* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Judgment reserved on: 21 March 2024**
Judgment pronounced on: 03 July 2024

\+ **ITA 218/2017**

INTERNATIONAL MANAGEMENT GROUP (UK) LIMITED ..... Appellant

Through: Mr. Ajay Vohra, Sr. Adv. with Mr. Prakash Kumar, Ms. Rashmi Singh, Advs.

Versus

COMMISSIONER OF INCOME TAX-2, INTERNATIONAL TAXATION, NEW DELHI ..... Respondent

Through: Mr. Kunal Sharma, Senior Standing Counsel with Ms Zehra Khan, Mr. Shubhendu Bhattacharyya and Mr. Ankit Choudhary, Advocates

\+ **ITA 1013/2018**

INTERNATIONAL MANAGEMENT GROUP (UK) LIMITED ..... Appellant

Through: Mr. Ajay Vohra, Sr. Adv. with Mr. Prakash Kumar, Ms. Rashmi Singh, Advs.

Versus

COMMISSIONER OF INCOME TAX-2 INTERNATIONAL TAXATION, NEW DELHI ..... Respondent

Through: Mr. Kunal Sharma, Senior Standing Counsel with Ms Zehra Khan, Mr. Shubhendu Bhattacharyya and Mr. Ankit Choudhary, Advocates

\+ **ITA 1055/2018**

INTERNATIONAL MANAGEMENT GROUP
(UK) LIMITED ..... Appellant

Through: Mr. Ajay Vohra, Sr. Adv. with Mr. Prakash Kumar, Ms. Rashmi Singh, Advs.

Versus

COMMISSIONER OF INCOME TAX-2, INTERNATIONAL TAXATION, NEW DELHI ..... Respondent

Through: Mr. Kunal Sharma, Senior Standing Counsel with Ms Zehra Khan, Mr. Shubhendu Bhattacharyya and Mr. Ankit Choudhary, Advocates

\+ **ITA 986/2018**

INTERNATIONAL MANAGEMENT GROUP
(UK) LIMITED ..... Appellant

Through: Mr. Ajay Vohra, Sr. Adv. with Mr. Prakash Kumar, Ms. Rashmi Singh, Advs.

Versus

COMMISSIONER OF INCOME TAX-2 INTERNATIONAL TAXATION, NEW DELHI ..... Respondent

Through: Mr. Kunal Sharma, Senior Standing Counsel with Ms Zehra Khan, Mr. Shubhendu Bhattacharyya and Mr. Ankit Choudhary, Advocates

\+ **ITA 993/2018**

INTERNATIONAL MANAGEMENT GROUP
(UK) LIMITED ..... Appellant

Through: Mr. Ajay Vohra, Sr. Adv. with Mr. Prakash Kumar, Ms. Rashmi Singh, Advs.

Versus

COMMISSIONER OF INCOME TAX-2, INTERNATIONAL TAXATION, NEW DELHI ..... Respondent

Through: Mr. Kunal Sharma, Senior Standing Counsel with Ms Zehra Khan, Mr. Shubhendu Bhattacharyya and Mr. Ankit Choudhary, Advocates

\+ **ITA 381/2019**

INTERNATIONAL MANAGEMENT GROUP (UK) LIMITED ..... Appellant

Through: Mr. Ajay Vohra, Sr. Adv. with Mr. Prakash Kumar, Ms. Rashmi Singh, Advs.

Versus

COMMISSIONER OF INCOME TAX -2 INTERNATIONAL TAXATION, NEW DELHI ..... Respondent

Through: Mr. Kunal Sharma, Senior Standing Counsel with Ms Zehra Khan, Mr. Shubhendu Bhattacharyya and Mr. Ankit Choudhary, Advocates

\+ **ITA 997/2019**

INTERNATIONAL MANAGEMENT GROUP (UK) LIMITED ..... Appellant

Through: Mr. Ajay Vohra, Sr. Adv. with Mr. Prakash Kumar, Ms. Rashmi Singh, Advs.

Versus

COMMISSIONER OF INCOME TAX-2, INTERNATONAL TAXATION, NEW DELHI ..... Respondent

Through: Mr. Zoheb Hossain, SSC with Mr. Sanjeev Menon, Adv.

\+ **ITA 175/2021**

INTERNATIONAL MANAGEMENT GROUP
(UK) LIMITED ..... Appellant

Through: Mr. Ajay Vohra, Sr. Adv. with
Mr. Prakash Kumar, Ms. Rashmi
Singh, Advs.

Versus

COMMISSIONER OF INCOME TAX-2 INTERNATIONAL TAXATION, NEW DELHI ..... Respondent

Through: Mr. Zoheb Hossain, SSC with
Mr. Sanjeev Menon, Adv.

\+ **ITA 4/2023**

INTERNATIONAL MANAGEMENT GROUP
(UK) LIMITED ..... Appellant

Through: Mr. Ajay Vohra, Sr. Adv. with
Mr. Prakash Kumar, Ms. Rashmi
Singh, Advs.

Versus

COMMISSIONER OF INCOME TAX -2, INTERNATIONAL TAXATION, NEW DELHI ..... Respondent

Through: Mr. Zoheb Hossain, SSC with
Mr. Sanjeev Menon, Adv.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE PURUSHAINDRA KUMAR KAURAV

J U D G M E N T

YASHWANT VARMA, J.

S. No.	Particulars	Paragraph Nos.
A.	**PREFACE**	1 – 22
B.	**IMG'S CHALLENGE**	23 – 36

A. PREFACE

1. This set of appeals instituted by the International Management Group (UK) Limited [hereinafter to be referred as "IMG"], impugn the decisions rendered by the **Income Tax Appellate Tribunal**[1] on appeals spanning **Assessment Years**[2] 2010-11 to 2018-19. The appeals had been formally admitted on the following three principal questions of law: -

> "(i) Did the ITAT err in holding that the business income was divisible under the India-UK DTAA, though it arose out of a single contract having regard to Articles 7 and 13 of India-UK DTAA?
>
> (ii) Whether the ITAT erred in holding that services provided by IMG to BCCI under the Service Agreement dated 24.9.2009 qualify

[1] Tribunal
[2] AYs

as fee for technical services in terms of Article 13(4)(c) of the DTAA between India and UK?

(ill) Alternatively, in case answer(s) to above two questions are in negative; whether the income determined as FTS can be deemed to accrue or arise in India in terms of Section 9(vii)(b) of Income Tax Act, 1961, especially when services provided by IMG, during the relevant year, were utilized by BCCI outside India?"

2. The said questions as they arise in this batch have been set out succinctly in a tabular statement which forms part of the written submissions tendered by the appellant and is extracted hereinbelow:-

"S.No.	AY	ITA No.	Relevant Question of law	IPL Event venue
1	2010-11	218/2017	Para 9 (i), (ii) and (iii) above	South Africa
2	2011-12	986/2018	Para 9 (i) and (ii) above	India
3	2012-13	993/2018,	Para 9 (i) and (ii) above	India
4	2013-14	1013/2018	Para 9 (i) and (ii) above	India
5	2014-15	1055/2018	Para 9 (i) and (ii) above	India
6	2015-16	381/2019	Para 9 (i), (ii) and (iii) above	United Arab Emirates
7	2016-17	997/2019	Para 9 (i) and (ii) above	India
8	2017-18	175/2021	Para 9 (i) and (ii) above	India
9	2018-19	4/2023	Para 9 (i) and (ii) above	India"

3. As would be manifest from a perusal of the aforesaid table, the solitary distinctive feature concerning ITA 218/2017 and ITA 381/2019 is the fact that the **Indian Premier League**[3] in those years had been held outside India and more particularly in South Africa and the United Arab Emirates respectively.

4. The issue itself arises in the backdrop of a **Memorandum of Understanding**[4] entered into between IMG and the **Board of Control**

[3] IPL
[4] MoU

for Cricket in India[5] on 13 September 2007 and a separate Services Agreement dated 24 September 2009. Those agreements pertained to the advisory and managerial service to be provided by IMG for establishment, commercialization and operation of the IPL. For the purposes of brevity, we propose to notice the salient facts as they obtain in ITA 1013/2018 and which pertains to a year in which the league was held in India and ITA 218/ 2017 and which relates to the league held in South Africa. We do so since ITAs' 218/2017 and 318/2019 raise an additional aspect pertaining to Section 9(1)(vii)(b) of the **Income Tax Act, 1961**[6] and which was invoked by the appellant in the backdrop of the event having been held outside India and thus, according to them, not being exigible to tax since it represented the rendering of service to an Indian payer outside the country.

5. The appellant had consistently taken the stand before the authorities below that the income earned by it and in terms of the Services Agreement would constitute business income and thus be taxable to the extent envisaged under Article 7 of the India United Kingdom **Double Taxation Avoidance Agreement**[7]. It appears to have been asserted that only such of the receipts as would be attributable to a **Permanent Establishment**[8] in India would be taxable. It appears to have been the admitted position between the parties that IMG had a Service PE as contemplated under Article 5(2)(k) of the DTAA in all the relevant AYs'. The attribution of income to the PE was explained

[5] BCCI
[6] Act
[7] DTAA
[8] PE

by way of the following table: -

"AY	ITA No.	Total Receipts	Receipt attributed to PE		Treated as FTS (INR)
			Amount (INR)	%	
2010-11	218/2017	33,00,00,000	9,22,49,819	28	23,77,50,181
2011-12	986/2018	27,00,00,000	19,58,26,586	73	7,41,73,414
2012-13	993/2018,	28,00,00,000	21,48,45,495	77	6,51,54,505
2013-14	1013/2018	28,00,00,000	20,99,17,301	75	7,00,82,699
2014-15	1055/2018	28,00,00,000	21,16,65,921	76	6,83,34,079
2015-16	381/2019	27,00,00,000	17,00,87,645	63	9,99,12,355
2016-17	997/2019	27,00,00,000	20,54,26,724	76	6,45,73,276
2017-18	175/2021	34,54,98,001	26,87,40,992	78	7,67,57,010
2018-19	4/2023	27,90,95,068	22,13,61,792	79	5, 77,33,276"

6. The **Dispute Resolution Panel**[9] as well as the Tribunal, however, have essentially come to hold that quite apart from the income which was attributable to the Service PE of IMG, the balance receipts would be liable to tax under Article 13 of the DTAA being **Fee for Technical Services**[10]. It is in the aforesaid backdrop that we had admitted these appeals on the questions of law extracted hereinabove.

7. As would be evident from the record of ITA 1013/2018 for IPL 2012, IMG had received INR 28,00,00,000/- from BCCI. Adopting the profit split method prescribed under the Indian Transfer Pricing Regulations, it had attributed revenue of INR 20,19,17,301/- to the Indian PE. The net income of INR 7,83,66,521/- attributable to activities undertaken in India had been offered to tax on net income basis in accordance with the provisions of Section 44DA of the Act read along with the provisions of Article 7 of the DTAA.

8. The remaining revenue of INR 7,00,82,699/-, according to IMG,

[9] DRP
[10] FTS

pertained to work done outside India and thus not attributable to the PE and consequently not liable to be taxed. Aggrieved by the draft assessment order which was framed for that year and in terms of which the **Assessing Officer**[11] had taken the position that receipts of INR 7,00,82,699/- received for work done outside India was liable to be taxed as FTS, objections came to be filed before the DRP. It appears to have been principally contended that the aforesaid revenue would not constitute FTS and would even otherwise be liable to be examined in light of Article 13(6) of the DTAA. It becomes pertinent to note that Para 6 of Article 13 provides that Articles 13(1) and 13(2) would be inapplicable if FTS were received by a beneficial owner consequent to carrying on of business in the other Contracting State through a PE situate therein and the right, property or contract in respect of which FTS was earned is effectively connected with such a PE. In that event, FTS, as per Article 13(6) stands exorcised from that provision of the Convention and is liable to be taxed in accordance with Article 7 or Article 15 of the DTAA as the case may be.

9. Dealing with the aforesaid submissions, the DRP upon a consideration of the terms and stipulations comprised in the Services Agreement came to hold that the income of INR 7,00,82,699/- was liable to be treated as FTS. While dealing with this aspect, it held as under: -

> "To our mind even a bare perusal of the provisions of the agreement supra will show that the requirements of Article 13 are more than met as spelled out in greater detail hereunder.

[11] AO

i) IMG having carried out the research has advised the BCCI in connection with the formation and governance of the League and IPL, thus making available to it technical knowledge, experience, skill1 know-how or processes.

ii) IMG has assisted the BCCI in connection with and made available to it technical knowledge, experience, skill, know-how or processes for formulating the structure of the League; the League rules and regulations; the Franchise agreements and any necessary franchise regulations; the League implementation budget; and the Media Rights agreements. All of these have made available technical knowledge, experience, skill, know-how or processes and even after the agreement lapses they would continue to be available to and available with the BCCI for such use as they deem appropriate.

iii) The IMG have also made available technical knowledge, experience, skill, know-how or processes for the ongoing execution of the management in respect of the Rights of BCCI and advice in connection with Franchise Rights; Media Rights; sponsorship rights; official suppliership rights licensing and merchandising rights; stadium signage rights; and any other rights in relation to the league that may come-up for leverage by BCCI in the future.

In framing the Franchisees and rights agreements, and preparation and execution of marketing strategies for and advice in connection with any ongoing tender process in respect of Franchise Rights; IMG have made available technical. knowledge, experience, skill, know-how or processes. Yet again it bears reiteration that all of these technical/consultancy services will be available to BCCI even after the agreement lapses and they would continue to be available to BCCI in the form of Franchise, Media, sponsorship, official suppliership, licensing and merchandising rights stadium signage rights and available with the BCCI for such use as they deem appropriate for all times to come.

iv) IMG assists BCCI in the preparation of a television production specification, the development of best practice match day guidelines for Franchisees and supervision in respect of their execution the development of best practice match day media guidelines and supervision in respect of their execution; advice, and assistance in connection with the development of any relevant stadia and the finance which may be necessary in connection therewith and, if requested, the introduction to the BCCI of third parties who are involved in the redevelopment of stadia;

In rendering the above technical/consultancy services taxpayer has made available technical knowledge, experience, skill, know-how or processes. The best practice match day guidelines, and match day media guidelines will be available to BCCI even after the agreement lapses for such use as they deem appropriate for all times to come and result in the transfer of a technical plan.

(iv) advice and assistance in connection with the rules and regulations relating to the registration, trading and auction of Players; the creation of and advice and assistance with the "look and feel" elements in relation to the BCCI Marks generally and, in particular, at any relevant Stadia the provision of hospitality guidelines in relation to the League and implementation of hospitality in the latter case in a manner to be mutually discussed and agreed;

- the provision of a league handbook;
- advice and assistance in connection with the Player contracts;
- the establishment and maintenance of the Player registration system;
- the management of the annual Player trading window;

(v) Advice and assistance in connection with Anti-Doping and WADA Compliance Regulations; Assistance in the creation / development of new intellectual properties relating to the League **and all such properties created will be the sole property of BCCI; and will vest with BCCI.**

(vi) Carrying out research in consultation with BCCI each year to ascertain improvements in various areas of management and execution of the League; Development of the strategic brand framework for BCCI and manage brand IPL working with the BCCI team; and bringing in global best practices in building and evaluating sporting properties and related aspects and delivering a post event report at the end of each season. **Yet again it bears reiteration that all of these aforementioned technical/consultancy services have made available tangible, technical knowledge, experience, skill, know-how or processes, and in some cases technical plans which will be available to BCCI even after the agreement lapses in the form of the rules and regulations relating** to the registration, trading and auction of Players; the creation of BCCI Marks and look and feel of relevant Stadia, the provision of hospitality guidelines in relation to the League and the League handbook, the Player contracts frameworks; the establishment and maintenance of the Player registration system; the management of the annual Player

trading window; and the Anti-Doping and WADA Compliance Regulations; the development of new intellectual properties relating to the League and all such properties are the sole property of BCCI; and they would continue to be available to and available with the BCCI for such use as they deem appropriate for all times to come.

(vii) Provision of the requisite manpower that is required to carry out such activities as are within IMG's control in connection with the successful running of the league and Matches including the provision of a fully staffed office to do the same, at the sole cost of IMG; the hiring of whatever resources are required to fully perform IMG's obligations under this Agreement at the sole cost of IMG which too is covered by Article 13 of the India UK DTAA which states that fees for technical services mean payments of any kind of any person inconsideration for the rendering of any technical or consultancy services including the provision of technical or other personnel.

It is thus that DRP has no hesitation in holding that the requirements of S 9(1)(vii) of the Act and Article 13 of the India UK DTC are more than met by the Services rendered under the Services Agreement dated 24.09.2009 for which the fees received are brought to tax as FTS by the assessing officer."

10. It then proceeded to evaluate the contention of IMG and which appears to have asserted that since the services were rendered outside India, the revenue was not liable to be taxed as FTS. It appears to have urged that for the purposes of revenue being taxable in India, it was incumbent for the authorities to have found on fact that service had been rendered in India. The aforesaid argument, however, came to be negated by the DRP which took note of the Explanation which had come to be inserted in Section 9(1) by virtue of Finance Act, 2010 with retrospective effect from 01 June 1976 and which, according to it, had erased the requirement of actual rendition of service in India being a prerequisite for the purposes of taxation.

11. Insofar as this aspect is concerned, the DRP observed as

follows:-

> **"2.7 Whether Services being performed by non-resident taxpayers outside India and having been rendered from outside India are taxable as FTS**
>
> **Taxpayers Arguments**
>
> *1. However, the Hon'ble DRP made a patent error of low by attributing such receipts to the PE though the same to pertained to work outside India. Further, the taxation of the receipts as FTS was only directed on a protective basis in the direction passed by the Hon'ble DRP.*
>
> *2. While dealing with the interpretation of Article 7 of the India-UK DTAA, the Special Bench of Income 1ox Appellate Tribunal Mumbai in the case of Clifford Chance {33 taxamann.com 200} {2013} has held that the receipts for work done outside India cannot be attributed to the PE under Article 7 of the India-UK DTAA.*
>
> *3. It is submitted that the receipts of INR 7,00,82,699 for work done outside India cannot be attributed to the PE on account of the following reasons:*
>
> *- The attribution to the PE has been done by the assessee on the basis of a transfer pricing report capturing the Functions, Assets and Risk analysis and is in accordance with the international principles of attribution.*
>
> *- The Ld. AO has also referred the matter to the Ld TPO and the LD. TPO has accepted that the receipts attributed to the PE are at arm's length.*
>
> *Given this aspect, the question of attributing the receipts of INR 7,00,82,699 for work done outside India to the PE does not arise at all.*

The taxpayer has relied heavily on the decision in the case of Clifford Chance. In Clifford Chance's own case in a previous year the Bombay High Court (HC) had held that the rendition of services in India was an essential condition for its taxability in India. After a retroactive amendment in the Income Tax Statute whereafter income by way of fee for technical services could be taxed in India even if the services were rendered from outside India (Finance Act (FA) 2010 introduced an Explanation in the deeming provisions of the Indian Tax Lows (ITL) retroactively from 1 June 1976 that income from interest, royalty or fee for technical services (FTS) earned by a non-resident (NR) would be taxable in India irrespective of the place

from where the services ore rendered) Tribunal in the case of **Linklaters LLP** held that owing to the retroactive amendment, the decision of the Bombay HC was no longer good law. The SB was therefore constituted to decide these - two issues **viz** impact of retroactive amendment to the assessment of the Taxpayer and the scope of attribution of income which is indirectly attributable to a permanent establishment (PE).**The decision of the SB is thus limited to the two questions that were placed before it.** It may not be considered to have ruled on controversies that may arise if income is considered as Fees for Technical Service. **The decision of Clifford Chance supra is thus entirely irrelevant to the facts of this case.** Nippon Kaiji Kyokoi is also distinguishable on fact.

This question regarding taxability of FTS rendered from abroad is now unequivocally answered in favour of Revenue by the Apex Court in **Supreme Court decision in GVK Industries Ltd & Anr [TS-61-SC-2015].** Apropos the reliance placed by the taxpayer on the direction issued by the DRP is not only the subject matter of an appeal, as pointed out by the AO at para 13 of the Draft Assessment order but is superceded by the decision of the Hon'ble Supreme Court.

Taxpayers arguments in GVK Industries Ltd & Anr [TS-61-SC-2015]

In its affidavit, taxpayer GVK Industries Ltd contended that the NRC was an independent unit and was, in a way, subsidiarised by ABB. That apart, merely because expert advice was obtained, it could not be said that it pursued the application for loan/financial assistance on behalf of NRC and further the advisory services **were rendered from outside India.** The assessee also contended that **'the NRC did not render any technical or consultancy service to the company but only rendered advise in connection with payment of loan by it** and hence, it would not amount to technical or consultancy service within the meaning of Sec. 9(1)(vii)(b).

• The High Court (HC) in GVK Industries Ltd held that assessee **was not entitled to the NOC.** Referring to the decision in case of **'Electrical Corporation of India Ltd Vs CIT'**, the HC dismissed the writ petition. Aggrieved, assessee preferred an appeal before the Apex Court. Referring to the Principles in decisions in case of 'C.I.T. V. Aggarwal and Company'[(1965) 56 ITR 20], 'C.I.T. v. TRC [(1987) 166 ITR 1993] and 'Birendra Prasad Rai V. ITC (1981) 129 ITR 295], Supreme Court (SC) noted that the singular question that remained to be answered was whether the payment or receipt paid by the appellant to

NRC as success fee would be deemed to be taxable in India u/s. 9(1)(vii).

