services is neither in the nature of royalty nor fee for technical services. We will discuss this case in detail *infra*. Thus, it is overt that consideration for use of Designations and Marks of ICC by the assessee during its advertisement and promotion activities does not result into 'Royalty' income in the hands of the recipient. To sum up, payment for advertisement and publicity by the assessee during the ICC events, with or without the use of Marks or Identification etc., does not fall within the realm of 'Royalty' in the hands of recipient.

40. This leaves us with the second category of right exclusively from the 'Rights Package' which is for the use of Marks of ICC in connection with the 'manufacture and sale' of the licensed products, covered under one part of Clause 2 of the Appendix 3. This right is obviously not for

any advertisement and promotion by the assessee but for the use of Marks of ICC in manufacture and sale of licensed products. In the normal circumstances, any consideration paid for the use of trade mark or patent etc. on goods manufactured and sold, gets covered in the definition of `Royalty' as per Clause (iii) of Explanation 2 to section 9(1)(vi) of the Act.

41. We have noted above that `Rights fee' is a one composite payment for a package of 21 rights given to the assessee as per Appendix 3. There is no bifurcation of consideration relatable to such rights individually. We have also seen above that apart from the payment of `Rights fee', this Agreement also requires payment of `Royalty' by the assessee, which is a fee payable by the assessee to ICC for each Licensed product sold as specified in Appendix 4. In turn, Appendix 4 provides that the assessee shall be liable to pay royalty at the rate of 6% on the wholesale price of Cricket bats sold using its Marks, 5% on the wholesale price of other Cricket equipments sold using its Marks and 12.5% on wholesale price of non inclusive support apparel sold using its Marks. This shows

that there is a separate provision in the Agreement for payment of royalty on the manufacture and sale of licensed products using the Marks of ICC, which is obviously in the nature of 'Royalty' duly covered under Clause (iii) of Explanation 2 to section 9(1)(iii) of the Act. Evidently, there is some overlapping in the Agreement inasmuch as the consideration for the right to use Marks on the 'manufacture and sale of licensed products' has been covered under both under 'Royalty' and 'Rights fee'. What is pertinent to note is that consideration for use of Marks on the manufactured products meant for commercial sale is exclusively covered under the 'Royalty' clause of the Agreement and a minuscule part of the 'Rights fee' clause also embraces it. Absence of any separate consideration for the part of Clause 2 of Appendix 3 dealing with royalty and further due to non-provision of any mechanism in the Agreement for apportioning 'Rights fee' amongst 21 rights, it has to be held that no part of 'Rights fee' is attributable to the use of Marks for the manufacture and sale of licensed products, consideration for which is exclusively covered under 'Royalty' clause of the Agreement. Thus, taking a holistic view of the Agreement, it is held that payment

for use of Designations and Marks etc. is on two counts, that is, for advertisement and promotion, which is dealt with by 'Rights fee' clause and for manufacture and sale of products, which is dealt with by 'Royalty' clause. It is only the latter, which is in the nature of 'Royalty' income in the hands of ICC.

42. We again take up the judgment of the Hon'ble Delhi High in *Sheraton International Inc (supra)*. The appellant-assessee in that case was incorporated in the USA and non-resident company was engaged in providing services to hotels in various parts of the world. It also entered into an agreement with ITC for providing services to its hotels. The scope of services in the agreement was publicity, advertisement and sales. In consideration of these services, ITC agreed to pay fee @ 3% of the room sales to the assessee. The AO came to hold that the payment received by the assessee was in the nature of fees for technical services. He also held that the assessee has a business connection in India. Income of the assessee was estimated by treating such amount as 'fees for included services' chargeable to tax under Article 12(4)(b) of the DTAA