• The Hon'ble Supreme Court observed that clause (b) of sec. 9 (l)(vii) lays down the principle of what was basically known as the **"source rule" i.e., income of the recipient to be charged or chargeable in the country where the source of payment is located, to clarify, where the payer is located.** Therefore, deduction of tax at source when made applicable, it had to be ensured that this principle was not violated. SC noted that the two principles, namely, **"Situs of residence"** and **"Situs of source of income"** had witnessed divergence and difference in the field of international taxation. The principle "Residence State Taxation" gave primacy to the country of the residency of the assessee.

• **The SC referred to the Delhi HC ruling in 'CIT vs. Bharti Cellular Limited and others' wherein it - was held that consultancy meant giving professional advice or services in a specialized field.** SC also referred to the dictionary meaning of 'consultation' in Black's Law Dictionary, and discussed the meaning of the word 'consultancy Services'. SC held that the NRC had the skill, acumen and knowledge in the specialized field i.e. preparation of a scheme for required finances and to tie-up required loans and the nature of service referred by the NRC would come within the ambit and sweep of the term 'consultancy service' and, therefore, it had been rightly held by HC that the tax at source should have been deducted as the amount paid as fee could be taxable under the head 'fee for technical service'.

In arriving at its decision SC relied on the Constitution bench judgment in **GVK [TS-69-SC-2011]** wherein it was held that the Parliament is constitutionally restricted from enacting legislation with respect to extraterritorial aspects or causes that did not have, nor expected to have any, direct or indirect, tangible or intangible impact(s) on or effect(s) in or consequences for: (a) the territory of India, or any part of India; or (b) the interests of, welfare of, well-being of, or security of inhabitants of India, and Indians. SC also reiterated observations of the Constitution bench where the Constitution bench held that **where Parliament itself posited a degree of relationship between the extra-territorial aspect or cause and something in India or related to India and Indians,**

beyond the constitutional requirement that it be real and not fanciful, then the courts would have to enforce such a requirement in the operation of the law as a matter of that law itself, and not of the Constitution.

Hon'ble SC also relied on co-ordinate bench ruling in 'CIT. vs. Aggarwal and Company' ((1965) 56 ITR 20], CIT vs. TRC [(1987) 166 ITR 1993] and Birendra Prasad Rai vs. ITC [(1981) 129 ITR 295].

SC further relied on 'the Introduction in Klaus Vogel on Double Taxation Convention, South Asean, Reprint Edition (2007)] wherein it was mentioned that **what was prohibited by international taxation law was imposition of sovereign act of a State on a sovereign territory and the said principle of formal territoriality applied to acts intended to enforce internal legal provisions abroad.**

Applying Supreme Court decision in GVK Industries Ltd & Anr [TS-61-SC-2015] the receipts from services rendered abroad are taxable and jurisprudence relied upon is superceded by this SC decision and the rationale laid down regarding FTS is also applicable ie taxpayer has itself submitted that it has the skill, acumen and knowledge in the specialized field,

"Over the years, IMG UK has gained vast experience of working on event management and talent representation activities, across golf, tennis, football, etc. sporting events. The nature of contracts/ activities undertaken by the Company primarily Includes event creation, client representation, Consultation services, etc, IMG UK and the Board of control for Cricket in India ["BCCI"] entered into a Memorandum of understanding ("MOU") for assistance in establishment, commercialization and operation of the Indian Premier League ("IPL") In September 2007. In addition and consequent to the initial contract, the parties entered into a separate service agreement dated September 24, 2009 in relation to the second season and subsequent seasons for IPL events.

Extract from Transfer Pricing Report para 4.3 Page 17

"BCCI awarded the original contract of 2007 to IMG UK because of the vast knowledge and experience of IG UK, which has been developed by the UK entity over the years as a result of working on similar assignments in the field of sports (including cricket) prior to this contract. Accordingly, IMG UK possessed all the necessary technical shill, expertise and

related Intangibles for the purpose of executing the BCCI contract."

12. The DRP further held that the 'make available' stipulation in Article 13 of the DTAA also stood satisfied. It then proceeded to examine the assertion of IMG based on Article 13(6) and which argument if were to be accepted, the revenue would have become liable to be taxed in terms of Article 7 as opposed to Article 13 of the DTAA. While dealing with this aspect, it held that the revenue in question could not be said to be effectively connected to the PE and consequently the same would not escape taxability under Article 13.

13. Pursuant to these directions of the DRP, a final assessment order came to be framed. IMG, thereafter, challenged the aforesaid assessment order before the Tribunal. The Tribunal dismissed the appeal essentially following its decision pertaining to AY 2010-11 and which forms the subject matter of ITA 218/2017.

14. Insofar as AY 2010-11 is concerned, it related to the revenues earned by IMG for the IPL event which was held in South Africa in 2009. For IPL 2009, IMG earned a total service fee of INR 33,00,00,000/-. Out of the aforesaid, it attributed INR 9,22,49,819/- to the Indian PE and a net profit of INR 3,28,04,660/- computed in accordance with the transfer pricing regulations was asserted to be attributable to the Indian PE and offered to tax.

15. The AO while drawing up a draft order, however, held that the balance receipt of INR 23,77,50,181/- was liable to be taxed as FTS. It was the aforesaid order which was assailed before the DRP. While dealing with those objections, the DRP held that the aforesaid revenue

was liable to be taxed as FTS. This is evident from Para 5.6 of its directions, which is extracted hereinbelow: -

> **"5.6** In addition and consequent to the "MOU" dated 13.09.2007, the assessee and BCCI also entered into a separate, service agreement, on 24.09.2009 for Representation Period consisting of nine IPL seasons starting from 01.01.2009 (Clause 1.1l(q) of the service agreement). This service agreement was entered after the end of 1PL season of 2009 with retrospective date from 01.0l.2009. The annual charge of Rs 33.00 crores received during the year is for all services, rendered by the assessee anywhere in the world (Clause 1.l(x) and 6.2 of the service agreement) and it is in the nature of FTS as it is already determined irrespective of the places where the services are rendered. Basically the income from franchisees, broadcasters, etc. received by the BCCI is not as peer the above agreement but by separate agreements with them and income there from thus accrues and received in India and it has nothing to do with the places where IPL matches are played. In present case, the position of the AO is that income of the assessee is deemed to accrue or arise in India. Section 9 of the Act provides for incomes which shall be deemed to accrue or arise in India. Therefore, if an income accrues or arises directly or indirectly through or from a business connection in India, it shall be deemed to accrue or arise in India and hence such income of non-resident becomes taxable in India. It means that existence of business connection in India of non-resident is prerequisite under the Income Tax Act for bringing business income to tax in India. Under DTAA, however, higher threshold level in form of existence of PE in India is required for bringing business income of non-resident to tax in India. The assessee has not denied existence of its PE in India. The major source of revenue from the IPL matches played abroad is originated in India. In view of above and the reasoning given in the impugned order, we are of the considered view that the AO has rightly held Rs.23,77,50,181/- as FTS."

16. However, it took into consideration the admitted fact that the event had been held and hosted in South Africa and thus amounting to the rendition of service to BCCI outside India. It consequently came to hold that Section 9(1)(vii)(b) stood attracted as would be evident from the following conclusions: -

> "**5.4** In view of the above, it is evident that the intention of the

> legislature clarified by the Explanatory circular on the introduction of the amendment in the Income Tax Act has been to consider "such person" appearing in section 9(1)(vii)(b) with reference to the resident payer for the said amount because the expression "if the payment is relatable to a business of profession carried on **by him outside India"** refers to the business or profession carried out by him viz. resident payer in this context and not the non-resident payee. In view of the clear disposition of the relevant provisions of the I.T. Act, we hold that the provision of section 9(1)(vii)(b) are also satisfied and the case of the assessee is not covered by the exceptions."

17. It ultimately came to hold that the income although constituting FTS would be liable to be taxed as business income in terms of Article accepting the contention based on Article 13(6) of the DTAA. However, it also proceeded to direct the AO to frame an order treating the said income as FTS on protective basis. It was the final assessment order drawn pursuant to those directions which led to appeals being filed by both IMG as well as the Income Tax Department.

18. Dealing with the aforesaid appeals, the Tribunal identified the principal issues to be whether receipt of INR 23,77,50,181/- was chargeable to tax in India at all and the second question being whether the same was liable to be treated as FTS. The Tribunal firstly reviewed the terms and conditions as contained in the MoU as well as the Services Agreement. It also took into consideration the nature of functions performed by the UK office of IMG and its Indian PE, as were recorded in the transfer pricing study report. Proceeding further, it firstly took up for consideration the argument of IMG based on Article 13(6) and whether FTS could be said to be effectively connected with its PE. The aforesaid contention was ultimately answered as under:-

> "**38.** Now the issue arises is whether the whole contract is

'effectively connected' with the permanent establishment or part of the services are 'effectively connected with the permanent establishment. On reading of. the above two agreements and the transfer pricing study report submitted by the assessee, more specifically at para number 4.4.2 ~e the functions performed by the permanent establishment of the appellant in India and para number 4.4.1 shows what are the functions performed by the IMG UK. It is further mentioned in the transfer pricing study report that certain routine services relating to on ground implementation and running of the event was subcontracted to the IMC India, branch. The IMG India PE was involved in/ responsible for overseeing and managing. The liasonsing and implementation support activities undertake taken by the IMC India branch. It is also important to note that how this functions were performed it was stated in the transfer pricing study report of the appellant that IMO UK employees came to India from time to time for short-term visits. Further few freelancers were appointed/engaged by IMO UK for undertaking the on- ground implementation and related supervision activities in India. As these functions performed, assessee has claimed that it has created a service PE in India and therefore the income should be chargeable to tax according to the article 7 of the Double Taxation Avoidance Agreement. Therefore according to us the above agreements and memorandum of understanding has two limb one. with respect to the performance of the activities performed by the permanent establishment in India and another limb deals with respect to the performance of the services by the IMG UK directly for which the India PE has nothing to do. Admittedly the issue is concerned with respect to the fees for technical services. It is also admitted position that while the effective connection of royalties with a permanent establishment has to be evaluated by applying the 'assets test' , and for the purpose of fees for technical services the 'activity test? or 'functional test' should be applied as held in case of Nippon Kaiji Kyokoi V ITO 47 SOT 41 (Mum). Therefore to "effectively connect' the whole income with the PE, contending party i.e. assessee, should establish that PE is engaged in the performance of all those services or should be involved in actual rendering of such services, or (2) it shou1d arise as a result of the activities of the PE, or (3) The PE should, at least, facilitate, assist or aid in performance of such service irrespective of the other activities PE performs. Therefore according to article 7, for attribution of the profits to the permanent establishment the activity carried out by the permanent establishment is important and to that extent only the profits can be attributed to that particular permanent establishment. However if there are other activities, which are also incorporated in the agreement, which are not at all carried on with the help of, or

through, or by, or under the control, or under the supervision of the permanent establishment such activities and income arising there from cannot be said to be 'effectively connected' with the permanent establishment and article 7 cannot be applied to those services. In the present case certain activities are carried out by the appellant which are not even concerned with the functioning . of the permanent establishment therefore in our view only the activities which are performed by the permanent establishment are effectively connected with the permanent establishment and activities which are not carried on by the permanent establishment but are carried out by the head office of the appellant are not 'effectively connected' with the permanent establishment. We are also of the view that the term 'effectively connected' should not be understood to mean the opposite of 'legally connected' but rather something in the sense of 'really connected'. Therefore the activities mentioned in the contract should be connected to the permanent establishment not only in the form but also in substance. It is also interesting to note that the permanent establishment of the assessee has been admitted by the appellant only because of the reason that some of the employees of the appellant came to India from time to time for short visit and further certain freelancers were appointed for undertaking the own ground implementation related supervision activities in India. Therefore according to us there are minimum activities performed by the PE of appellant in India. Hence just performing such minimum activities it cannot be said that whole of the revenue of Rs. 33 crores involved in the contract is 'effectively connected' with the activities of the permanent establishment in India. Hence we reject the contention of the assessee that the whole of the revenue involved in the contract should be considered as effectively connected with the permanent establishment of the appellant. We also give one more reason may be a hypothetical one which supports our view. Supposedly a contract of Rs. 100 crore is awarded to an overseas entity for rendering of the management services and if such: overseas entity establishes a permanent establishment by just deputing its staff for more than 90 days, it creates a service permanent establishment of that for an entity in India. On the basis of the minimum activities performed by that particular staff which 1s deputed in India 10% of the gross receipt say 10 crores is attributed to permanent establishment and after claiming deduction of expenses there from of say 60% of the income attributed, assessee offered balance amount as profit of the permanent establishment for taxation. In transfer pricing study report, based on FAR analysis such attribution of the profit is considered to be at arm's length by the assessee and as well as by the transfer pricing officer, it cannot be said that the balance sum of Rs. 90 crores be taxed in India as the

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

19. The Tribunal while ruling on the interplay between Articles 7 and 13 of the DTAA, held as follows:-

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

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

(6). The provisions of paragraphs 1 and 2 of this Article shall not apply if the beneficial owner of the royalties or fees for technical services, being a resident of a Contracting State, carries on business in the other Contracting State in which the royalties or fees for technical services arise through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the right, property or contract in respect

of which the royalties or fees for technical services are paid is effectively connected with such permanent establishment or fixed base. In such case, the provisions of Article 7 (Business profits) or Article 15 (Independent personal services) of this Convention, as the case may be, shall apply."

[Underline supplied by us]

41. on reading of the above article it is apparent that the provisions of paragraph 1 and 2 of this article shall not apply if the beneficial owner of the royalty fees for technical service, being a resident of a contracting state, carries on business in other contracting State in which the royalties or fees for technical services arise through a permanent establishment situated therein, and the right property or contract in respect of which the royalty fees for technical services are paid is effectively connected with that permanent establishment or fixed base. Then only the provisions of article 7 related to business profit shall apply. Therefore the above article provides for twin conditions, (1) that the royalty or fees for technical services should arise through a permanent establishment situated in the other State and (2) the right property or contract in respect of the royalty or fees for technical services are paid is effectively connected with the such permanent establishment or fixed base. In the present case the benches raised a specific query that how the activities carried on by the UK office of the appellant are arise through the permanent establishment and how the contract is effectively connected with such permanent establishment. The Ld. authorized representative responded by submitting that it is with respect to the contract which should be effectively connected to the permanent establishment or fixed base. However with respect to the evidence of activities carried on by the overseas head office of the appellant and how they are connected or arising through the permanent establishment has, not been responded to. Despite this we have pursued the relevant activities performed by the foreign office of the appellant as well as the permanent establishment of the appellant. We are of the view that activities carried on by the foreign office of the assessee are not at all arising through the permanent establishment of the appellant in India. Therefore one of the condition of the about twin conditions also failed in case of the appellant. Once again we would like to reiterate that for the purpose of applicability of article 13 (6) with respect to the fees for technical services one has to apply the activity test of the permanent establishment in the source country is held by the coordinate bench in case' of the Nippon Kaiji Koyokoi V ITO (supra).

42. Therefore we reject the contention of the assessee that out of 33 crores Rs. 9 crores are effectively connected with the permanent

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

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

20. The Tribunal on due examination of the rival contentions further held that the 'make available' stipulation comprised in Article 13 of the DTAA also stood satisfied. This becomes evident from the following findings which came to be rendered: -

> "**43**. Now the next contention raised by the appellant is that as there is no 'make available' test satisfied in case of the services provided by the appellant, hence, according to article 13 (4) which defines the fees for technical services means payments of any kind of any person in consideration for the rendering of any technical or consultancy services which make available technical knowledge, experience, skill know-how or processes, or consist of development and transfer of a technical plan technical design. According to the assessee as clause C of article 13 (4) is not satisfied the balance cannot be charged to tax as fees for technical services. In the present case the services are already described in the previous paragraphs

and there cannot be two opinion about that that mere provision of services or technical services is not sufficient, it is essential that services should be "make Available" technical knowledge, experience, skill, know-how or process. The expression make available has far-reaching significance since it limits the scope of technical and consultancy services. Generally this expression 'make available' is used in the sense of one person supplying or transferring or imparting technical knowledge or skill or technology to another and technology is considered 'made available' only when the services receiver is enabled to absorb and apply the technology contained therein. If the services do not have any technical knowledge the fees paid for it do not fall within the meaning of fees for technical services as per the article 13 of the India UK DTAA.. The services receiver is able to make use of the technical knowledge etc by himself in his business or for his own benefit and without recourse to the service provider in future and for this purpose the transmission of the technical knowledge, experience, skill, etc from the service provider to the services CP is necessary. In other words the technical knowledge, experience, skill etc must remain with the service recipient even after the rendering of the services has come to an end and the services receiver is at liberty to use the technical knowledge skill know-how and processes in his own right. In the present case the assessee has hired for conducting research in respect of the appropriate structure for the IPL and makes recommendation to BCCI accordingly. It is required to provide the Constitution of the IPL, the authority of the governing Council, the structure of IPL, tournament rules and regulation ,the franchisee tender document ,the franchisee agreement, necessary franchisee regulation and the IPL implementation budget. According to the para No. 9 of the agreement that intellectual property rights remains with the board of control for Cricket in India. Even before us Ld. authorized representative could not point out that why 'make available test' has not been satisfied in this even by providing all the rules and regulations of IPL, standard operating procedures of matches, copies of the franchisee agreement, various documentation/contracts etc which shall remain with the BCCI. Therefore in the present case according to us the BCCI is enabled to absorb and apply the information and the advice provided by the appellant to it for conducting such sporting events. According to us when all this documentation and material is provided to the BCCI it is able to use such know-how and documentation generated from provision of the services of the appellant independent of the services of the appellant in future. It is too naïve to say that in absence of IMG services BCCI on its own IPL tournament cannot hold. Merely because the BCCI has entered into a contract for conducting further 9 events does not

lead to the conclusion that the information documentation, agreements, contracts etc cannot be said to be 'made available' to the appellant. In fact according to us it is. In view of this we reject the contention of the appellant that the sum of Rs. 237750181/-cannot be taxed as fees for technical services as it does not satisfy 'make available' condition provided in article 13(4) 9c) of the DTAA."

21. The Tribunal with respect to applicability of Section 9(1)(vii) of the Act drew the following conclusions: -

"**48.** According to provisions of section 9 (1) of the Income tax Act the income by way of fees for technical services payable by a person who is resident to a non-resident shall be deemed to accrue or arise in India and shall be chargeable to tax u/s. 5 of the Income Tax Act in the hands of a non-resident. The claim of the appellant is that receipt of Rs. 237750181/- falls within the exception provided under clause (b) of the above section which says that where the fees for technical services are payable in respect of services utilized in a business or profession carried on by such person outside India or for the purpose of making or earning any income from any source outside India, it shall not be considered as fees for technical services as income deemed to accrue or arise in India in terms of the provisions of section 9(1)(vii)(b) of the Income Tax Act. The main reason to say so by the appellant is that the IPL 2009 event has been held outside India and therefore the BCCI has utilized those services outside India and therefore they fall into the exception and cannot be taxed in India. We have carefully considered the rival contentions and reject the contention of the appellant for the reason that to fall within the exception the assessee must be carrying out business outside India and such services must be utilized in that business by a person who is a resident in India and who pays income by way of fees for technical services to a non- resident. It is an established fact that BCCI is carrying on business in India and not outside India. Further the source of income of the BCCI is in India and not outside India. Merely because the event is performed outside India it cannot be said that source of income of the BCCI is not in India. Therefore according to us the income of the appellant of Rs. 237055181/- is chargeable to tax as fees for technical services under section 9 (1) (vii) of the Income Tax Act as Fees for technical services."

22. On an overall consideration of the above, the Tribunal proceeded to dismiss the appeal of IMG and allow the appeal of the Department

holding that INR 23,77,50,181/- would be governed by Article 13 of the DTAA and liable to be taxed as FTS on a substantive basis.

B. IMG'S CHALLENGE

23. Appearing in support of the appeals, Mr. Vohra, learned senior counsel canvassed the following submissions for our consideration. Mr. Vohra submitted that a cumulative reading of the terms and conditions of the MoU as well as the Services Agreement would lead one to the irresistible conclusion that the receipts of IMG were liable to be viewed as business profits, and consequently entitled to be taxed only to the extent of income attributable to the Indian PE of IMG. Mr. Vohra submitted that it was the undisputed position that pursuant to the nature of services performed in India coupled with the visits of IMG employees to the country, the prescriptions of Article 5(2)(k) of the DTAA stood satisfied and that consequently a Service PE had come into existence. Mr. Vohra underlined the fact that Article 5(2)(k) applies only where services other than those taxable under Article 13 are furnished. It was in the aforesaid backdrop that learned senior counsel submitted that once the revenue had accepted the existence of a Service PE and the taxability of INR 9,22,49,819/- being income attributable to the Service PE, it was clearly not open for the respondents to hold that the balance receipts from BCCI were liable to be taxed as FTS.

24. According to learned senior counsel, the respondents clearly stood estopped from contending that receipts from BCCI to the extent not attributable to the admitted Service PE, would be taxable under

Article 13. The submission, in essence, was that once the respondents had accepted the constitution of a Service PE as well as the attribution of income thereto, they could not thereafter have turned around to assert that receipts to the extent not attributable to the PE were liable to be treated as FTS. This more so since, as per the appellants, the applicability of Article 5(2)(k) was itself dependent upon it being found that the services rendered were other than those which would fall within the ambit of Article 13.

25. It was Mr. Vohra's submission that the receipts received from BCCI by IMG flowed from one singular contract and which envisaged the furnishing of composite services relating to assistance in establishment, commercialization and operation of the IPL. Mr. Vohra highlighted the fact that neither the Services Agreement nor the DTAA empowers the Respondent to bifurcate the composite consideration received between business profits and FTS. Apart from the above, Mr. Vohra further submitted that a bare perusal of the obligations placed upon IMG and which can be discerned from the MoU and the Services Agreement would evidence that the revenue received by IMG cannot possibly be held to fall within the ambit of FTS under Article 13 of the DTAA. This since, according to learned senior counsel, IMG had not made available any technical knowledge, experience, skill, know-how or processes to BCCI. In order to shed light on the meaning liable to be ascribed to the phrase "make available" as appearing in Article 13, Mr. Vohra drew our attention to the Memorandum of Understanding appended to the India US DTAA and which, while dealing with the subject of FTS, employs similar language. Mr. Vohra relied upon the

following passages as appearing in the said Memorandum of Understanding: -

> "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. Similarly, the use of a product which embodies technology shall not per se be considered to make the technology available. "

26. Mr. Vohra also relied upon the following pertinent observations as rendered by the Karnataka High Court in **CIT v. De Beers India Minerals P. Ltd**[12]**:-**

> "**13.** Therefore, the clause in the Singapore agreement which explicitly makes it clear the meaning of the words "make available", the said clause has to be applied, and to be read into this agreement also. Therefore, it follows that for attracting the liability to pay tax not only the services should be of technical in nature, but it should be made available to the person receiving the technical services. The technology will be considered made available when the person, who received service is enabled to apply the technology. The service provider in order to render technical services uses technical knowledge, experience, skill, know-how or processes. To attract the tax liability, that technical knowledge, experience, skill, know-how or process which is used by the service provider to render technical service should also be made available to the recipient of the services, so that the recipient also acquires technical knowledge, experience, skill, know-how or processes so as to render such technical services. Once all such technology is made available it is open to the recipient of the service to make use of the said technology. The tax is not dependent on the use of the technology by the recipient. The recipient after receiving of technology may use or may not use the technology. It has no bearing on the taxability aspect is concerned. When the technical service is provided, that technical service is to be made use of by the recipient of the service in further conduct of his business. Merely because his business is dependent on the technical service which he receives from the service provider, it does not follow that he is making use of the technology which the service

[12] 2012 SCC OnLine Kar 8858

provider utilises for rendering technical services. The crux of the matter is after rendering of such technical services by the service provider, whether the recipient is enabled to use the technology which the service provider had used. Therefore, unless the service provider makes available his technical knowledge, experience, skill, know-how or process to the recipient of the technical service, in view of the clauses in the DTAA the liability to tax is not attracted.

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21. What is the meaning of "make available". The technical or consultancy service rendered should be of such a nature that it "makes available" to the recipient technical knowledge, know-how and the like. The service should be aimed at and result in transmitting technical knowledge, etc., so that the payer of the service could derive an enduring benefit and utilize the knowledge or know-how on his own in future without the aid of the service provider. In other words, to fit into the terminology "making available", the technical knowledge, skills, etc., must remain with the person receiving the services even after the particular contract comes to an end. It is not enough that the services offered are the product of intense technological effort and a lot of technical knowledge and experience of the service provider have gone into it. The technical knowledge or skills of the provider should be imparted to and absorbed by the receiver so that the receiver can deploy similar technology or techniques in the future without depending upon the provider. Technology will be considered "made available" when the person acquiring the service is enabled to apply the technology. The fact that the provision of the service that may require technical knowledge, skills, etc., does not mean that technology is 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. In other words, payment of consideration would be regarded as "fee for technical/included services" only if the twin test of rendering services and making technical knowledge available at the same time is satisfied"

27. Our attention was also drawn to the decision of the Kerala High Court in **US Technology Resources (Pvt.) Ltd. vs. Commissioner of Income Tax**, where the phrase "make available" was explained to indubitably envisage a transfer of technology or know-how. We deem it apposite to extract the following paragraphs of that decision: -

"7. There can be no dispute that the income generated by the US company under the agreement entered into with the Indian company as remuneration for the services provided is brought within the scope of total income under section 5(2) of the Act. Section 9 speaks of "income deemed to accrue or arise in India" and clause (vii) of sub-section (1) of the aforesaid provision, as is relevant for our consideration, is extracted hereunder:

"(vii) income by way of fees for technical services payable by—. ..

(c) a person who is a non-resident, where the fees are payable in respect of services utilised in a business or profession carried on by such person in India or for the purposes of making or earning any income from any source in India:

Provided that nothing contained in this clause shall apply in relation to any income by way of fees for technical services payable in pursuance of an agreement made before the 1st day of April, 1976, and approved by the Central Government.. ..

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'."

There can also be no dispute as per the extracted Explanation that the services offered by the US company to the Indian company comes under the said definition. The services offered, as is seen from the terms of the agreement which are specifically termed by the first appellate authority as "technical and consultancy services", are (i) management decision-making, (ii) financial decision-making, (iii) legal matters and public relation activities, (iv) treasury services and (v) risk management services. Read with the Explanation, this definitely would come within the ambit of "technical and consultancy services" as defined under the Act. The first appellate authority has also relied on Continental Construction Ltd. v. CIT (1992) 195 ITR 81 (SC), CBDT v. Oberoi Hotels (India) P. Ltd. (1998) 231 ITR 148 (SC) ; (1998) 97 Taxman 453 (SC) and Dean, Goa Medical College v. Dr. Sudhir Kumar Solanki (2001) 7 SCC 645, wherein the ambit of the definition was examined by the hon'ble Supreme Court.

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18. We are conscious of the fact that the DTAA as relevant in the present case, is not applicable even in the case of De Beers India Minerals (P.) Ltd. where the non-resident hailed from Netherlands. However, on facts we are of the opinion that when the definition clause in DTAA read along with the MOU specifically refers to transfer of technologies, the facts as available in the Karnataka decision are more similar to the present facts. Herein also there is no technology transfer ; nor is there a plan or strategy relating to management, finance, legal, public relations or risk management transferred to the appellant. The services promised by the non-resident company is only to advice on such aspects as are specifically referred to in the agreement. The non-resident company only assists the Indian company in making the correct decisions on such aspects as is specifically referred to in the agreement, as and when such advice is required. There is no transfer of technology or know-how, even on managerial, financial, legal or risk management aspects ; which would be available for the Indian company to be applied without the hands-on advice offered by the US company. The advice offered on such aspects would have to be on a factual basis with respect to the problems arising at various points of time and there cannot be found any transfer of technical or other know-how to the Indian company."

28. Our attention was also drawn to the following pertinent observations as appearing in the judgment handed down by our Court in **CIT (IT) v. Bio-Rad Lab (Singapore) Pte. Ltd.**[13]**:-**

"**14.** According to the Tribunal, the agreement between the respondent-assessee and its Indian affiliate had been effective from January 1, 2010, and if, as contended by the appellant-Revenue, technical knowledge, experience, skill, and other processes had been made available to the Indian affiliate, the agreement would not have run its course for such a long period.

14.1 Notably, this aspect is adverted to in paragraphs 17 to 23 of the impugned order. For convenience, the relevant paragraphs are extracted hereafter (page 463 of 33 ITR (Trib)-OL) :

"A perusal of the aforementioned provision shows that in order to qualify as fees for technical services, the services rendered ought to

satisfy the 'make available' test. Therefore, in our considered opinion, in order to bring the alleged managerial services within the

[13] 2023 SCC OnLine Del 6770

ambit of fees for technical services under the India-Singapore Double Taxation Avoidance Agreement, the services would have to satisfy the 'make available' test and such services should enable the person acquiring the services to apply the technology contained therein.. ..

.. . agreement is effective from January 1, 2010 and we are in the assessment years 2018-19 and 2019-20. In our considered opinion, if the assessee had enabled the service recipient to apply the technology on its own, then why would the service recipient require such service year after year every year since 2009 ?

This undisputed fact in itself demolishes the action of the Assessing Officer/Dispute Resolution Panel. The facts on record show that the recipient of the services is not enabled to provide the same service without recourse to the service provider, i. e, the assessee.

In our humble opinion, mere incidental advantage to the recipient of services is not enough. The real test is the transfer of technology and on the given facts of the case, there is no transfer of technology and what has been appreciated by the Assessing Officer/learned Commissioner of Income-tax (Appeals) is the incidental benefit to the assessee which has been considered to be of enduring advantage.

In our understanding, in order to invoke make available clauses, technical knowledge and skill must remain with the person receiving the services even after the particular contract comes to an end and the technical knowledge or skills of the provider should be imparted to and absorbed by the receiver so that the receiver can deploy similar technology or techniques in the future without depending upon the provider." (emphasis is ours)

15. We tend to agree with the analysis and conclusion arrived at by the Tribunal."

29. Mr. Vohra in support of his submission that the fundamental requirements of the applicability of Article 13 of the DTAA were not met also relied upon two recent decisions rendered by this Court in **Commissioner of Income Tax (International Taxation) vs. Relx Inc**[14] and **Commissioner of Income Tax- International Taxation-3**

[14] 2024 SCC OnLine Del 1314

vs. Salesforce.com Singapore[15].

30. Proceeding further on this aspect, Mr. Vohra contended that the *sine qua non* for Article 13 being attracted would be the transfer of technical knowledge, experience, skill, know-how or processes in a manner which would have enabled BCCI itself to conduct the IPL on its own without any advice or assistance of IMG. According to learned senior counsel, the fact that the Services Agreement with BCCI continued for more than ten years and saw IMG being involved on a yearly basis to provide assistance in the conduct of the IPL is itself evidence of no transfer of technical knowledge, experience or skill having taken place.

31. This aspect was sought to be highlighted with the identification of some of the key activities undertaken by IMG and whether the same could be said to satisfy the requirement of 'make available'. Mr. Vohra referred to the following comparative table in this respect: -

"Nature of activities	**Whether Make Available**
Conducting research in respect of making recommendation to BCCI on the appropriate structure for all aspects of the IPL.	Since, recommendations are made every year for the modifications in the structure due to the participant's changes, the review of the guidelines etc. by the Appellant does not make available the knowledge to BCCI.
Formulating policies/procedures and work plan relating to running of the event in India, including setting out the logistics, man powers etc.	Every year requirements are different and accordingly logistics, man powers and work plans need to be changed. No make available.
Development of best practice match day media guidelines	For every IPL the media guidelines and best practices need to drafted.

[15] ITA 144/2023

	No make available.
Identification of prospective sponsors	Yearly activity. No Make available.
Advice and assistance in connection with rules and regulations relating to registration, auction and trading of players	Yearly activity. No Make available.
Advice and assistance in connection with Player Contracts	Yearly activity. No Make available.
Advice and assistance in connection with Anti-Doping and WADA Compliances Regulations	There has been lot of development as far as anti-doping laws are concerned and accordingly guidelines need to be reviewed consistently. No make available.
Creation of IPL match schedule	Yearly activity. No make available.
Bringing in global best practices in building and evaluating sporting properties and related aspects.	BCCI is not expected to be an expert in global best practices."

32. It was then submitted by learned senior counsel in the alternative that even if one were to assume that the services rendered by IMG answer the description of FTS, the payments received by it would fall for consideration only under Article 7 of the DTAA since the same was indelibly connected to the contract that IMG had with BCCI, and which was concerned with the rendition of services and fees so received in consideration thereof being effectively connected with the Service PE of the appellant. According to Mr. Vohra, Article 13(6) requires one to examine whether the contract is 'effectively connected' to the PE and if the answer to the above be in the affirmative, the receipts being liable

to be taxed only to the extent as envisaged under Article 7 of the DTAA. According to learned senior counsel, since IMG admittedly had a Service PE and the source of revenue was only one contract, it must consequently be held that the same was effectively connected with the PE. Accordingly, and in view of the above, it was his submission that the entire receipt from BCCI would go out of the ambit of Article 13 and become taxable as income under Article 7 to the extent attributable to the PE.

33. According to learned senior counsel, this aspect stands answered in favour of the appellant by the Supreme Court in **Ishikawajma Harima Heavy Industries Ltd. vs. Director of Income Tax, Mumbai**[16] and where it was observed as follows: -

> "79. Since the appellant carries on business in India through a permanent establishment, they clearly fall out of the applicability of Article 12(5) of DTAA and into the ambit of Article 7. The Protocol to DTAA, in para 6, discusses the involvement of the permanent establishment in transactions, in order to determine the extent of income that can be taxed. It is stated that the term "directly or indirectly attributable" indicates the income that shall be regarded on the basis of the extent appropriate to the part played by the permanent establishment in those transactions. The permanent establishment here has had no role to play in the transaction that is sought to be taxed, since the transaction took place abroad."

34. Mr. Vohra in this context also relied upon the following observations as appearing in a ruling handed down by the **Authority of Advanced Ruling** in **Worley** P**arsons Services**[17]:-

> "13.2 There is one more aspect which will have some relevance in understanding the observations referred to supra. In the DTAA between India and Japan, the terminology of article 12 is somewhat

[16] (2007) 3 SCC 481
[17] [2009] 312 ITR 273 (AAR)

different. The phraseology used in article 12.5 is "the right, property or contract in which the royalties or fees for technical services are paid is effectively connected with the PE". In such a case, article 7 will apply. Instead of the word 'services' occurring in the Treaty with which we are concerned, the expression 'contract' is used therein. In view of this language of article 12(5), a view can be taken that the contract as a whole was effectively connected with the PE though the particular services (offshore services) were not so connected. Apparently, for this reason, their Lordships have proceeded on the premise that the offshore services forming part of the contract though rendered outside India were effectively connected to the PE, though the PE had no role in playing the actual rendering of such services."

35. Our attention was also drawn to the following passage as appearing in **Philip Baker's treatise on "Double Taxation Conventions"**: -

"**Article 7(7): Specific articles override Article 7(1)**

Article 7(7) concerns both of the situations covered by art. 7(1) (i.e. where the enterprise does or does not have a permanent establishment). Where an enterprise receives any type of income dealt with by any of the specific Articles of the Convention, the specific Articles are not affected by art. 7. Many of the other Articles specifically Artie] es 10(4), 11 (4), 12(3) and 21 (2) contain paragraphs which provide that, where the shareholding, indebtedness, etc., is "effectively connected with the permanent establishment, art. 7 should apply. According to paragraph 35 of the Commentary, such payments may then be regarded as "profits" of the permanent establishment within art. 7 and may be attributed to the permanent establishment or they can be taxed separately but without the limits contained in the specific Articles. The order of priority is thus as follows. First, it is necessary to decide whether an item of income falls within one of the specific Articles - dividends, royalties, etc. If it does, then that Article applies unless the enterprise has a permanent establishment in that state and the income is effectively connected with that permanent establishment. In that event, art. 7 will apply and the income will be taxed as a profit of the permanent establishment or separately."

In view of the aforesaid and in light of Article 13(6) of the DTAA, Mr.

Vohra would submit that the view taken by the Tribunal that the revenue was liable to be taxed as FTS is rendered wholly untenable.

36. Proceeding further to address submissions on the additional ground based on Section 9(1)(vii) of the Act, Mr. Vohra submitted that undisputedly in 2009 and 2014, the IPL event was hosted outside India. In view of the above, it was submitted that the case of the appellant would clearly fall within the ambit of Section 9(1)(vii)(b) of the Act since the fee so earned would be liable to be viewed as being in respect of services utilized by BCCI outside India or for that matter enabling it to earn income from a source outside India. It was in the aforesaid backdrop that Mr. Vohra submitted that in the years the IPL event was hosted outside India, the services rendered by IMG to the extent not attributable to its PE, were utilized by BCCI for earning income from a source outside India. This since the sources of income were gate receipts, in stadia advertisements, telecasting rights and others, and all of which were earned from the singular fact of the event itself having taken place in South Africa and UAE. In view of the above, Mr. Vohra had contended that the aforesaid income cannot possibly be deemed to accrue or arise in India and consequently held to be taxable. This issue according to learned senior counsel, in any case, stands answered in favor of the appellants by the Supreme Court in **GVK Industries Ltd. vs. Income Tax Officer and Anr.**[18] where the scope of Section 9(1)(vii) was explained as follows: -

> "**25.** The principal provision is sub-clause (*b*) of Section 9(1)(*vii*) of the Act. The said provision carves out an exception. The exception

[18] 2015 SCC OnLine SC 136

carved out in the latter part of sub-clause (*b*) applies to a situation when fee is payable in respect of services utilised for business or profession carried out by an Indian payer outside India or for the purpose of making or earning of income by the Indian assessee i.e. the payer, for the purpose of making or earning any income from a source outside India. On a studied scrutiny of the said clause, it becomes clear that it lays down the principle what is basically known as the "source rule", that is, income of the recipient to be charged or chargeable in the country where the source of payment is located, to clarify, where the payer is located. The clause further mandates and requires that the services should be utilised in India."

C. CONTENTIONS OF THE RESPONDENTS

37. For the respondents while oral submissions were addressed by Mr. Kunal Sharma and Mr. Sanjeev Menon, a detailed Note of Submissions had also been tendered under the pen of Mr. Zoheb Hossain, the learned senior standing counsel. Mr. Hossain's note rightly identifies the two principal questions with arise as being whether the services rendered by the assessee would qualify as technical or consultancy services and whether the furnishing of those services would fall within the scope of the 'make available' requirement as appearing in Article 13(4) of the DTAA.

38. In order to appreciate the issues that arise, Mr. Hossain firstly drew our attention to the principal obligations placed upon IMG UK and which have also been extracted in the order of the Tribunal for AY 2010-11. The Tribunal had in this regard relied upon the following stipulations as appearing in the Services Agreement: -

"**4. IMG's Obligations**

IMG shall during the Representation Period provide the services set out in Clauses 4.1 and 4.2 (the "Services") it being acknowledged that a significant proportion of the Services constitutes advice

provided to the BCCI from outside India using IMG's international expertise and resources.

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

(a) the structure of the League;

(b) the League rules and regulations;

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

(d) the League implementation budget; and

(e) the Media Rights agreements.

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

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

(i) Franchise Rights;

(ii) Media Rights;

(iii) sponsorship rights;

(iv) official suppliership rights;

(v) licensing and merchandising rights;

(vi) stadium signage rights; and

(vii) any other rights in relation to the League that may come up for leverage by BCCI in the future

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

(i) any ongoing tender process in respect of Franchise Rights;

(ii) the Media Rights; and

(iii) the commercial Rights;

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

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

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

(i) contracts with the successful Franchisees;

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

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

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

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

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

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

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

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

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

(n) the provision of a League handbook;

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

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

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

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

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

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

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

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

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

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

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

39. Mr. Hossain also sought to draw a distinction between the services and functions performed by the UK office of IMG as also those which were undertaken by the PE. The UK office functions were discerned from the transfer pricing study report and relevant parts whereof are reproduced hereinbelow:-

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

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

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

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

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

5. Formulation/ preparation of marketing strategies for franchise tender

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

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

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

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

10. Preparation of television production specifications

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

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

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

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

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

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

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

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

19. Advice and assistance in connection with the Player contracts

20. Establishment and maintenance of the Player registration system

21. Creation of the IPL match schedule along with IMG India PE

22. Advice and assistance in connection with Anti-Doping and WADA Compliance Regulations along with IMG India PE

23. Development assistance in creation of new intellectual properties relating to the League

24. Carrying out research in consultation with BCCI to ascertain improvements in various areas of management and execution of the League

25. Bringing-in global best practices in building and evaluating sporting properties and related aspects

26. Delivering a post event report at the end of each season

27. Preparation of marketing collaterals, press packs and appropriate presentation documentation for meetings/ events conducted in this regard. Accordingly, the conceptualization, strategy formulation, core process and know-how development, creation of framework for IPL, etc was done by IMG UK from the UK."

40. The functions of the India office were also noticed in the said report and the parts thereof which are relied upon by the respondents are extracted hereunder:-

"**4.4.2. Functions performed by IMG India PE**

As part of the execution of the contract, a certain set of activities were required to be undertaken in India. Accordingly, some of the discussions/ negotiation processes between BCCI and various other parties (like franchises, sponsors, media partners, etc.) happened in India since the 2009 event was scheduled to take place in India. For this purpose, IMG UK employees came to India from time to time for short term visits. Further, few freelancers were appointed/ engaged by IMG UK for undertaking the on-ground implementation and related supervision activities in India.