with the USA. The tribunal deleted the addition by holding that the main services rendered by the assessee to ITC were advertisement and publicity. Use of trademarks by ITC in other enumerated services was held to be incidental to the main services. Thus, the tribunal held that the amount was neither in the nature of 'Royalty' as per Explanation 2 to section 9(1)(vi) nor in the nature of 'Fees for technical services' as per Explanation 2 to section 9(1)(vii) but only 'Business income'. As the assessee did not have any PE in India, the business income was also held to be not chargeable to tax. The Hon'ble High Court approved the view taken by the Tribunal. We find that the facts of the case under consideration are on much stronger footing. In that case, the services to be rendered by Sheraton were not only publicity, advertisement but also concerning sales, for which one composite payment was made, which was held to be not in the nature of 'Royalty'. In the instant case, we are concerned only with payment of Rs.4.56 crore as 'Rights fee', which is exclusively for the use of Marks of ICC for the purposes of promotion and advertisement and not for manufacture and sale of licensed products. When a consolidated payment for both the advertisement and non-

advertisement services was held to be not 'Royalty', we cannot hold payment only for the advertisement services, as royalty. In view of the foregoing discussion, we are of the considered opinion that the DRP has canvassed an unimpeachable view and no exception can be taken to the direction for deleting the disallowance u/s 40(a)(i) of the Act.

43. Before parting with this issue we would like to refer to the without prejudice argument advanced by the Id DR that the payment should also be considered u/s 9(1)(i) of the Act. Relying on *Sheraton's case (supra)*, it was submitted that similar payment has been held by the Hon'ble Delhi High Court in the nature of business income. He stated that ICC is a resident of British Virgin Islands, with which India does not have any DTAA and thus income of ICC becomes chargeable to tax because of business connection under section 9(1)(i) of the Act and there is no need to show the existence or otherwise of its permanent establishment in India.

44. We are not inclined to entertain this contention put forth on behalf of the Revenue for the obvious reason that the assessee specifically

argued before the AO that there was no 'Business connection' of ICC in India. Such argument has been reproduced by the AO himself on page 25 of his order. Despite that, the AO chose to treat in the hands of ICC the payment by the assessee as 'royalty' or 'fees for technical services' covered u/s 9(1)(vi) or (vii) and not due to 'business connection' covered u/s 9(1)(i) of the Act. In view of these facts, we are unable to admit the submission advanced by the ld. DR that the payment be also considered as covered u/s 9(1)(i) of the Act. It goes without saying that a DR cannot improve the order of the AO. His duty is to defend the assessment order and not setting up a new case.

45. There is another dimension of the case. Disallowance u/s 40(a)(i) is made when the assessee fails to deduct tax at source etc. in terms of section 195 before making payment to a non-resident. This section, in turn, provides that no payment should be made to non-resident without deduction of tax at source which is chargeable to tax in his hands. Thus, chargeability of income to tax in the hands of a non-resident is a condition precedent. In other words, if such receipt is not chargeable to

tax in the hands of the non-resident, there will be no liability on the part of the payer to withhold tax and consequently, there can be no question of disallowance u/s 40(a)(i). We have noted from Appendix 2 that the assessee was to pay `Rights fee' to ICC even during the preceding year. Taking this factor into consideration, the Id. DR was directed to inform the Bench if the payment by the assessee to ICC during the instant year or in earlier years was subjected to tax in the hands of the latter. Despite allowing time, the Id. DR failed to point out if the amount in question has been subjected to tax in the assessment of ICC. Obligation to deduct tax at source u/s 195 in the hands of a payer is a natural consequence of chargeability to tax of the receipt in the hands of payee. Failure of the Revenue to bring on record any evidence of such payment having been subjected to tax in the hands of ICC also casts shadow on the liability of the assessee to deduct tax at source.

46. We, ergo, hold that the payment made by the assessee to ICC amounting to Rs. 4.56 crore as `Rights fee' is not in the nature of `Royalty' or `Fees for technical services' covered u/s 9(1)(vi) or 9(1)(vii)

of the Act and as such the assessee was not obliged to deduct tax at source on this payment. *Ex consequenti*, the provisions of section 40(a)(i) are not attracted. This ground is not allowed.

47. In the result, the appeal of the assessee is partly allowed and that of the Revenue is partly allowed for statistical purposes.

The order pronounced in the open court on 20.03.2017.

Sd/-

[KULDIP SINGH]
JUDICIAL MEMBER

Dated, 20th March, 2017.

VI/AjayKeot

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT (A)
5. DR, ITAT

Sd/-

[R.S. SYAL]
ACCOUNTANT MEMBER

AR, ITAT, NEW DELHI.