***

The activities undertaken by the Branch include: liaison/ coordination support in dealing with the client/ BCCI, media partners, sponsors, franchisees, player auction process, etc. in India; organizing the implementation of the event in India viz. coordinating with various third parties in India to ensure that facilities/ arrangements at the match locations are in line with the desired IMG UK guidelines; providing/ managing logistics, manpower support in India relating to running of the event and undertaking related administrative support activities, assistance in negotiation of

contracts with sponsors, media, successful franchisees etc.; undertaking market/ industry research to assist IMG UK in identification of prospective sponsors in India. The logistic activities essentially involved making arrangements for travel bookings, room bookings, commuting of IMG staff, etc. As mentioned earlier, IMG UK/ IMG India PE sub contracted certain routine services relating to on-ground implementation/ running of the event to IMC India Branch. IMG India PE was involved in/ responsible for overseeing and managing the liaisoning and implementation support activities undertaken by IMC India Branch.

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

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

41. It was at the outset contended by the respondents that a plain reading of the scope of work assigned to IMG UK would establish that the services rendered by it would clearly fall within the ambit of technical and consultancy services. The note of Mr. Hossain, while seeking to expound upon the terms "technical" and "consultancy" occurring in the DTAA relies upon Article 12A of the UN Model Convention which reads as follows: -

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

2. However, notwithstanding the provisions of Article 14 and subject to the provisions of Articles 8, 16 and 17, fees for technical services arising in a Contracting State may also be taxed in the Contracting State in which they arise and according to the laws of that State, but if the beneficial owner of the fees is a resident of the other Contracting State, the tax so charged shall not exceed ___ per cent [the percentage is to be established through bilateral negotiations] of the gross amount of the fees.

3. The term "fees for technical services" as used in this Article means any payment in consideration for any service of a managerial, technical or consultancy nature, unless the payment is made:

(a) to an employee of the person making the payment;

(b) for teaching in an educational institution or for teaching by an educational institution; or

(c) by an individual for services for the personal use of an individual.

4. The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of fees for technical services, being a resident of a Contracting State, carries on business in the other Contracting State in which the fees for technical services arise through a permanent establishment situated in that other State, or performs in the other Contracting State independent personal services from a fixed base situated in that other State, and the fees for technical services are effectively connected with:

(a) such permanent establishment or fixed base, or

(b) business activities referred to in (c) of paragraph 1 of Article 7.

In such cases the provisions of Article 7 or Article 14, as the case may be, shall apply.

5. For the purposes of this Article, subject to paragraph 6, fees for technical services shall be deemed to arise in a Contracting State if the payer is a resident of that State or if the person paying the fees, whether that person is a resident of a Contracting State or not, has in a Contracting State a permanent establishment or a fixed base in connection with which the obligation to pay the fees was incurred, and such fees are borne by the permanent establishment or fixed base.

6. For the purposes of this Article, fees for technical services shall be deemed not to arise in a Contracting State if the payer is a resident of that State and carries on business in the other Contracting State through a permanent establishment situated in that other State or performs independent personal services through a fixed base situated in that other State and such fees are borne by that permanent establishment or fixed base.

7. Where, by reason of a special relationship between the payer and the beneficial owner of the fees for technical services or between both of them and some other person, the amount of the fees, having

regard to the services for which they are paid, exceeds the amount which would have been agreed upon by the payer and the beneficial owner in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In such case, the excess part of the fees shall remain taxable according to the laws of each Contracting State, due regard being had to the other provisions of this Convention."

42. The note then draws our attention to the following passages as appearing in the commentary of the UN Model Convention: -

> "64. The ordinary meaning of the term "technical" involves the **application of specialized knowledge, skill or expertise with respect to a particular art, science, profession or occupation**. Therefore, fees received for services provided by regulated professions such as law, accounting, architecture, medicine, engineering and dentistry would be fees for technical services within the meaning of paragraph 3. Thus, if an individual receives payments for professional services referred to in Article 14, paragraph 2 from a resident of a Contracting state, those payments would be fees for technical services. If the payments arise in that Contracting State because they are made by a resident of that State or borne by a permanent establishment or fixed base in that State, the payments would be subject to tax by that State in accordance with paragraph 2 irrespective of the fact that the services are not performed in that State through a fixed base in that State.
>
> 65. Technical services are not limited to the professional services referred to in Article 14, paragraph 2. Services performed by other professionals, such as pharmacists, and other occupations, such as scientists, academics, etc., may also constitute technical services **if those services involve the provision of specialized knowledge, skill and expertise**.
>
> 66. The ordinary meaning of "consultancy" involves provision of advice or services of a specialized nature. Professionals usually provide advice or services that fit within the general meaning of consultancy services although, as noted in paragraph 63 and 64, they may also constitute management or technical services."

43. According to the respondents, the services provided by IMG UK involved provision of specialized knowledge and skill with respect to researching into structuring, organizing and commercially exploiting sporting leagues. It was submitted that since the work undertaken by

the appellant largely involved researching and advising, the same would clearly fall within the meaning of technical and consultancy services. In order to expand upon the aforesaid submission, the respondents also relied upon a decision of the Madras High Court in **Regen Powertech Pvt. Ltd. vs. Deputy Commissioner of Income Tax**[19] and which was concerned with remittances made by the Indian payer to a non-resident for conducting a market study. While dealing with the aforesaid that High Court had held as follows: -

> "**10.** There are three issues raised before us in this appeal. First relates to payments made by the assessee to M/s. WFPL, Srilanka, the second relates to payment made to M/s. WRS, Germany and the third relates to payment made to M/s. Ernst and Young, United Arab Emirates. The result to be arrived in this appeal wholly revolves upon the terms and conditions of the contract entered into between the assessee and the three foreign entities. The Assessing Officer has examined the terms and conditions minutely and has assigned reasons in support of his conclusion as to why the assessee should have deducted tax at source while effecting such payments. The learned senior standing counsel for the Revenue is right in his submission that we cannot embark upon a fact finding exercise but we are required to answer the substantial question of law, if any arisen in this appeal. We would be well justified in interfering with the order of the Tribunal if the assessee contends that it suffers from perversity. The assessee has not raised such a ground in this appeal but seeks to assail the findings of the Tribunal, vis-a-vis the interpretation given to the type of contract/arrangement between the assessee and the three foreign entities. Therefore, we are not expected to reappreciate the factual position to arrive at a conclusion in the matter. Nevertheless, we noted the findings of the Assessing Officer as affirmed by the Commissioner of Income-tax (Appeals) and the Tribunal as well as the work order issued by the assessee to M/s. WFPL, Srilanka dated March 25, 2013. The assessee in their reply to the show-cause notice dated February 8, 2016 contended that they took the assistance of M/s. WFPL, Srilanka for construction scope to be performed in Srilanka. If we examine the terms and conditions mentioned in the work order, more particularly the scope of work and the various clauses contained therein, we have no

[19] (2019) SCC OnLine Mad 39086

hesitation to hold that the nature of activity done in Srilanka is not mere construction or assembly or mining like project. Admittedly, the installation of wind turbine is a highly skilled and technical work. The various clauses in the work order clearly demonstrates the scope of work and therefore, we cannot but hold that the Assessing Officer was right in concluding that the services rendered by M/s. WFPL is in the nature of fee for technical services. Similarly, with regard to the services rendered by M/s. WRS, Germany was stated by the assessee to be a repair work. The Assessing Officer after taking note of what is the type of repair work which would accrue in wind turbine, concluded that the repairs are not mundane repairs but require highly sophisticated techniques and accordingly held that it is in the nature of technical services. After analysing the type of services rendered by M/s. Ernst and Young at United Arab Emirates, the Assessing Officer held that the market study is in the nature of technical services and the remittance is to be treated as fee for technical services. We find that there is no error in the said conclusion especially when it has been rendered on appreciation of the scope of work based on the documents placed by the assessee before the Assessing Officer. Therefore, we find that the conclusion arrived at by the two authorities and the Tribunal on all the three issues does not call for interference."

44. The respondents contended that three fact finding authorities had on an analysis of the documentary evidence placed before them, come to the conclusion that the services performed by IMG would fall within the scope of FTS as defined under Article 13 of the DTAA. According to the respondents, the mere fact that Article 13(4) does not speak of managerial services would clearly not advance the case of the appellant any further since the services rendered would, in any case, fall within the ambit of technical or consultancy services. In view of the above, the fact that those services are not concerned with the control or administration of the conduct of the commercial enterprise would be of little relevance.

45. The respondents argued that once it is found that the services performed would qualify as technical or consultancy services, all that

need be further established is those having been made available to the Indian payer. According to them, undisputedly the work performed by IMG UK consisted of conducting research, advising, consulting, developing strategies, preparation of contracts, rules, regulations as well as constitution of the governing body of the league itself. They contended that as a result of extension of those services, BCCI was made available technical knowledge in the form of findings from research carried out by IMG UK, know-how relating to commercial rights, structuring, organizing and management of a sports league or processes in the form of league structure and work-flow as well as experience in conducting and organizing a large scale sports league. According to them, all of the above would have enabled BCCI to eventually organize the league on its own.

46. According to the respondents, the FTS Clause in the DTAA requires that the technical knowledge and skill remain with the person who was recipient of the services even after a particular contract had come to an end. This prescription, according to them, is also fulfilled since the technical knowledge comprised in the research would remain with the BCCI even after the contract had come to an end. Similar would be the position relating to know-how pertaining to commercial rights or for that matter structuring, organizing and management of a sports league. Viewed in light of the above, it was their submission that the 'make available' requirement erected by Article 13 clearly stood fulfilled. It was further argued that merely because the tenure of the Services Agreement spanned over ten years, the same would not detract from the 'make available' condition being fulfilled since Article 13(4)

does not prescribe a duration over the course of which knowledge, technical know-how, skill may be made available.

47. They further submitted that regard must also be had to the fact that a business in its formative years may inevitably require hand holding by a consultant and which may not be limited to a one-time provision of knowledge, skill, know-how, experience or processes. According to them, handholding could continue for elongated periods and till such time the recipient of service comes to acquire adequate knowledge, skill, know-how and experience and become enabled to function independently. Viewed in that light, they submitted that the mere fact that the agreement spanned or spread over a period of ten years by itself would not be a factor relevant for determining whether the make available condition had been met. In support of the aforenoted submission, the respondents placed reliance upon the following observations as appearing in **Centrica India Offshore Pvt. Ltd. vs. Commissioner of Income Tax & Ors.**[20]

> "**32.** The mere rendition of service is not an "included service" that triggers tax liability. Instead, the enterprise must "make available" the skill behind that service to the other party, i.e., the Indian recipient. The definition, as it appears, is more restricted that in the India-UK DTAA. The question is whether the higher threshold, is met in this case. The service provided by the secondees is to be viewed in the context in which their secondment or deputation was necessitated. The overseas entities required the Indian subsidiary, CIOP, to ensure quality control and management of their vendors of outsourced activity. For this activity to be carried out, CIOP required personnel with the necessary technical knowledge and expertise in the field, and thus, the secondment agreement was signed since CIOP—as a newly formed company—did not have the necessary human resource. The secondees are not only providing services to CIOP but rather tiding CIOP through the initial period, and ensuring

[20] 2014 SCC OnLine Del 2739

that going forward, the skill set of CIOP's other employees is built and these services may be continued by them without assistance. In essence, the secondees are imparting their technical expertise and know-how on to the other regular employees of CIOP. Indeed, it is admitted by CIOP that the reason for the secondment agreement was to provide support for the initial years of operation, till the necessary skill-set is acquired by the resident employee group. The activity of the secondees is thus to transfer their technical ability to ensure quality control vis-a-vis the Indian vendors, or in other words, "make available" their know-how of the field to CIOP for future consumption. The secondment, if viewed from this angle, actually leads to a benefit that transmits the knowledge possessed by the secondees to the regular employees. Indeed, any other reading would unduly restrict article 12 of the DTAA, which contemplates not only a formal transfer of intellectual property but also other techniques and skills ("soft" intellectual property, if it can be called as such) required for the operation of a business. The skills and knowledge required to ensure that the task entrusted to CIOP—quality control—is carried on diligently certainly falls within the broad ambit of article 12."

48. The respondents in this behalf also drew our attention to the following observations as appearing in the order of the Tribunal: -

"**43**. Now the next contention raised by the appellant is that as there is no 'make available' test satisfied in case of the services provided by the appellant, hence, according to article 13 (4) which defines the fees for technical services means payments of any kind of any person in consideration for the rendering of any technical or consultancy services which make available technical knowledge, experience, skill know-how or processes, or consist of development and transfer of a technical plan technical design. According to the assessee as clause C of article 13 (4) is not satisfied the balance cannot be charged to tax as fees for technical services. In the present case the services are already described in the previous paragraphs and there cannot be two opinion about that that mere provision of services or technical services is not sufficient, it is essential that services should be "make Available" technical knowledge, experience, skill, know-how or process. The expression make available has far-reaching significance since it limits the scope of technical and consultancy services. Generally this expression 'make available' is used in the sense of one person supplying or transferring or imparting technical knowledge or skill or technology to another and technology is considered 'made available' only when the services

receiver is enabled to absorb and apply the technology contained therein. If the services do not have any technical knowledge the fees paid for it do not fall within the meaning of fees for technical services as per the article 13 of the India UK DTAA.. The services receiver is able to make use of the technical knowledge etc by himself in his business or for his own benefit and without recourse to the service provider in future and for this purpose the transmission of the technical knowledge, experience, skill, etc from the service provider to the services CP is necessary. In other words the technical knowledge, experience, skill etc must remain with the service recipient even after the rendering of the services has come to an end and the services receiver is at liberty to use the technical knowledge skill know-how and processes in his own right. In the present case the assessee has hired for conducting research in respect of the appropriate structure for the IPL and makes recommendation to BCCI accordingly. It is required to provide the Constitution of the IPL, the authority of the governing Council, the structure of IPL, tournament rules and regulation ,the franchisee tender document ,the franchisee agreement, necessary franchisee regulation and the IPL implementation budget. According to the para No. 9 of the agreement that intellectual property rights remains with the board of control for Cricket in India. Even before us Ld. authorized representative could not point out that why 'make available test' has not been satisfied in this even by providing all the rules and regulations of IPL, standard operating procedures of matches, copies of the franchisee agreement, various documentation/contracts etc which shall remain with the BCCI. Therefore in the present case according to us the BCCI is enabled to absorb and apply the information and the advice provided by the appellant to it for conducting such sporting events. According to us when all this documentation and material is provided to the BCCI it is able to use such know-how and documentation generated from provision of the services of the appellant independent of the services of the appellant in future. It is too naïve to say that in absence of IMG services BCCI on its own IPL tournament cannot hold. Merely because the BCCI has entered into a contract for conducting further 9 events does not lead to the conclusion that the information documentation, agreements, contracts etc cannot be said to be 'made available' to the appellant. In fact according to us it is. In view of this we reject the contention of the appellant that the sum of Rs. 237750181/-cannot be taxed as fees for technical services as it does not satisfy 'make available' condition provided in article 13(4) 9c) of the DTAA."

49. The stand taken by IMG in these appeals was then questioned on a more fundamental plane with the respondents arguing that Article

13(6) was clearly not attracted since there was no effective connection between the contract and the PE. Reliance was firstly placed upon the following observations as appearing in the transfer pricing study report:-

> "**4.4.2. Functions performed by IMG India PE**
>
> As part of the execution of the contract, a certain set of activities were required to be undertaken in India. Accordingly, some of the discussions/ negotiation processes between BCCI and various other parties (like franchises, sponsors, media partners, etc.) happened in India since the 2009 event was scheduled to take place in India. For this purpose, IMG UK employees came to India from time to time for short term visits. Further, few freelancers were appointed/ engaged by IMG UK for undertaking the on-ground implementation and related supervision activities in India.
>
> ***
>
> The activities undertaken by the Branch include: liaison/ coordination support in dealing with the client/ BCCI, media partners, sponsors, franchisees, player auction process, etc. in India; organizing the implementation of the event in India viz. coordinating with various third parties in India to ensure that facilities/ arrangements at the match locations are in line with the desired IMG UK guidelines; providing/ managing logistics, manpower support in India relating to running of the event and undertaking related administrative support activities, assistance in negotiation of contracts with sponsors, media, successful franchisees etc.; undertaking market/ industry research to assist IMG UK in identification of prospective sponsors in India. The logistic activities essentially involved making arrangements for travel bookings, room bookings, commuting of IMG staff, etc. As mentioned earlier, IMG UK/ IMG India PE sub contracted certain routine services relating to on-ground implementation/ running of the event to IMC India Branch. IMG India PE was involved in/ responsible for overseeing and managing the liaisoning and implementation support activities undertaken by IMC India Branch.
>
> All these aforesaid activities were undertaken by IMG India PE under the framework, guidelines and policies prepared by IMG UK (from outside India). Any significant divergence or variation from the framework required specific approval from the Project leader, who was based in UK.

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

50. It was thus sought to be emphasized that the Indian PE's role, quite apart from undertaking functions distinct from those performed by IMG UK, was essentially confined to 'subcontracted support service'. The respondents argued that the purpose underlying Article 13(6) is to exclude from the scope of FTS income which is otherwise attributable to a PE and thus chargeable under the head of "business income". This aspect of Article 13(6), according to the respondents, has been rightly enunciated by the Mumbai Bench of the Tribunal in **DCIT vs. Marubeni Corporation**[21] where it had held: -

> **"7.** In view of the above discussions, to term a connection of the interest income with the permanent establishment or the fixed base, as "effectively connected", one has to see whether, by virtue of such a connection, the interest income in question is taxable as an income attributable to the permanent establishment or the fixed base in question. The effectiveness of connection thus lies in the taxability under article 7 or article 14. Unless that taxability comes into play, there cannot be any overlapping in the scope of article 11*vis-à-vis* article 7 or *vis-à-vis* article 14, and, unless there is such an overlapping of the treaty provisions, there is no occasion for exclusion of one of the overlapping treaty provision by article 11(6). In other words, the taxability under article 7 or article 14 is a sine *qua* non for triggering the exclusion clause under article 11(6). There is no finding to, or even indication of, that effect. Unless the Assessing Officer gives that finding, excluding interest income from gross basis taxation under article 11(6) cannot come into play. In any event, triggering of exclusion under article 11(6) does not, by itself, result in taxation of interest income at the normal rate of tax-unless the interest income is taxable under article 7(1) or under article 14(1)."

51. The respondents then sought to draw sustenance from the commentary pertaining to the OECD Model Convention to drive home

[21] ITA No.10/Mum/2022

their contention that the effective connection test was not met. It becomes relevant to note that Article 12(3) of the OECD Model Convention reads as follows: -

> "**3.** The provisions of paragraph 1 shall not apply if the beneficial owner of the royalties, being a resident of a Contracting State, carries on business in the other Contracting State in which the royalties arise through a permanent establishment situated therein and the right or property in respect of which the royalties are paid is effectively connected with such permanent establishment. In such case the provisions of Article 7 shall apply."

52. Explaining the scope of that Article, the commentary renders the following observations: -

> "**21.1** A right or property in respect of which royalties are paid will be effectively connected with a permanent establishment, and will therefore form part of its business assets, if the "economic ownership of that right or property is allocated to that permanent establishment under the principles developed in the Committee's report entitled Attribution of Profits to Permanent Establishments1 (see in particular paragraphs 72-97 of Part I of the report) for the purposes of the application of paragraph 2 of Article 7. In the context of that paragraph, the "economic" ownership of a right or property means the equivalent of ownership for income tax purposes by a separate enterprise, with the attendant benefits and burdens (e.g. the right to the royalties attributable to the ownership of the right or property, the right to any available depreciation and the potential exposure to gains or losses from the appreciation or depreciation of that right or property)."

53. It would be pertinent to note that the expression 'effectively connected' also occurs in Article 12A(4) of the UN Model Convention. The commentary on that Convention explains the scope of Article 12A(4) in the following terms:-

> "**106.** The paragraph does not define the meaning of the expression "effectively connected." As a result, whether fees for technical services are effectively connected with a permanent establishment,

fixed base or business activities similar to those carried on through a permanent establishment must be determined on the basis of all the relevant facts and circumstances of each case. In general, fees for technical services would be considered to be effectively connected with a permanent establishment or fixed base if the technical services are closely related to or connected with the permanent establishment or fixed base or fit the business activities are similar to those carried out through the permanent establishment. This will be the case where the remuneration paid to the person providing the services is borne by the permanent establishment or fixed base in the State in which the fees arise.

107. Where paragraph 4 applies, fees for technical services are taxable by the State in which the fees arise as part of the profits attributable to the permanent establishment in accordance with Article 7 or the income attributable to the fixed base in accordance with Article 14. Thus, paragraph 4 relieves the State in which the fees for technical services arise from the limitations on its taxing rights imposed by Article 12A."

54. Viewed in light of the above, the respondents submitted that the Indian PE cannot be recognized to have undertaken activities which would fall within the meaning of technical or consultancy services and that more fundamentally the economic ownership over the contractual rights also did not rest in the Indian PE. It was thus urged that since the functions performed by the Indian PE were confined to 'subcontracted support services', the prerequisites for the invocation of Article 13(6) were not satisfied.

55. It was then submitted that merely because some part of the income earned from the Services Agreement was attributed to the Indian PE and offered to tax as business income, cannot mean that the assessee would otherwise stand exempted from paying tax on FTS under Article 13. It was in this regard submitted that Article 5(2)(k) essentially deals with services rendered, furnished or performed within a Contracting State. According to the respondents, the said Article

places an additional requirement for the purposes of its applicability by qualifying the services which would fall within that Article as being those which are otherwise not covered by Article 13. The submission in essence was that Article 5(2)(k) is concerned with services furnished in a contracting state and which may be other than technical or consultancy. Viewed in that light, it was submitted that merely because an entity provided technical or consultant service from outside the territory of India, it would not mean that Article 5(2)(k) would not apply to technical or consultant services performed or carried out from within. The respondents argued that the mere fact that they accepted the position of a Service PE having come into existence cannot possibly be viewed as an admission with respect to taxability of revenue earned from services performed from outside.

56. The written submission tendered by the respondents further asserts that the services provided by the appellant through its Service PE though performed in India were not of the nature envisaged by Article 13. In view of the above, they argued that the mere acceptance of the same cannot be viewed as services provided by IMG UK from outside India not being liable to tax under Article 13. The submission essentially was that merely because income attributable to the Indian PE had been taxed as business income does not mean that the assessee becomes exempt from paying tax on FTS under Article 13.

D. THE CONTRACT STRUCTURE

57. Before proceeding further to adjudicate upon the rival submissions noticed hereinabove, we deem it appropriate to consider

the following salient provisions which stood encapsulated in the MoU and the Services Agreement.

58. The MoU records the intent of BCCI to appoint IMG to assist it in the establishment, commercialization and operation of the IPL. The core responsibilities and primary functions which were entrusted upon IMG stand incorporated in Article 1 which is reproduced hereinbelow: -

> "l. **IMG Services**
>
> IMG has been appointed on a sole and exclusive basis to provide the following services in connection with the IPL (the "**Services**")
> 1.1 IMG shall conduct research in respect of the appropriate structure for the IPL and make recommendations to BCCI accordingly (it being acknowledged that the final decisions in respect thereof are BCCI's).
>
> 1.2 IMG shall research and provide appropriate presentation documentation in respect of the following:
> (a) the meetings in Singapore on 2nd and 3rd September 2007.
> (b) the IPL presentation and press conference which is scheduled to take place in New Delhi on 13 September (including the preparation of marketing collateral and press packs in association with BCCI's PR agency) and
> (c) any other appropriate events.
>
> 1.3 Once BCCI has decided upon the most appropriate structure for the IPL under advice from lMG, IMG shall conduct research into and prepare the following IPL foundation documentation in connection with it including:
> (a) the constitution of the IPL
> (b) the authority of the Governing Council of the IPL;
> (c) the structure of the tournament;
> (d) the IPL tournament rules and regulations;
> (e) the franchise tender document;
> (f) the franchise agreement and any necessary franchise regulations;
> (g) the IPL implementation budget.
>
> 1.4 In addition to the matters referred to in paragraph 1.1 - 1.3 above IMG shall carry out/provide (as appropriate) the following:
>
> (a) the development of a rights management process in respect of the

commercial rights and assets of any kind arising out of the IPL/ BCCI

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

(c) the preparation and execution of marketing strategies for:
• the Franchise tender
• the media Rights
• the sponsorship Rights
• the official supplier Rights
• the licensing Rights
• any other Rights;

(d) the management of the Franchise tender process;

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

(f) the preparation and negotiation of the contracts with:
• the successful Franchisees
• sponsors
• the media
• all other entities which acquire or may be interested in any of the Rights

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

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

(h) the preparation of a television production specification;

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

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

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

therewith. ”

59. As per the stipulations contained in the MoU, the term of engagement was prescribed to be ten years from the date of its execution and until the conclusion of the 10th season of the IPL. In furtherance of the understanding so reached, a Services Agreement came to be executed thereafter on 24 September 2009. The Services Agreement defined the expression “Representation Period” as under: -

> “"**Representation Period**" means the entire period of time (not being limited by reference to the duration of any Season) commencing on 1 January 2009 and concluding on the date of the conclusion of the ninth complete Season thereafter or, if shorter, the period from the signature of this Agreement until its termination in accordance with the provisions hereof;”

60. The word “territory” was defined in terms of Clause 1.1(x) as follows: -

> “"**Territory**" means the world.”

61. Clause 2.1 of the agreement read thus: -

> “2.1 BCCI hereby appoints IMG as BCCI's preferred agent and representative to advise and assist in the exploitation of the Rights and the provision of the Services throughout the Territory during the Representation Period. ”

62. Of equal significance were Clauses 3.1, 4, 4.1 and 4.2 which are extracted hereinbelow: -

> “ **3. Exploitation of Rights**
> 3.1 IMG is hereby granted the right and authority to assist BCCI in exploiting the Rights 'during the Representation Period including without limitation making arrangements for agreements in respect of the Rights, provided that IMG does not have the power to bind or commit BCCI to any agreement or arrangement relating to the Rights.
>
> xxxx xxxx xxxx
>
> **4. IMG's Obligations**

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

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

(a) the structure of the League;

(b) the League rules and regulations;

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

(d) the League implementation budget; and

(e) the Media Rights agreements.

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

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

(i) Franchise Rights;

(ii) Media Rights;

(iii) sponsorship rights;

(iv) official suppliership rights;

(v) licensing and merchandising rights;

(vi) stadium signage rights; and

(vii) any other rights in relation to the League that may come up for leverage by BCCI in the future

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

(i) any ongoing tender process in respect of Franchise Rights;

(ii) the Media Rights; and

(iii) the commercial Rights;

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

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

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

(i) contracts with the successful Franchisees;

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

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

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

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

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

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

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

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

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

(n) the provision of a League handbook;

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

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

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

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

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

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

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

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

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

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

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

63. The consideration for the provision of services by IMG was set out in Clause 6.1 which is extracted hereinbelow: -

"**6. Consideration**

6.1 In consideration of the provision of the Services, BCCI will pay to IMG the sum of:

(a) in respect of the 2009 IPL Season the sum of Rs 23 crores being the invoiced and as yet unpaid balance of the total sum of Rs 33 crores which the parties acknowledge is due and payable in respect of said Season pursuant to the MOU (as varied by the parties), which sum shall be paid immediately upon signature of this Agreement in accordance with said invoices; and :

(b) Rs 27 crores in respect of the 2010 IPL Season and each subsequent Season during the Representation Period provided that such sum shall increase by Rs 1 core in respect of each Season in which there are nine or 10 Teams and a further Rs 1 crore per team in respect of each Season in which there are more than 10 Teams. This annual sum shall be paid in respect of 2010to 25% on each of 1 October 2009, 1 January 2010, 1 April 2010 and 1 July 2010 with the payments in respect of each subsequent year of the Representation Period being structured in the same manner (such that in respect of 2011 the 25% instalments will be payable on 1 October 2010, 1 January 2011, 1 April 2011 and 1 July2011 and so on).

64. Clauses 6.2 and 6.3 which governed the remittance of consideration are reproduced hereunder: -

> "6.2 The above-mentioned annual sums shall in each year be allocated in respect of those of the Services which are provided in India and in respect of those of the Services which are provided from outside India and IMG shall after the end of each Season inform BCCI of such allocation.
>
> 6.3 All sums payable by BCCI to IMG shall be paid together with any service tax which is chargeable thereon and less any deduction for withholding tax that is required to be made by law. In the event that any payment is made net of withholding tax, BCCI shall deliver to IMG a certificate of deduction of tax paid in respect of the payment as soon as practicable after such payment is made. "

65. Both the MoU as well as the Services Agreement unequivocally acknowledge the expertise of IMG to curate and conceptualize sporting leagues. Taking into account the requisite expertise required for conducting a sporting league of this magnitude, BCCI charged IMG with conducting research into and preparing the foundational charter which would inter alia cover the constitution of the IPL, the structure of the tournament, the rules and regulations for the league, franchisee agreements as also the estimated implementation budget. Besides these core responsibilities, IMG was also obligated to prepare a comprehensive outline for the exploitation of commercial rights and assets. This included franchise agreements, media rights, official suppliership, sponsorship, licensing and merchandising rights. A review of Clause 1.4 of the MoU reveals that IMG by virtue of its expertise, skill and knowledge was granted the right to build the sports league from its foundation and to continue to advise and administer the same over ten league seasons. The diversity of the responsibilities placed upon IMG is indicative of the intent of BCCI to leverage the former's

vast experience and knowledge in conceptualizing and curating a sporting league of eminence. This becomes evident from Clause 4 of the Services Agreement specifically acknowledging that a significant proportion of the service which IMG was to render constituted advice to be provided to BCCI from outside India using *".....IMG's international expertise and resources"*. Clause 4.1 significantly records that while IMG had carried out research and broadly advised the BCCI in connection with the formation and governance of the IPL, it would continue to advise and assist BCCI on areas enumerated therein.

66. It is thus manifest that it was the technical expertise, specialized knowledge and extensive know-how available with IMG which formed the basis for the services which were extended to BCCI for the purposes of exploitation of the rights as defined and the provision of services throughout the territory and which as per Clause 1.1(x) of the MoU was not confined to India but covered the globe in its entirety. It was in furtherance of the aforesaid contractual obligations that IMG appears to have established its India office and which came to constitute a Service PE in terms of Article 5(2)(k) of the DTAA. This was also in light of the obligation of the IMG to depute adequate number of personnel for the purposes of effective administration of the league. IMG thus was to play a critical role in ensuring the successful conceptualization, execution and administration of the IPL. The global reach of IMG's obligations included managing international broadcasting rights, securing worldwide sponsorships and negotiating with corporations for official suppliership. What we seek to emphasise is that IMG's obligations required coordination and strategic planning

on an international scale and thus travelling beyond the borders of India.

E. THE ARTICLE 5(2)(k) QUESTION

67. As noticed hereinabove, it had been urged on behalf of IMG that once the Service PE had admittedly come into existence and the income attributable to that establishment subjected to tax, it would be impermissible for the respondents to assert that income other than that attributable to the Service PE would be liable to tax under Article 13 of the DTAA. Essentially, it had been contended that the respondent not only stood estopped from taking that position but they could also not have legally bifurcated the composite consideration earned by IMG into Business Profits and FTS. Mr. Vohra had vehemently argued that the respondents having accepted the income attribution to the Service PE, they stood precluded from treating the residual revenue as FTS and imposing tax under Article 13. This submission had proceeded in the backdrop of Article 5(2)(k) speaking of furnishing of services other than those taxable under Article 13. The submission was founded on the premise that once the revenue was accepted to fall within the ambit of Article 5(2)(k), it would be impermissible for the respondents to treat that service as being FTS under Article 13. We, however, find ourselves unable to sustain the aforenoted submission for the following reasons.

68. It is essential to underscore that Article 5 of the DTAA neither serves as a head of taxation nor does it concern itself with a categorization or classification of income. Rather, Article 5 is

specifically concerned with defining and delineating the concept of a "Permanent Establishment" and enumerating circumstances in which a PE could be said to have come into existence. The Article serves to enumerate the criteria and circumstances in which a non-resident entity's presence and activities in a Contracting State would be sufficient to constitute a PE. Thus, in terms of Article 5(2)(k), the moment a resident of a Contracting State were to furnish services including managerial services within the other Contracting State through employees or other persons who had stayed in that State for a period or periods aggregating more than 90 days within a twelve month period, a Service PE would come into existence.

69. It is pertinent to note that the DTAA characterizes profits and income under various independent Articles which form part of the Convention. This is evident from a perusal of Article 6 which defines the principles for taxation of income derived from immovable property, Article 7 which speaks of Business Profits, Articles 8 and 9 which deal with profits derived from the operation of aircrafts and ships, Article 11 which covers the subject of dividends and Article 13 which regulates the taxation regime with respect to royalties and FTS.

70. In the view of the Court, Article 5 serves a specific and clearly delineated purpose within the DTAA framework. It is concerned solely with the conditions under which a Service PE would be deemed to have existed and clause (k) thereof focusing on the duration and nature of services provided by the resident of a Contracting State within the other. It does not extend to characterization or categorization of income nor does it prescribe the specific Article under which such income

should be taxed. To construe Article 5(2)(k) as encompassing the authority to classify and tax income would be a fundamental misinterpretation of its avowed purpose. The Article's role is limited to defining the circumstances under which a PE could be said to exist and does not extend to the subsequent tax treatment of the income derived from the PE's activities.

71. We are thus of the firm opinion that merely because a part of the revenue earned by IMG was attributable to functions performed by the Service PE which came into existence by virtue of Article 5(2)(k), the respondents were clearly not estopped in law from examining whether revenue other than that attributable to the Service PE could be subjected to tax under the separate and individual Articles of the DTAA. All that Article 5(2)(k) regulated was whether a Service PE could be said to have been in existence in the relevant assessment year. The characterization of income, the extent to which it was attributable to the PE and the Article under which it was liable to be taxed were issues which were clearly open for examination. In our considered view, merely because IMG chose to treat the same as Business Profits, the respondents were neither estopped nor restrained from examining the issue independently and uninfluenced by the action of IMG offering a part of the revenue to tax albeit under the head of Business Income.

F. BIFURCATION OF INCOME- WHETHER SUSTAINABLE?

72. The argument of bifurcation of income being impermissible, a submission which was addressed in conjunction with the above, would also falter in light of Article 7(9) of the DTAA. Article 7 reads thus: -

"ARTICLE 7
BUSINESS PROFITS

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

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

.

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

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

5. Subject to paragraphs 6 and 7 of this Article, in the determination of the profits of a permanent establishment, there shall be allowed as deduction expenses which are incurred for the purposes of the business of the permanent establishment, including executive and general administrative expenses so incurred, whether in the State in

which the permanent establishment is situated or elsewhere, which are allowed under the provisions of and subject to the limitations of the domestic law of the Contracting State in which the permanent establishment is situated.

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

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

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

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

73. As is manifest from a reading of Article 7(9), "profits", if otherwise classifiable or being found to have been separately dealt with by the other Articles of the DTAA, would move out of the ambit of Article 7 which stands confined to Business Profits. The bifurcation of income earned by a non-resident appears to be clearly envisaged under the DTAA in light of Article 7(9) itself using the expression *"…. where profits include items of income…."*. Paragraph 9 thus clearly envisages distinct items of income and which may form part of the total revenue of a non-resident entity. It is important to acknowledge the inherent complexities of contracts having more than one facet. There could be numerous contingencies in which mixed contracts may envisage separate and distinct obligations and sources of revenue. Contracts could comprise of more than one object and in which case one may be obliged to discern different elements constituting part of the composite bargain and splitting of those elements. While that may hypothetically and in practice require one to examine whether sources of income are separate and distinct or identifying the dominant source of income, that is not an issue which merits an authoritative declaration insofar as the present appeals are concerned. All that we seek to emphasize is of the potentiality of multiple streams of revenue or income embodied within a single contract and each of which may warrant separate consideration for the purposes of tax characterization. The rationale for our conclusions as articulated in the preceding discussion would be further elucidated in the detailed analysis which follows.

74. It is pertinent to note that Article 7 is clearly not intended to be

an overriding, a non obstante or an umbrella provision which would eclipse all other independent Articles of the Convention. This is evident from para 9 of Article 7 which in unequivocal terms speaks of items of income dealt with separately under other Articles of the Convention being left untouched. Para 9 in unambiguous terms prescribes that in such a situation those other Articles shall not be affected by Article 7. Thus the Article while providing the framework for taxation of business profits respects the boundaries that the DTAA erects and the specific Articles of the Convention that address different categories of income. The structure of the DTAA ensures that each type of income is governed by the specific Article and thus preventing an overlap or conflict.

75. The language in which Article 7(9) of the DTAA stands couched also stands resonated in Article 7(4) of the OECD Model Convention which reads as follows: -

> "4. Where profits include items of income which are dealt with separately in other Articles of this Convention, then the provisions of those Articles shall not be affected by the provisions of this Article. "

Explaining the underlying intent of Article 7(4) of the OECD Model Convention, the official Commentary observes as follows: -

> "71. Although it has not been found necessary in the Convention to define the term "profits", it should nevertheless be understood that the term when used in this Article and elsewhere in the Convention has a broad meaning including all income derived in carrying on an enterprise. Such a broad meaning corresponds to the use of the term made in the tax laws of most OECD member countries.
>
> 72. Absent paragraph 4, this interpretation of the term "profits" could have given rise to some uncertainty as to the application of the Convention. If the profits of an enterprise include categories of income which are dealt with separately in other Articles of the

Convention, e.g. dividends, the question would have arisen as to which Article should apply to these categories of income, e.g. in the case of dividends, this Article or Article 10.

73. To the extent that an application of this Article and the special Article concerned would result in the same tax treatment, there is little practical significance to this question. Further, it should be noted that some of the special Articles contain specific provisions giving priority to a specific Article (see paragraph 4 of Article 6, paragraph 4 of Articles 10 and 11, paragraph 3 of Article 12, and paragraph 2 of Article 21).

74. The question, however, could arise with respect to other types of income and it has therefore been decided to include a rule of interpretation that ensures that Articles applicable to specific categories of income will have priority over Article 7. It follows from this rule that Article 7 will be applicable to business profits which do not belong to categories of income covered by these other Articles, and, in addition, to income which under paragraph 4 of Articles 10 and 11, paragraph 3 of Article 12 and paragraph 2 of Article 21, fall within Article 7. This rule does not, however, govern the manner in which the income will be classified for the purposes of domestic law; thus, if a Contracting State may tax an item of income pursuant to other Articles of this Convention, that State may, for its own domestic tax purposes, characterise such income as it wishes (i.e. as business profits or as a specific category of income) provided that the tax treatment of that item of income is in accordance with the provisions of the Convention. It should also be noted that where an enterprise of a Contracting State derives income from immovable property through a permanent establishment situated in the other State, that other State may not tax that income if it is derived from immovable property situated in the first-mentioned State or in a third State (see paragraph 4 of the Commentary on Article 21 and paragraphs 9 and 10 of the Commentary on Articles 23 A and 23 B)."

76. A similar provision is found in the UN Model Convention and Article 7(6) whereof is framed in the following words: -

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

77. The official Commentary on the UN Model Convention makes

the following pertinent observations: -

> "29. Paragraph 6 reproduces paragraph 7 of Article 7 of the 2008 OECD Model Tax Convention. The Committee considers that the following part of the Commentary on paragraph 7 of Article 7 of the 2008 OECD Model Tax Convention is applicable to paragraph 6 of Article 7 of the United Nations Model Tax Convention (the modifications that appear in italics between square brackets, which are not part of the Commentary on the OECD Model Tax Convention, have been inserted in order to provide additional explanations or to reflect the differences between the provisions of the OECD Model Tax Convention and those of this Model):
>
> > 59. Although it has not been found necessary in the Convention to define the term "profits", it should nevertheless be understood that the term when used in this Article and elsewhere in the Convention has a broad meaning including all income derived in carrying on an enterprise. Such a broad meaning corresponds to the use Of the term made in the tax laws of most OECD member countries 60. This interpretation of the term "profits", however, may give rise to some uncertainty as to the application of the Convention. If the profits of an enterprise include categories of income which are treated separately in other Articles of the Convention, e.g. dividends, it may be asked whether the taxation of those profits is governed by the special Article on dividends etc., or by the provisions of this Article.
> >
> > 61. To the extent that an application of this Article and the special Article concerned would result in the same tax treatment, there is little practical significance to this question. Further, it should be noted that some of the special Articles contain specific provisions giving priority to a specific Article (cf. paragraph 4 of Article 6, paragraph 4 of Articles 10 and 11, paragraph [4] of Article 12[, para- graph 4 of Article 12A, paragraph 8 of Article 12B) and paragraph 2 of Article 21).
> >
> > 62. It has seemed desirable, however, to lay down a rule of interpretation in order to clarify the field of application of this Article in relation to the other Articles dealing with a specific category of income. In conformity with the practice generally adhered to in existing bilateral conventions, paragraph [6] gives first preference to the special Articles on dividends, interest etc. It follows from the rule that this Article will be applicable to business profits which do not belong to categories of income covered by the special Articles, and, in addition, to dividends, interest etc. which under paragraph 4 of Articles 10 and 11, paragraph [4] of Article 12, paragraph 4 of Article 12A, paragraph 8 of Article 12B) and paragraph 2 of Article 21, fall within this Article [...]. It is understood that the items of income covered by the special Articles

may, subject to the provisions of the Convention, be taxed either separately, or as business profits, in conformity with the tax laws of the Contracting States.

63. It is open to Contracting States to agree bilaterally upon special explanations or definitions concerning the term "profits" with a view to clarifying the distinction between this term and e.g. the concept of dividends. It may in particular be found appropriate to do so where in a convention under negotiation a deviation has been made from the definitions in the special Articles on dividends, interest[, *royalties, fees for technical services and income from automated digital services*]. It may also be deemed desirable if the Contracting States wish to place on notice, that, in agreement with the domestic tax laws of one or both of the States, the term "profits" includes special classes of receipts such as income from the alienation or the *letting of a business or of movable property used in a business. In this connection it may have to be considered whether it would be useful to include also additional rules for the allocation of such special profits.*

64. It should also be noted that, whilst the definition of "royalties" in paragraph 2 of Article 12 of the 1963 Draft Convention and 1977 Model Convention included payments "for the use of, or the right to use, industrial, commercial, or scientific equipment", the reference to these payments was subsequently deleted from that definition in order to ensure that income from the leasing of industrial, commercial or scientific equipment, including the income from the leasing of containers, falls under the provisions of Article 7 rather than those of Article 12, a result that the Committee on Fiscal Affairs considers to be appropriate given the nature of such income."

78. Explaining the purpose of Article 7(7) as it forms part of the OECD Model Convention, **Klaus Vogel**[22] explains it to be representative of *"subsidiarity rules"*. It explains the intent of Articles 7(4) and 7(6) of the OECD Model Convention being to convey that notwithstanding business profits constituting an umbrella term, where a class of income is found to have been dealt with specifically by another Article, it would stand removed from the sweep of Article 7 and be liable to be considered for taxation in accordance with those special

[22] Klaus Vogel on Double Taxation Conventions [Fifth Edition]

articles. We deem it apposite to extract the following passages from the aforenoted seminal work *(at page 604)*: -

"**F. Article 7(4) OECD MC and Article 7(6) UN MC**

I. The Models

1. Rule

Based on Article 7(7) of the pre-2010 OECD MC, the **subsidiarity rules** laid down in Article 7(4) OECD MC and, literally identical, in Article 7(6) UN MC clarify the relation between Article 7 OECD and UN MC and other distributive rules. According to this rule, the provisions of other Articles of the respective MC shall not be affected by the provisions of Article 7 OECD and UN MC where profits include items of income which are dealt with separately in those other Articles.

With regard to the prerequisites and the function of this rule, Article 7(4) OECD MC and Article 7(6) UN MC show **similarity to Article 21(1) OECD and UN MC**. This goes for both the use of the terms 'items of income' (*infra* m.no. 179), dealt with [separately]' (*infra* m.no. 180) and 'in [other] Articles' (*infra* m.no. 181).

2. 'Items of Income'

The language used by Article 7(4) OECD MC and Article 7(6) UN MC makes clear that the **umbrella term** 'profits' means the aggregate of two or more 'items of income', and that the subsidiarity rule affects these single items of income only. This is in line with the general requirement of both the distributive rules and the method Article to address single elements. At the same time, it reflects the understanding of 'business profits' as a concept which is based on the income-generating unit while other distributive rules focus on the economic character of a single payment or transaction.

3. 'Dealt with Separately'

Items are 'dealt with' (French 'traité') in other Articles if they belong to any 'class of income' (cf. no. 1 OECD MC Comm. on Article 21) defined or described by other Articles and if the other preconditions of the respective special Article are met., most notably by Articles 6, 8, 10, 11, 12, 13 or 17 OECD and UN MC, or by Article 14 UN MC.

4. 'In Other Articles'

All other distributive rules that cover (exclusively or next to private investment or service income) entrepreneurial income qualify as 'other Articles' in the sense of Article 7(4) OECD MC and Article 7(6). Most notably, this goes for Articles 6,8-12 and 17.

5. Legal consequences

Article 7(4) OECD MC and Article 7(6) UN MC makes clear that the provisions of other Articles of the respective MC shall not be affected by the provisions of Article 7 OBCD and UN MC. This wording indicates that there is no strict exclusivity between Article 7 OECD and UN MC on the one hand and the special distributive rules on the other hand."

79. It is thus evident that the authoritative commentaries of both the OECD as well as the UN Model Conventions explain the objective of Article 7 pertaining to Business Profits and the protective clause comprised therein as being relevant to clarify the extent of its application coupled with the width and the avowed objective of conferring precedence upon those special Articles as opposed to placing all earnings and income under the broad rubric of Business Profits. It is in the aforesaid light that Article 7(9) of the DTAA must be interpreted and understood as incorporating a rule of interpretation which bids us to apply that Article pertaining to Business Profits only till such time as the revenue earned by the non-resident entity does not pertain to categories of income explicitly covered by the other Articles of the Convention. What needs to be emphasized is that Article 7, and when it speaks of Business Profits, is not intended to function as an overarching, all-encompassing provision that subsumes all forms of income or revenue irrespective of their intrinsic character. It is in fact intended to operate within a clearly defined scope respecting the distinct treatment accorded to various categories of income under the

different Articles of the DTAA. The explanation provided by the commentaries on the OECD/UN Model Conventions as well as the authoritative texts noticed by us hereinabove reinforces this interpretative approach.

80. The aspect of splitting of elements of a composite contract and the characterization of distinct heads of income have been succinctly explained by Vogel when it observes that the word "profits" would mean the aggregate of two or more items of income and the subsidiarity rule affecting those singular items. It proceeds further to pertinently observe that while Business Profits and which is the subject of Article 7 is a concept pertaining to income generation, the special Articles of the Convention lay emphasis on the economic character of a transaction. It is in the aforesaid backdrop that it advocates the position that distributive rules embodied in the separate Articles of the Convention stand saved and preserved by virtue of Article 7(4). In our considered opinion, the position in law so enunciated would equally apply to Article 7(9) of the DTAA.

81. Furthermore, the bifurcation of income which is envisaged under Article 7(9) itself and is in consonance with the scheme of the DTAA ensures that each type of income is subjected to the specific tax treatment it merits based on its intrinsic character and the particular circumstances under which it is earned. Bifurcation, where warranted would prevent an overgeneralization of income under a single category and which could potentially lead to inappropriate tax treatment.

82. As observed earlier, the concept of splitting a composite contract

into its constituent elements and subsequently characterizing these elements under distinct heads of income reflects a sophisticated understanding of the economic realities of transactions. This approach acknowledges that a single contract may encompass multiple revenue streams each with its own tax implications. By adhering to this method, tax authorities can ensure that the appropriate tax treatment is applied to each type of income, aligning with the principles of fairness and transparency in international taxation. This nuanced interpretation and application of Article 7 highlights the importance of recognizing the economic character of transactions and ensuring that each type of income is taxed according to its specific attributes. It prevents the oversimplification of tax classifications and upholds the detailed and structured approach intended by the DTAA.

83. It is thus apparent that by virtue of Article 7(9) of the DTAA, it was incumbent upon the respondents to ascertain the true character of the income earned by IMG and the mere fact that it had chosen to offer up the revenue attributable to the Service PE as Business Profit was clearly not conclusive of the question which arose. The mere categorization of revenue by the taxpayer does not definitively resolve the issue of tax treatment. The authorities were clearly empowered and under an obligation to accurately determine the real nature and classification of income of IMG. Para 9 clearly envisages contingencies where profits earned may comprise of more than one item of income and which would consequently require the taxing authority to deduce and identify the most appropriate Article under which the item of income would be liable to be categorized. We thus find ourselves

unable to sustain the submissions of the appellant addressed on this score.

G. THE FTS ISSUE

84. That takes us to the principal question which arises and concerns itself with whether the services rendered by IMG could be validly classified as FTS. As we view Article 13 of the DTAA, it becomes apparent that the expression "Fee for Technical Services" stands defined as being consideration received for the rendering of any technical or consultancy services. However, and as would be evident from a close reading of Para 4 thereof, the mere rendition of technical or consultancy service would in itself be insufficient. This since Para 4(c) places an added condition of the furnishing of such service, ultimately leading to technical knowledge, experience, skill, know-how or processes being made available.

85. Article 13 of the DTAA reads as under: -

> "1. Royalties and fees for technical services arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.
>
> 2. However, such royalties and fees for technical services may also be taxed in the Contracting State in which they arise and according to the law of that State; but if the beneficial owner of the royalties or fees for technical services is a resident of the other Contracting State, the tax so charged shall not exceed :
> (a) in the case of royalties within paragraph 3(*a*) of this Articles, and fees for technical services within paragraphs 4(*a*) and (*c*) of this Article,—
> (*i*) during the first five years for which this Convention has effect ;
> (*aa*) 15 per cent of the gross amount of such royalties or fees for technical services when the payer of the royalties or fees for technical services is the Government of the first-mentioned Contracting State or a political sub-division of that State, and
> (*bb*) 20 per cent of the gross amount of such royalties or fees for

technical services in all other
(*ii*) during subsequent years, 15 per cent of the gross amount of such royalties or fees for technical services; and
(*b*) in the case of royalties within paragraph 3(*b*) of this Article and fees for technical services defined in paragraph 4(*b*) of this Article, 10 per cent of the gross amount of such royalties and fees for technical services.

3. For the purposes of this Article, the term "royalties" means :
(a) payments of any kind received as a consideration for the use of, or the right to use, any copyright of a literary, artistic or scientific work, including cinematography films or work on films, tape or other means of reproduction for use in connection with radio or television broadcasting, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience; and
(*b*) payments of any kind received as consideration for the use of, or the right to use, any industrial, commercial or scientific equipment, other than income derived by an enterprise of a Contracting State from the operation of ships or aircraft in international traffic.

4. For the purposes of paragraph 2 of this Article, and subject to paragraph 5, of this Article, the term "fees for technical services" means payments of any kind of any person in consideration for the rendering of any technical or consultancy services (including the provision of services of a technical or other personnel) which :
(*a*) are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 3(*a*) of this article is received ; or
(*b*) are ancillary and subsidiary to the enjoyment of the property for which a payment described in paragraph 3(*b*) of this Article is received ; or
(*c*) make available technical knowledge, experience, skill know-how or processes, or consist of the development and transfer of a technical plan or technical design.

5. The definition of fees for technical services in paragraph 4 of this Article shall not include amounts paid :
(*a*) for services that are ancillary and subsidiary, as well as inextricably and essentially linked, to the sale of property, other than property described in paragraph 3(*a*) of this Article;
(*b*) for services that are ancillary and subsidiary to the rental of ships, aircraft, containers or other equipment used in connection with the operation of ships, or aircraft in international traffic;
(*c*) for teaching in or by educational institutions ;

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

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

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

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

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

this Article by means of that creation or assignment."

86. It is therefore apparent that the mere rendition of technical or consultancy service would not lead to revenue, income or profits being placed under the broad head of FTS unless the taxing authority additionally finds that technical knowledge, skill, know-how or processes were made available. What we seek to emphasize is the impetrative of the 'make available' condition being met and the imperative of the knowledge, skill, know how being made available to the payer.

87. The authoritative Commentary on the UN Model Convention while explaining the ambit of Article 12A carries the following instructive exposition on the meaning to be ascribed to the words "technical" and "consultancy": -

Paragraph 3

"**61.** This paragraph specifies the meaning of the phrase "fees for technical services" for purposes of Article 12A. The definition of "fees for technical services" in paragraph 3 is exhaustive. "Fees for technical services" are limited to the payments described in paragraph 3; other payments for services are not included in the definition and are not dealt with in Article 12A (see the examples in paragraphs 87 to 103 below).

62. Article 12A applies only to fees for technical services, and not to all payments for services. Paragraph 3 defines "fees for technical services" as payments for managerial, technical or consultancy services. Given the ordinary meanings of the terms "managerial", "technical" and "consultancy"' the fundamental concept underlying the definition of fees for technical services is that the services must involve the application by the service provider of specialized knowledge, skill or expertise on behalf of a client or the transfer of knowledge, skill or expertise to the client, other than a transfer of information covered by the definition of "royalties" in paragraph 3 of Article 12. Services of a routine nature that do not involve the

application of such specialized knowledge, skill or expertise are not within the scope of Article 12A.

63. The ordinary meaning of the term "management" involves the application of knowledge, skill or expertise in the control or administration of the conduct of a commercial enterprise or organization. Thus, if the management of all or a significant part of an enterprise is contracted out to persons other than the directors, officers or employees of the enterprise, payments made by the enterprise for those management services would be fees for technical services within the meaning of paragraph 3. Similarly, payments made to a consultant for advice related to the management of an enterprise (or of the business of an enterprise) would be fees for technical services.

64. The ordinary meaning of the term "technical" involves the application of specialized knowledge, skill or expertise with respect to a particular art, science, profession or occupation, therefore, fees received for services provided by regulated professions such as law, accounting, architecture, medicine, engineering and dentistry would be fees for technical services within the meaning of paragraph 3. Thus, if an individual receives payments for professional services referred to in paragraph 2 of Article 14 from a resident of a Contracting State, those payments would be fees for technical services. If the payments arise in that Contracting State because they are made by a resident of that State or borne by a permanent establishment or fixed base in that State, the payments would be subject to tax by that State in accordance with paragraph 2 irrespective of the fact that the services arc not performed in that State through a fixed base in that State.

65. Technical services are not limited to the professional services referred to in paragraph 2 of Article 14. Services performed by other professionals, such as pharmacists, and other occupations, such as scientists, academics, etc. may also constitute technical services if those services involve the provision of specialized knowledge, skill and expertise.

66. The ordinary meaning of "consultancy" involves the provision of advice or services of a specialized nature. Professionals usually provide advice or services that fit within the general meaning of consultancy services although, as noted in paragraphs 63 and 64 above, they may also constitute management or technical services.

67. The terms "management", "technical" and "consultancy" do not have precise meanings and may overlap. Thus, for example, services of a technical nature may also be services of a consultancy nature

and management services may also be considered to be services of a consultancy nature."

88. *Vogel* explains the concept of technical services in the following terms *(at page 1184)*:-

"IV. Article 12A(3) UN MC

1. The Model

a. Rule

The term 'fees for technical services' is defined as:

- any payment in consideration for
- any service of managerial, technical, or consultancy nature,
- unless the payment is made:

  a. to an employee of the person making the payment;

  b. for teaching in an educational institution or for teaching by an educational institution; or

  c. by an individual for services for the personal use of an individual.

Article 12A(3) UN MC contains the definition of **'fees for technical services'**. In so far that the UN MC itself provides an autonomous definition of 'fees for technical services', national law cannot be used for its interpretation (cf. Article 3(2) UN MC, see supra m.no. 71). In contrast to Article 12(2) OECD MC which refers to the national law for the interpretation of the different terms in the catalogue of the paragraph, the terms 'management', 'technical', and 'consultancy' of Article 12A(3) UN MC have an **autonomous meaning** in the UN MC.

b. Any Payment

The term 'payment' has a broad meaning that is comparable to 'paid to' in Articles 10, 11, and 12 UN MC. It is defined as **'fulfilment of the obligation to put funds at the disposal of the service provider in the manner required by contract or custom**' (no. 40 UN MC Comm. on Article 12A referring to no. 3 UN MC Comm. on Article 10 and no. 6 UN MC Comm. on Article 11 quoting no. 7 OECD MC on Article 10 and no. 5 OECD MC on Article 11). For detailed information, see supra m.no. 252.

c. In Consideration For

The payments must be made in consideration for any service of a managerial, technical, or consultancy nature. Comparable to Article

12 UN MC, any economic exchange connection is sufficient including, i.e., payments for damages (see supra m.no. 89).

……..

d. Any Service (Managerial, Technical or Consultancy Nature)

Article 12A UN MC is not applicable to every payment in consideration for services. The services have to be of a managerial, technical, or consultancy nature as the services qualify as **'technical services'** only in these cases. The attribute "technical" is used twice: once in a wider sense to describe all of the services covered by Article 12A and once in a narrow sense in a 'technical nature' as opposed to 'managerial' or 'consultancy nature".

aa. *Different Definitions of Technical Service in the Divergent Country Practice of Article 12 MCs.* While Article 12A UN MC is a stand alone article, it has been developed from the divergent country practice of including fees for technical services in Article 12 MC. This historic development leads to a contextual bond between Article 12 UN MC and Article 12A UN MC that explains some of the peculiarities of the definition of Article 12A UN MC and aids in its interpretation. Further context is scarce: The term 'service' can also be found in other provisions dealing with different types of services like Articles 5(3)(1), 14, and 19 UN MC. Article 14(2) suggests that any activity suffices, but there is **no general definition**. The General Agreement on Trade in Services also does not contain a definition (no. 83 UN MC Comm. on Article 12A).

The category of technical services has developed from the problematic delimitation between **IP licensing and service contracts**. While the protected information that constitutes IP has to be divulged to the licensee as part of the licensing contract, there is often the need for further training of the licensee and the employees; this constitutes a service. Similar problems arise with consulting: The service provider does not transmit its **special knowledge**, **skill, and expertise** as such but uses them to make statements on customers' issues.

These services are dubbed as 'technical' because they relate to the application of IP and not to fundamental research. Furthermore, in the context of Article 12 OECD and UN MC and their catalogue of IP, the term 'technical' must initially be understood in a traditional way such as **'applied and industrial science**' or **'engineering sciences**." It excludes social sciences, the arts and humanities, and arts and crafts as well as commercial managerial or professional services such as managers, intermediators, lawyers, and doctors.

This narrow understanding of a technical nature was not in every country's interest and, therefore, some DTCs explicitly add managerial services, general consulting, or cover services of all kinds. Article 12A UN MC follows this tradition in including services of managerial and consulting services.

This raises the issue of whether these additions form a separate category that does not need a link to the traditional technical nature in the context of Article 12. In that wide understanding, any 'applied science' in whatever field or, even further, any '**professional service imbued with expertise**' qualifies for a 'technical service' under Article 12A UN MC. From this perspective, almost every consulting service would be deemed as 'technical'.

Yet, if this was the intention, the Contracting States should have chosen 'consulting' or another more general term instead of 'technical service'. Furthermore, the context of Article 12 strongly suggests that technical assistance refers to industrial IP rights and industrial secrets and know-how that dominate the catalogue of Article 12 OECD and UN MC. Therefore, to take the title of 'technical services' seriously, all 'technical services', even those of a 'managerial nature' or 'consultancy nature, need a link to the traditional field of technique to 'applied and industrial science' or 'engineering sciences'. The combination of technical with managerial and consultancy services leads to an increased importance of the 'human element' in an Indian court decision, excluding almost fully automatized standard procedures.

bb. The Definition of Article 12A UN MC. While the headline of Article 12A UN MC still reads 'technical services', its structure shows that it follows a wide understanding and, in principle, covers every professional service that is imbued with expertise. The introduction of the category of 'technical services of a consultancy nature' besides the 'technical services of technical nature' shows that consulting that is not related to the traditional field of technique should also be covered. The UN Model Commentary confirms **this wide understanding** by defining services as activities carried out by one person for the benefit of another person in consideration for a payment whereas the manner of providing services was not decisive (no. 84 UN MC Comm. on Article 12A). Examples in the commentary also follow the wide understanding by, e.g., including a heart surgeon (no. 89 UN MC Comm, on Article 12A).

Traditionally, technical services have been defined by the provisions of **Special Knowledge, skill, and expertise** to make statements on the **special issues of the customer**. The UN MC apparently draws on this understanding as it **excludes services of a routine nature** (no. 62 UN MC Comm. on Article 12A). Technical

services have to be discerned from routine services with a case-by-case analysis.

One important aspect is whether the service is **individually customized to the specific needs of the customer**. A standard scope of services under a standard contract is a strong argument for routine services. Yet, if a service provider determines the need of a customer in-depth and then chooses from several standardized services in order to offer the one that fits best, they cannot qualify as being of a routine nature. Thus, it is not possible to avoid a qualification as a technical service by simply drafting the contract in a standard manner or using standard service elements.

The UN Model Commentary provides some examples. The **access to a database** will, in most cases, be of a routine nature while the creation of a customized database qualifies as technical services (no. 90, 91 UN MC Comm. on Article 12A). Yet, the selective access to some databases according to the established needs of clients is equivalent to the creation of a custom database and can thus also be qualified as a technical service. Financial services such as payment and transmission services, banker's drafts, foreign exchange, debt and credit card services, and negotiable instruments are general products that are routinely made available to clients by financial institutions (no. 95 UN MC Comm. on Article 12A). **Payments for services rendered to a specific customer upon request** in addition to transaction processing services such as warning bulletin fees for listing invalid or fraudulent accounts, cardholder service fees, fees for programme management services, account and transaction enhancement services fees, hologram and publication fees, and fees for advisory services are not a standard facility and constitute fees for technical services. If the financial institution provides, e.g., advice to a company that is resident in the other Contracting State with respect to a potential merger or acquisition involving this company, then Article 12A UN MC is applicable (no. 96 UN MC Comm. on Article 12A).

……..

cc. Services of Managerial Nature. The ordinary meaning of the term 'management' refers to the application of knowledge, skill, or expertise in the control or administration of the conduct of a commercial enterprise or organization (no. 63 UN MC Comm. on Article 12A). The UN MC Comm. on Article 12A provides two examples: firstly, payments by an enterprise for management services in cases when the management of all or significant parts of the enterprise are contracted out to other persons, and these persons are not related to the enterprise (not directors, officers, employees)

and, secondly, payments in consideration for advice of consultants related to the management or business of an enterprise.

dd. Services of Technical Nature. "Technical services involve the application of specialized knowledge, skill, or expertise with respect to a particular art, science, profession, or occupation (no. 64 UN MC Comm. on Article 12A). The UN Comm. further refers to **regulated professions** such as law, accounting, architecture, medicine, engineering, and dentistry as examples covered by Article 12A(3) UN MC. These examples are not exhaustive."

89. It becomes apparent upon a consideration of the views expressed above that the word "technical" is no longer liable to be understood in its archaic sense as being confined to the traditional sciences. What authorities commend for consideration is an ascertainment of whether the services rendered involved the application of a specialised skill, knowledge or expertise. It is this shift in understanding which has led to the application of specialised knowledge, skill or expertise with respect to any art, science, profession or occupation being recognised as falling within the ambit of the expression "technical" services. Similarly, the word "consultancy" would entail the provision of advice or service of a specialised nature. There could also be the possibility where technical and consultancy services may also overlap or where the nature of service furnished may be discerned as falling under both those heads. We thus broadly concur with the views expressed and noticed above. However, we note that insofar as these appeals are concerned, there appears to be no contestation on the nature of activities which were rendered by IMG and the respondents have not questioned those services falling within the scope of the expression "technical and consultancy services". The principal issue of disputation was whether the "make available" test was satisfied.

90. We find that the most lucid enunciation of the meaning to be assigned to the phrase "make available" appears in the decision of the Karnataka High Court in *De Beers* and where the High Court had held:-

> "**13.** Therefore, the clause in the Singapore agreement which explicitly makes it clear the meaning of the words "make available", the said clause has to be applied, and to be read into this agreement also. Therefore, it follows that for attracting the liability to pay tax not only the services should be of technical in nature, but it should be made available to the person receiving the technical services. The technology will be considered made available when the person, who received service is enabled to apply the technology. The service provider in order to render technical services uses technical knowledge, experience, skill, know-how or processes. To attract the tax liability, that technical knowledge, experience, skill, know-how or process which is used by the service provider to render technical service should also be made available to the recipient of the services, so that the recipient also acquires technical knowledge, experience, skill, know-how or processes so as to render such technical services. Once all such technology is made available it is open to the recipient of the service to make use of the said technology. The tax is not dependent on the use of the technology by the recipient. The recipient after receiving of technology may use or may not use the technology. It has no bearing on the taxability aspect is concerned. When the technical service is provided, that technical service is to be made use of by the recipient of the service in further conduct of his business. Merely because his business is dependent on the technical service which he receives from the service provider, it does not follow that he is making use of the technology which the service provider utilises for rendering technical services. The crux of the matter is after rendering of such technical services by the service provider, whether the recipient is enabled to use the technology which the service provider had used. Therefore, unless the service provider makes available his technical knowledge, experience, skill, know-how or process to the recipient of the technical service, in view of the clauses in the DTAA the liability to tax is not attracted.
>
> **14.** The learned Additional Solicitor General relied on three judgments to point out that was the earlier view. Now, there is a departure supporting the Department. The first judgment on which reliance is placed is the judgment of the Advance Rulings Authority in the case of Perfetti Van Melle Holding B. V., In re (2012) 342 ITR 200 (AAR) where it was held as under (page 212):

"The expression 'make available' only means that the recipient of the service should be in a position to derive an enduring benefit and be in a position to utilise the knowledge or know-how in future on his own. 'By making available the technical skills or know-how, the recipient of the same will get equipped with that knowledge or expertise and be able to make use of it in future, independent of the service provider. .. So when the expertise in running the industry run by the group is provided to the Indian entity in the group to be applied in running the business, the employees of the Indian entity get equipped to carry on that business model or service model on their own without reference to the service provider, when the service agreement comes to an end. It is not as if for making available, the recipient must also be conveyed specifically the right to continue the practice put into effect and adopted under the service agreement on its expiry."

xxxx xxxx xxxx

17. From the aforesaid statement of law it is clear the test is whether the recipient of the service is equipped to carry on his business without reference to the service provider. If he is able to carry on his business in future without the technical service of the service provider in respect of services rendered then, it would be said that technical knowledge is made available.

xxxx xxxx xxxx

21. What is the meaning of "make available". The technical or consultancy service rendered should be of such a nature that it "makes available" to the recipient technical knowledge, know-how and the like. The service should be aimed at and result in transmitting technical knowledge, etc., so that the payer of the service could derive an enduring benefit and utilize the knowledge or know-how on his own in future without the aid of the service provider. In other words, to fit into the terminology "making available", the technical knowledge, skills, etc., must remain with the person receiving the services even after the particular contract comes to an end. It is not enough that the services offered are the product of intense technological effort and a lot of technical knowledge and experience of the service provider have gone into it. The technical knowledge or skills of the provider should be imparted to and absorbed by the receiver so that the receiver can deploy similar technology or techniques in the future without depending upon the provider. Technology will be considered "made available" when the person acquiring the service is enabled to apply the technology. The fact that the provision of the service that may require technical knowledge, skills, etc., does not mean that

technology is 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. In other words, payment of consideration would be regarded as "fee for technical/included services" only if the twin test of rendering services and making technical knowledge available at the same time is satisfied."

91. Of equal significance are the observations of the Kerala High Court in *US Technology Resources* when their Lordships laid emphasis on the transfer of technology or know-how being a necessary ingredient of the "make available" condition which stands indelibly attached to FTS. To recall, the Kerala High Court in the aforenoted decision had held:-

> **"18.** We are conscious of the fact that the DTAA as relevant in the present case, is not applicable even in the case of De Beers India Minerals (P.) Ltd. where the non-resident hailed from Netherlands. However, on facts we are of the opinion that when the definition clause in DTAA read along with the MOU specifically refers to transfer of technologies, the facts as available in the Karnataka decision are more similar to the present facts. Herein also there is no technology transfer ; nor is there a plan or strategy relating to management, finance, legal, public relations or risk management transferred to the appellant. The services promised by the non-resident company is only to advice on such aspects as are specifically referred to in the agreement. The non-resident company only assists the Indian company in making the correct decisions on such aspects as is specifically referred to in the agreement, as and when such advice is required. There is no transfer of technology or know-how, even on managerial, financial, legal or risk management aspects ; which would be available for the Indian company to be applied without the hands-on advice offered by the US company. The advice offered on such aspects would have to be on a factual basis with respect to the problems arising at various points of time and there cannot be found any transfer of technical or other know-how to the Indian company."

92. While on the subject of make available, it would be beneficial to refer to Vogel's explanation of contract types and the expression *"use or right to use"* as it appears in Article 12 of the OECD and UN Model

Conventions. The treatise firstly refers to three perceivable contractual scenarios of which one could involve the transfer of know-how. Emphasis is yet again laid upon a transfer of ownership or alienation being the primary criterion for answering the question of whether a right to use had been conferred. However, of significance is the caveat which is entered with respect to contracts where the property or the know-how is not transferred to the payer who merely receives the goods or services created by a utilisation of the property. This becomes evident from the following extracts forming part of that work *(at page 1140)*:-

> "**4. The Contract Type/Scope of Transfer (Use/information/Alienation)**
>
> Article 12 OECD and UN MC contain **up to three contract types.** They distinguish themselves by the different extent to which all or part of the property rights are transferred to the royalty payer.
>
> The main type are contracts that transfer **'the use or the right to use'** to the payer. The payer himself can use the property, but does not get the full ownership rights of it. As the case may be, the owner might grant the use' to different persons at the same time. The IP is 'lent' (no. 1 OECD MC Comm. on Article 12) or 'rented out'.
>
> A special type are contracts in which the payment is for information concerning experience. This special case of property is also known as a **'know-how'** contract. Its specific attribute is the lack of legal protection as an absolute right. When know-how is shared, it cannot be taken back and its use cannot be prohibited (at least to third persons, the receiver of know-how might be bound by contractual injunctive reliefs). Therefore, the transfer of the use cannot be distinguished from a transfer of full ownership.
>
> A third type of contracts contains the full transfer of ownership, **alienation**. Alienation is not included in the OECD and UN MC, and thus is covered by Article 13 OECD and UN MC (*supra* m.no.20 et seq.).
>
> In all types of contracts the payer receives the property for his own

use or ownership. Hence, they have to be distinguished from contracts where the property is not transferred to the payer but is used by the beneficial owner for producing goods for or rendering services to the payer. The payer then does not receive the property itself, but a good or service that was created by utilizing the property (*infra* m.no. 105 et seq.)"

93. As we read Article 13(4)(c) of the DTAA, it becomes manifest that the mere furnishing of service would not suffice and a liability of tax would be triggered only if the technical or consultancy service were coupled with a transfer of the expertise itself. The expression *"make available"* must be construed as an enablement, conferral of knowledge and which would lead to the payer becoming skilled to perform those functions independently. The make available condition would be satisfied if the services rendered entails equipping the recipient with skill and evidencing an apparent conferment, alienation or transfer of skill, knowledge or know-how. This transfer of knowledge or skill is a pivotal factor in determining whether the consideration received can be classified as FTS. The "make available" stipulation ensures that only those services that impart lasting technical benefits are classifiable as FTS. It was on a consideration of the aforesaid that this Court in *Bio-Rad* had held that the real test would be the transfer of technical knowledge, the knowledge and skills and expertise of the provider being absorbed by the payer and who would then have the capability to deploy that knowledge or skill without reference to the original provider. This reinforces our view that the make available condition would be satisfied only if the rendering of service involves a clear and demonstrable transfer of technical skills, expertise or know-how to the recipient. It must involve a transfer of capabilities and not just the

temporary use of the provider's knowledge, expertise or skill.

94. This leads us to the definitive conclusion that the rendering of technical and consultancy services has to be read alongside and in conjunction with *"make available"* as that phrase appears in the aforesaid paragraph. On a plain textual reading of Article 13 it becomes apparent that both the rendering of service and the skill, knowledge and expertise being made available are conditions which must be concurrently and cumulatively satisfied. What we seek to emphasize is that Article 13 in unambiguous terms creates an enduring, unfading and imperishable link between the furnishing of service and a transmission or conferment of technical expertise, knowledge and skill.

95. It is also important to bear in mind that the mere usage or utilisation of technical or consultative material in aid of business would not be sufficient to attract Article 13 of the DTAA. If we were to accept the submission that handing over of research or advisory work were sufficient for the purposes of Article 13, it would render the *"make available"* condition comprised in Para 4 (c) wholly redundant and otiose since the mere rendering of service would have sufficed. As *De Beers* correctly holds *"The tax is not dependent on the use of technology by the recipient."* The make available prescription bids us to make a conscious distinction between a mere service provision and the impartation of lasting expertise. The offer of service or advise does not fundamentally alter the recipient's capabilities. These services, while potentially valuable, do not endow the recipient with new skills or knowledge which could be independently deployed in the future. The kernel of "make available" must therefore be recognised to be a transfer

of technology or skills rather than a temporary reliance on external support.

96. It is this aspect which convinces us to hold that the mere utilisation of the service in connection with business would not meet the test of Article 13. This we observe in light of the submission to the contrary as urged by Mr. Hossain who had contended that the handing over of research material, processes relating to the league structure and other services performed by IMG enabled BCCI to proceed independently in the future. We find ourselves unable to sustain that submission firstly since the respondents proceed on the incorrect assumption that know-how relating to commercial rights exploitation or that pertaining to structuring, organising and management of a sports league stood transferred. No provision of the MOU or the Services Agreement would warrant such an assumption being made or conclusion drawn. Equally fallacious was the submission that by virtue of the services furnished by IMG, BCCI was made available *"experience in conducting and organizing a large-scale sports league."* The contentions noticed above are neither borne out from the evidence which exists on the record, they are additionally rendered wholly unsustainable when one views the various contractual stipulations forming part of the MOU and the Services Agreement.

97. The submissions addressed on this score also fail to bear in mind that IMG came to be engaged by BCCI principally in light of its expertise, special abilities, experience and capabilities of conceptualising sporting leagues. IMG was tasked with creating the IPL based on the special knowledge, skill and experience that it possessed

in the curation of sporting leagues. A reading of the various obligations that were placed upon IMG clearly establish that all facets of the IPL and the entire gamut of activities connected with the proposed league were not only to be created by it, IMG was also tasked with managing and administering all commercial and media rights of the BCCI. As is evident from a reading of Clause 4.2 of the Services Agreement, IMG was called upon to prepare and execute marketing strategies, management of future tendering processes, craft the league handbook and discharge various other functions enumerated therein. The enumeration of functions in Clause 4.2(a) was merely illustrative as that clause used the expression *"including, without limitation:"*.

98. Of equal significance was the obligation of IMG to provide the requisite manpower to carry out activities connected with the league so as to ensure successful running of the league and the matches which were to be held. This obligation which stands incorporated in Clause 4.2 (r) also required it to establish a fully staffed office at its own cost. The Services Agreement required IMG to carry out research each year to ascertain improvements warranted in various areas pertaining to the management and execution of the league as well as the development of BCCI's brand framework.

99. On an overall consideration of all of the above, we come to the firm conclusion that there was no expertise, skill or know-how which could be said to have been made available to BCCI. The various functions which IMG was called upon to discharge was to be aided by the appellant drawing upon its expertise and special knowledge in the creation and conduct of leagues of the stature of the IPL. There was no

discernible intent on the part of BCCI to absorb or internalise IMG's unique skills and knowledge in the curation of sporting leagues. No part of that knowledge or skill stood transferred to BCCI. Merely because research material would have been shared with BCCI or the service rendered by it been put to use and utilised cannot possibly lead one to conclude that the payer stood enabled or equipped with the special knowledge underlying the technical and consultancy service which was extended.

100. The fact that IMG was retained to perform all of the aforenoted functions for a period of ten years is yet another indicator of BCCI having not been enabled or made available the special knowledge and skill possessed by IMG. The continued provisioning and rendering of service over a substantial period of time were factors which were duly recognised by the Court in *Bio Rad* as well when it observed that the same would clearly detract from an assumption that technical or consultancy services had been made available. We also bear in consideration the undisputable fact that the contractual arrangement contemplated a continued engagement and ongoing reliance on IMG's expertise without any transfer of know-how or skills to BCCI.

101. The reliance placed on the decision of the Madras High Court in *Regen Powertech* is clearly misplaced since the same came to be rendered in the context of the India-UAE DTAA which admittedly does not embody a FTS provision. We are also unpersuaded by the decision in *Centrica India Offshore* which was principally concerned with whether the secondment of employees had led to the creation of a Service PE. In any event, we find ourselves unable to interpret or

countenance the MOU or the Services Agreement as embodying any element of *"hand holding"* as was suggested. The decision thus is clearly distinguishable on facts and does not carry the case of the respondents any further.

H. ARTICLE 13(6) AND EFFECTIVE CONNECTION

102. That only leaves us to notice the argument of Mr. Vohra who had canvassed a submission in the alternative that if we were to hold that services rendered by IMG amounted to FTS, the revenue earned would stand exorcised from the ambit of Article 13 by virtue of Para 6 thereof. It would be pertinent to recall that Para 6 stipulates that where the FTS arises through a PE which exists and the right, property or contract in respect of the same is effectively connected with such PE, Article 13 would cease to apply and the income would then be taxable in accordance with Articles 7 or 15 of the DTAA, as the case may be. It was in the aforesaid context that learned counsels had addressed elaborate submissions on the meaning to be ascribed to the phrase *"effectively connected"*. Mr. Vohra had contended that it is the contract which must be found to be effectively connected as opposed to the activity that may have been undertaken by the PE. It was in the aforesaid backdrop that Mr. Vohra had relied upon the following observations as appearing in the decision of the Supreme Court in *Ishikawajima Harima*:-

> "**79.** Since the appellant carries on business in India through a permanent establishment, they clearly fall out of the applicability of Article 12(5) of DTAA and into the ambit of Article 7. The Protocol to DTAA, in para 6, discusses the involvement of the permanent establishment in transactions, in order to determine the extent of income that can be taxed. It is stated that the term "directly or

indirectly attributable" indicates the income that shall be regarded on the basis of the extent appropriate to the part played by the permanent establishment in those transactions. The permanent establishment here has had no role to play in the transaction that is sought to be taxed, since the transaction took place abroad."

103. Mr. Hossain to the contrary commended for our consideration the Commentary on the OECD and the UN Model Conventions and which lay emphasis on *"economic ownership"* and advocate the said factor as being determinative of an effective connection. However, it is significant to note that the extracts from the Commentary on the OECD Model Convention which were cited for our consideration pertained to Article 12 and which is confined to royalty. Article 12 does not extend in its application to FTS. This distinction must be borne in mind since royalty would either be earned or be payable where the subject matter of the transaction be property, tangible or intangible. However, and for the sake of completeness, we reproduce the relevant extracts from that Commentary hereunder:-

"**20.** Certain States consider that dividends, interest and royalties arising from sources in their territory and payable to individuals or legal persons who are residents of other States fall outside the scope of the arrangement made to prevent them from being taxed both in the State of source and in the State of the beneficiary's residence when the beneficiary has a permanent establishment in the former State. Paragraph 3 is not based on such a conception which is sometimes referred to as "the force of attraction of the permanent establishment". It does not stipulate that royalties arising to a resident of a Contracting State from a source situated in the other State must, by a kind of legal presumption, or fiction even, be related to a permanent establishment which that resident may have in the latter State, so that the said State would not be obliged to limit its taxation in such a case. The paragraph merely provides that in the State of source the royalties are taxable as part of the profits of the permanent establishment there owned by the beneficiary which is a resident of the other State, if they are paid in respect of rights or property forming part of the assets of the permanent establishment or

otherwise effectively connected with that establishment. In that case, paragraph 3 relieves the State of source of the royalties from any limitations under the Article. The foregoing explanations accord with those in the Commentary on Article 7.

21. It has been suggested that the paragraph could give rise to abuses through the transfer of rights or property to permanent establishments set up solely for that purpose in countries that offer preferential treatment to royalty income. Apart from the fact that such abusive transactions might trigger the application of domestic anti- abuse rules, it must be recognised that a particular location can only constitute a permanent establishment if a business is carried on therein and, as explained below, that the requirement that a right or property be "effectively connected" to such a location requires more than merely recording the right or property in the books of the permanent establishment for accounting purposes.

21.1 A right or property in respect of which royalties are paid will be effectively connected with a permanent establishment, and will therefore form part of its business assets, if the "economic" ownership of that right or property is allocated to that permanent establishment under the principles developed in the Committee's report entitled Attribution of Profits to Permanent Establishments[1] (see in particular paragraphs 72-97 of Part I of the report) for the purposes of the application of paragraph 2 of Article 7. In the context of that paragraph, the "economic" ownership of a right or property means the equivalent of ownership for income tax purposes by a separate enterprise, with the attendant benefits and burdens (e.g. the right to the royalties attributable to the ownership of the right or property, the right to any available depreciation and the potential exposure to gains or losses from the appreciation or depreciation of that right or property)."

104. Insofar as the Commentary on the UN Model Convention is concerned, the same related to Article 12A. The said Article reads thus:-

"Article 12A

FEES FOR TECHNICAL SERVICES

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

2. However, notwithstanding the provisions of Article 14 and subject to the provisions of Articles 8, 16 and 17, fees for technical services arising in a Contracting State may also be taxed in the Contracting State in which they arise and according to the laws of that State, but if the beneficial owner of the fees is a resident of the other Contracting State, the tax so charged shall not exceed___ per cent [*the percentage is to be established through bilateral negotiations*] of the gross amount of the fees.

3. The term "fees for technical services" as used in this Article means any payment in consideration for any service of a managerial, technical or consultancy nature, unless the payment is made:

(a) to an employee of the person making the payment;

(b) for teaching in an educational institution or for teaching by an educational institution; or

(c) by an individual for services for the personal use of an individual.

4. The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of fees for technical services, being a resident of a Contracting State, carries on business in the other Contracting State in which the fees for technical services arise through a permanent establishment situated in that other State, or performs in the other Contracting State independent personal services from a fixed base situated in that other State, and the fees for technical services are effectively connected with:

(a) such permanent establishment or fixed base, or

(b) business activities referred to in (c) of paragraph 1 of Article 7.

In such cases the provisions of Article 7 or Article 14, as the case maybe, shall apply.

5. For the purposes of this Article, subject to paragraph 6, fees for technical services shall be deemed to arise in a Contracting State if the payer is a resident of that State or if the person paying the fees, whether that person is a resident of a Contracting State or not, has in a Contracting State a permanent establishment or a fixed base in connection with which the obligation to pay the fees was incurred, and such fees are borne by the permanent establishment or fixed base.

6. For the purposes of this Article, fees for technical services shall be deemed not to arise in a Contracting State if the payer is a resident of that State and carries on business in the other Contracting State through a permanent establishment situated in that other State or performs independent personal services through a fixed base situated in that other State and such fees are borne by that permanent establishment or fixed base.

7. Where, by reason of a special relationship between the payer and the beneficial owner of the fees for technical services or between both of them and some other person, the amount of the fees, having regard to the services for which they are paid, exceeds the amount which would have been agreed upon by the payer and the beneficial owner in the absence of such relationship, the provisions of this Article shat I apply only to the last-mentioned amount. In such case, the excess part of the fees shall remain taxable according to the laws of each Contracting State, due regard being had to the other provisions of this Convention."

105. The Commentary on the UN Model Convention makes the following pertinent observations with respect to Article 12A:-

"104. This paragraph provides that paragraphs 1 and 2 do not apply to fees for technical services if the person who provides the services has a permanent establishment or fixed base in the State in which the fees arise and the fees are effectively connected with that permanent establishment or fixed base. In this regard, paragraph 4 is similar to paragraph 4 of Articles 10, 11 and 12 as well as paragraph 8 of Article 12B.Thus, if a resident of one Contracting State provides technical services through a permanent establishment or fixed base located In the other Contracting State, the fees received for those services will be taxable by the State in which the permanent establishment or fixed base is located in accordance with Article 7 or Article 14, rather than in accordance with Article 12A.

105. Since Article 7 of the United Nations Model Tax Convention adopts a limited force-of-attraction rule, which expands the range of income that may be taxed as business profits, paragraph 4 also makes paragraphs I and 2 inapplicable if the fees for technical services are effectively connected with business activities in the State in which the fees arise that are of the same or similar kind as those effected through the permanent establishment.

106. The paragraph does not define the meaning of the expression "effectively connected". As a result, whether fees for technical

services are effectively connected with a permanent establishment, fixed base or business activities similar to those carried on through a permanent establishment must be determined on the basis of all the relevant facts and circumstances of each case. In general, fees for technical services would be considered to be effectively connected with a permanent establishment or fixed base if the technical services are closely related to or connected with the permanent establishment or fixed base. Also, fees for technical services would be effectively connected with business activities referred to in paragraph l (c) of Article 7 where the technical services are provided by an enterprise as part of that enterprise's business activities carried on in a Contracting State where a permanent establishment of that enterprise is situated and these activities are of the same or similar kind as the business activities performed through that permanent establishment.

107. Where paragraph 4 applies, fees for technical services are taxable by the State in which the fees arise as part of the profits attributable to the permanent establishment in accordance with Article 7 or the income attributable to the fixed base in accordance with Article 14.Thus, paragraph 4 relieves the State in which the fees for technical services arise from the limitations on its taxing rights imposed by Article 12A. Where Article 7 applies as a result of the application of paragraph4, most countries consider that the State in which the permanent establishment is located is allowed to tax only the net profits from the technical services attributable to the permanent establishment.

Article 7 does not preclude taxation of business profits attributable to a permanent establishment on a gross basis, but a Contracting State must not discriminate against residents of the other State in violation of paragraph 3 of Article 24 (Non-discrimination). Similarly, where Article 14 applies, most countries consider that the State in which the fixed base is located is allowed to tax only the net income derived from the technical services. However, it may be useful for countries to clarify these issues during the negotiation of the treaty (sec paragraphs 9 and 10 of the Commentary on Article 14).

Paragraphs 5 and 6

108. Paragraph 5 lays down the principle that the State in which fees for technical services arise for purposes of Article 12A is the State of which the payer of the fees is a resident or the State in which the payer has a permanent establishment or fixed base if the fees for technical services are borne by the permanent establishment or fixed

base. It is not necessary for the services to be provided in the Contracting State in which the payer is resident or has a permanent establishment or fixed base. Whether a person is a resident of a Contracting State for purposes of Article 12A is determined in accordance with the provisions of Article 4 of the Convention.

109. Where there is an obvious economic link between technical services being provided and the permanent establishment or fixed base of the payer to which the services are provided, the fees for technical services are considered to arise in the Contracting State in which the permanent establishment or fixed base is situated. This result applies irrespective of the residence of the person to which the permanent establishment or fixed base belongs, even where that person resides in a third State.

110. Where there is no economic link between the technical services and the permanent establishment or fixed base, the payments for technical services are considered to arise in the Contracting State in which the payer is resident. If the payer of fees for technical services is not a resident of a Contracting State, Article 12A does not apply to the fees for technical services unless the payer has a permanent establishment or fixed base in the Contracting State and there is a clear economic link between the technical services and the permanent establishment or fixed base. Otherwise there would be, in effect, a force-of-attraction principle for fees for technical services, which would be inconsistent with other provisions of the United Nation Model Tax Convention.

111. Paragraph 5 is subject to paragraph 6, which provides an exception to the source rule in paragraph 5. Paragraph 6 deems fees for technical services paid by a resident of a Contracting State not to arise in that State where that resident (the payer) carries on business through a permanent establishment in the other Contracting State or performs independent personal services through a fixed base in the other Contracting State and the fees for technical services are borne by that permanent establishment or fixed base. As a result, in these circumstances, the Contracting State in which the payer is resident is not allowed to tax the payments for technical services under paragraph 2.

112. The phrase “borne by” must be interpreted in the light of the underlying purpose of paragraphs 5 and 6, which is to provide source rules for fees for technical services. A Contracting State is entitled to tax fees for technical services under paragraph 2 only if the fees arise in that State. The basic source rule in paragraph 5 is that fees for technical services arise in a Contracting State if the

payer is a resident of the State or the payer has a permanent establishment or fixed base in a Contracting State and the fees for technical services are borne by that permanent establishment or fixed base. However, the basic rule is limited by the deeming rule in paragraph 6 where the payer is a resident of a Contracting State but the fees for technical services are borne by a permanent establishment or fixed base that the payer has in the other Contracting State.

113. Where fees for technical services are incurred for the purpose of a business carried on through a permanent establishment or for the purpose of independent personal services performed through a fixed base, those fees will usually qualify for deduction in computing the profits attributable to the permanent establishment under Article 7 or the income attributable to the fixed base under Article 14. The deductibility of the fees for technical services provides an objective standard for determining that the payments have a dose economic connection to the State in which the permanent establishment or fixed base is situated."

106. As is evident from the above, Article 12A and more particularly Paras 5 and 6 thereof introduce the concept of FTS being *"……borne by the permanent establishment or fixed base."* The passages of the respective commentaries which were relied upon are liable to be appreciated bearing in mind the distinctive language in which Article 12A stands couched. While the OECD Commentary speaks of *"economic ownership"*, the UN Commentary asserts that the payment must *"have a dose of economic connection to the State in which the permanent establishment or fixed base is situate."* Those commentaries thus do not strike an identical position.

107. We also bear in mind the submission of Mr. Vohra who had laid stress upon the MOU and the Services Agreement being an indivisible contract and constituting a singular source of the income in question. Undisputedly, the income was earned by and was liable to be remitted

to IMG. The Service PE was undoubtedly not a separate legal entity which could have been possibly called upon to satisfy the test of economic ownership as suggested. While Conventions do accord an independent identity upon a PE, they do so for the purposes of taxation alone. A PE, however, need not in all circumstances be a juridical entity as is recognised in law. It is perhaps these and other limitations which constrained Vogel to express the following reservations with respect to the test of "economic ownership" *(at page 893)*:-

> "The **effectively connected rule** is not based on the **force of attraction rule** (no. 31 OECD MC 2014 Comm. on Article 10; no. 24 OECD MC 2014 Comm. on Article 11; no. 20 OECD MC 2014 Comm. on Article 12; no. 15 UN MC 2011 Comm. on Article 10). This means that dividends, interest and royalties flowing to a resident of a Contracting State from a source situated in the other State must not, by a kind of legal presumption, or fiction even, be related to a PE or a fixed base, as the case may be, which that resident may have in the source State, so that this State would not be obliged to limit its tax jurisdiction in such a case. The shares, debt claims, rights or property must **form part of the assets** of the PE respectively the fixed base or must be **otherwise effectively connected** with that establishment or base. This view is also put forward in *Tech Mahindra Limited v. Commissioner of Taxation*, where the Australian Federal Court stated that profits which are made liable to tax in the source state under the 'force of attraction' notion are not attributable to a PE and therefore not effectively connected with it. The US Technical Explanation gives the example of dividends derived by a dealer in shares or securities from shares or securities that the dealer held for sale to customers. However, in respect of debt claims, rights and property, the UN MC allows a limited force of attraction under Article 7(1)(c): **Business activities in the source State of the same or similar kind as those effected through the PE** may also be taxed in the source State. Consequently, interest received from debt claims and royalties received from rights and property effectively connected with such business activities may also be taxed unrestrictedly in the source State (no. 20 UN MC 2011 Comm. on Article 11; no. 17 UN MC 2011 Comm. on Article 12). For example, the proviso applies whenever both the PE's business activities and the head office's business activities carried out in the PE State consist of managing or

trading shares, granting loans or licensing. However, it does not apply if the head office's or the PE's activities consist only of disposing of capital by buying shares or depositing funds into bank accounts. Such activities are not the business activities referred to in Article 7(1)(c) UN MC.

The risk that the PE proviso may be **abused** through the transfer of shares, debt claims, rights or property to a PE set up solely to benefit from privileged tax regimes in the PE State may be **remote** (no. 32 OECD MC 2014 Comm. on Article 10; no. 25 OECD MC 2014 Comm on Article 12; no. 21 OECD MC 2014 Comm. on Article 12). First of all, a PE can only be identified if a business is carried on therein. Secondly, the condition that the shares, debt claims, rights or property must be effectively connected to such a location requires more than merely recording these assets in the books of the PE for accounting purposes. Next to this, the OECD believes that domestic anti-abuse rules can be an adequate weapon.

According to the OECD, shares, debt claims, rights or property **form part of the assets** of a PE if the '**economic'** ownership of these is allocated to that PE (no. 32.1-32.2 OECD MC 2014 Comm. on Article 10; no. 25.1-25.2 OECD MC 2014 Comm. on Article 12; no. 21.1-21.2 OECD MC 2014 Comm. on Article 12). 'Economic' ownership means the equivalent of ownership for income tax purposes by a separate enterprise, with the attendant benefits and burdens, such as the right to the dividends, interest or royalty attributable to the ownership of a holding, debt claim, right or property, as the case may be, and the potential exposure to gains or losses from the appreciation or depreciation of that holding, debt claim, right or property. In the opinion of this author, the term 'economic' ownership is not **appropriate** for the allocation of assets to a PE. A PE itself can never be owner of an asset because it is not a separate legal entity. As a result, it can never be the 'economic' owner of an asset as well. The term is therefore misleading. It also guides away attention from what is actually relevant for answering the question of what assets must be allocated to a PE: The **significant people's functions**. The author believes that this is an **activity test** and has nothing to do with an ownership test, and therefore is of the opinion that the relevant test is, or should be, whether the shares, debt claims, rights or property, as the case may be, are managed and their exploitation is directed and controlled by people active in or from a PE. If so, the asset concerned is effectively connected with that PE and the income received from it (i.e., dividend, interest respectively royalty must be attributed to that PE (see *supra* m.no. 124)). Whether the economic strength of a PE is

enhanced is, as such, not a relevant criterion. Assets cannot create economic activity by themselves.

108. While we have noticed the divergent views expressed in respect of the meaning to be assigned to the phrase *"effectively connected"*, in our considered opinion the scope of Article 13(6) is an aspect which need not be answered or conclusively pronounced upon in these appeals bearing in mind the conclusions that we have arrived at on the issue of FTS. The phrase "effectively connected", as would be evident from the preceding discussion, has been the subject of divergent and varying interpretations with different authorities and commentaries offering distinct perspectives on what would constitute a sufficient connection between income and PE or fixed base for tax purposes. However, in the context of these appeals, we find it unnecessary to delve into or definitively resolve the intricacies of Article 13(6) given our determination on FTS and which sufficiently addresses the taxation issue. We consequently leave Article 13(6) to be considered in a more appropriate case and where its interpretation and application may be central to the adjudicatory process.

I. THE SECTION 9(1)(vii) EXCEPTION

109. The appellants had, additionally, and insofar as AYs 2010-11 and 2015-16 were concerned, placed reliance upon the provisions comprised in Section 9(1)(vii) of the Act. The said provision reads as under:-

> "9. Income deemed to accrue or arise in India.—(1) The following incomes shall be deemed to accrue or arise in India—
>
> xxxxx xxxxx xxxxx

vii) income by way of fees for technical services payable by—

(*a*) the Government; or

(*b*) a person who is a resident, except where the fees are payable in respect of services utilised in a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India; or

(*c*) a person who is a non-resident, where the fees are payable in respect of services utilised in a business or profession carried on by such person in India or for the purposes of making or earning any income from any source in India:

Provided that nothing contained in this clause shall apply in relation to any income by way of fees for technical services payable in pursuance of an agreement made before the 1st day of April, 1976, and approved by the Central Government.

Explanation 1.—For the purposes of the foregoing proviso, an agreement made on or after the 1st day of April, 1976, shall be deemed to have been made before that date if the agreement is made in accordance with proposals approved by the Central Government before that date.

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"."

110. Of equal significance is the Explanation which came to be inserted in that Section by virtue of Finance Act, 2010 with retrospective effect from 01 June 1976. The said Explanation is extracted hereinbelow: -

"Explanation.—For the removal of doubts, it is hereby declared that for the purposes of this section, income of a non-resident shall be deemed to accrue or arise in India under clause (v) or clause (vi) or clause (vii) of sub-section (1) and shall be included in the total income of the non-resident, whether or not,—

(i) the non-resident has a residence or place of business or business connection in India; or

(ii) the non-resident has rendered services in India."

111. It was the case of the appellants that the income which was earned from BCCI in the aforenoted AYs' was in respect of the IPL which was conducted in South Africa and UAE. It was in the aforesaid background that it was urged that since the service was rendered to BCCI outside India, it would clearly fall outside the ambit of FTS.

112. It is pertinent to note that clause (vii) is a category of income included in Section 9 which prescribes various heads of income which would be deemed to have accrued or arisen in India. While ordinarily income earned by way of FTS payable by a resident Indian would, by virtue of the deeming provision become taxable, it creates an exception in cases where FTS is payable in respect of services utilized in a business of profession outside India or for purposes of earning income from any source outside India. It is in the aforesaid context that the appellants had argued that the income earned from BCCI would fall in the exception not only since the event was held outside India but also since the service was availed of for earning income from a source outside India.

113. The respondents, on the other hand, had sought to contend that the rendering of services in India no longer remains a statutory requirement by virtue of the Explanation which came to be added to Section 9 with retrospective effect from 01 June 1976. It becomes pertinent to note that the Tribunal had in this regard held as follows: -

"**48.** According to provisions of section 9 (1) of the Income tax Act the income by way of fees for technical services payable by a person who is resident to a non-resident shall be deemed to accrue or arise

in India and shall be chargeable to tax u/s. 5 of the Income Tax Act in the hands of a non-resident. The claim of the appellant is that receipt of Rs. 237750181/- falls within the exception provided under clause (b) of the above section which says that where the fees for technical services are payable in respect of services utilized in a business or profession carried on by such person outside India or for the purpose of making or earning any income from any source outside India, it shall not be considered as fees for technical services as income deemed to accrue or arise in India in terms of the provisions of section 9(1)(vii)(b) of the Income Tax Act. The main reason to say so by the appellant is that the IPL 2009 event has been held outside India and therefore the BCCI has utilized those services outside India and therefore they fall into the exception and cannot be taxed in India. We have carefully considered the rival contentions and reject the contention of the appellant for the reason that to fall within the exception the assessee must be carrying out business outside India and such services must be utilized in that business by a person who is a resident in India and who pays income by way of fees for technical services to a non- resident. It is an established fact that BCCI is carrying on business in India and not outside India. Further the source of income of the BCCI is in India and not outside India. Merely because the event is performed outside India it cannot be said that source of income of the BCCI is not in India. Therefore according to us the income of the appellant of Rs. 237055181/- is chargeable to tax as fees for technical services under section 9 (1) (vii) of the Income Tax Act as Fees for technical services."

114. The legislative history which preceded the introduction of the Explanation was dealt with in some detail by the DRP as would be evident from the following extracts of its Directions: -

"**5.** We have carefully considered the facts of the case and submission of the assessee. We have perused the abovementioned case laws. We would like to refer to Explanation below section 9(2) which has been inserted by the Finance Act, 2012 with retrospective effect from 1.6.1976. It reads as under:

"Explanation.-For the removal of doubts, it is hereby declared that for the purposes of this section, income of a non-resident shall be deemed to accrue or arise in India under clause (v) or clause (vi) or clause (vii) of sub-section (1) and shall be included in the total Income of the non-resident, whether or not,-

(i) the non-resident has a residence or place of business or business connection in India; or

(ii) the non-resident has rendered services in India."

5.1 For the purposes of understanding the reasons for the change, it is relevant to refer to the Explanatory Memorandum to the Finance Bill 2012, which is reproduced hereunder:

"Section 9 provides for situations where income is deemed to accrue or arise in India.

Vide Finance Act, 1976, a source rule was provided in section 9 through insertion of clauses (v), (vi) and (vii) in sub-section (1) for income by way of interest, royalty or fees for technical services respectively. It was provided, inter alia, that in case of payments as mentioned under these clauses, income would be deemed to accrue or arise in India to the non-resident under the circumstances specified therein.

The intention of introducing the source rule was to bring to tax interest, royalty and fees for technical services, by creating a legal fiction in section 9, even in cases where services are provided outside India as long as they are utilized in India*. The source rule, therefore, means that the situs of the rendering of services is not relevant.* ***It is the situs of the payer and the situs of the utilization of services which will determine the taxability of such services in India.***

This was the settled position of law till 2007. However, the Hon'ble Supreme Court, in the case of Ishikawajima-Harima Heavy Industries Ltd., vs. DIT (2007)[288 ITR 408], held that despite the deeming fiction in section 9, for any such income to be taxable in India, there must be sufficient territorial nexus between such income and the territory of India. It further held that for establishing such territorial nexus, the services have to be rendered in India as well as utilized in India. This interpretation was not in accordance with ***the legislative intent that the situs of rendering service in India is not relevant as long as the services are utilized in India.*** *Therefore, to remove doubts regarding the source rule, an Explanation was inserted below sub-section (2) of section 9 with retrospective effect from 1st June, 1976 vide Finance Act, 2007.* ***The Explanation sought to clarify that where income is deemed to accrue or arise in India under clauses (v), (vi) and (vii) of sub-section (1) of section 9, such income shall be included in the total income of the non-resident, regardless of whether the non-***

resident has a residence or place of business or business connection in India. *However, the Karnataka High Court, in a recent judgment in the case of Jindal Thermal Power Company Ltd. vs. DCIT (TDS), has held that the Explanation, in its present form, does not do away with the requirement of rendering of services in India for any income to be deemed to accrue or arise to a non-resident under section 9. It has been held that on a plain reading of the Explanation, the criteria of rendering services in India and the utilization of the service in India laid down by the Supreme Court in its judgment in the case of Ishikawajima-Harima Heavy Industries Ltd. (supra) remains untouched and unaffected by the Explanation.*

In order to remove any doubt about the legislative intent of the aforesaid source rule, it is proposed to substitute the existing Explanation with a new Explanation to specifically state that ***the income of a non-resident shall be deemed to accrue or arise in India under clause (v) or clause (vi) or clause (vii) of sub-section (1) of section 9 and shall be included in his total income, whether or not,***

(a) the non-resident has a residence or place of business or business connection in India; or

(b) the non-resident has rendered services in India.

This amendment is proposed to take effect retrospectively from 1st June, 1976 and will, accordingly, apply in relation to the Assessment year 1977-78 and subsequent years."

(Emphasis supplied)

5.2 From the above, it is now clear that the provisions of the Income Tax Act have been amended to include income in the hands of non-resident on accrual basis in India u/s 9(1)(v)/(vi)/(vii) whether or not the non-resident has a residence or place of business or business connection in India or the non-resident has in India. The issue has to be decided in the context of the law as applicable.

5.3 The Ld. ARs have also referred to provisions of clause (b) of section 9(1)(vii). According to the said sections, Royalty/FTS payable by a resident are deemed to accrue or arise in India where the royalty/fee is payable to a non-resident except where these are payable in respect of any right, property or information used or services utilized:

- for the purposes of a business of profession carried on by such person outside India,

or

- for the purpose of making or earning any income from any source outside India.

Both these eventualities are **not cumulative but are in the alternative** to each other and therefore, on non satisfaction of any one, the deeming fiction shall come into play in the case. The issue for consideration is the meaning of the expression 'such person' appearing in section 9(1) (vii)(b). In this context reference is made to the decision of the Hon'ble Delhi High Court in the case of CIT vs. Havells India Ltd 352 ITR 376 wherein Hon'ble High Court held that in order to fall within the exception provided in section 9(1)(vii)(b) the source of income, and not the receipt, should be situated outside India. Regarding the exception of section 9(1)(vii)(b) the Hon'ble Court held that in order to get the benefit of first exception it is necessary for the taxpayer (resident) to show that the technical services were utilized in a business carried outside India. Indirectly, the ratio decidendi has been that 'such person' appearing in section 9(1)(vii)(b) refers to the resident payer of the said fee and not the non-resident recipient. In this context, reference is made to the CBDT Circular No. 202 dt 5.7.1976, which reads as under:

"Source rule for "fees for technical services" - Section 9(1)(vii)

16.1 *As in the case of royalty, the Finance Act, 1976 has amended the Income-tax Act clearly specifying the circumstances in which income by way of "fees for technical services" will be deemed to accrue or arise in India and also defining the expression "fees for technical services". For this purpose, a new clause (vii) has been inserted in section 9(1).*

16.2 *Under the new provision, income by way of "fees for technical services" of the following types will be deemed to accrue or arise in India:*

(a) fees for technical services payable by the Central Government or any State Government;

(b) ***fees for technical services payable by a resident, except where the payment is relatable to a business or profession***

carried on by him outside India or to any other source of his income outside India*; and*

(c) fees for technical services payable by a non-resident if the payment is relatable to a business or profession carried on by him in India or to any other source of his Income in India.

16.3 *The expression "fees for technical services" has been defined to mean…..*

16.4 *The aforesaid amendment has come into force with effect from 1-6-1976, and will apply in relation to the assessment year 1977-78 and subsequent years."*

5.4 In view of the above, it is evident that the intention of the legislature clarified by the Explanatory circular on the introduction of the amendment in the Income Tax Act has been to consider "such person" appearing in section 9(1)(vii)(b) with reference to the resident payer for the said amount because the expression "if the payment is relatable to a business or profession carried on **by him outside India"** refers to the business or profession carried out by him viz. resident payer in this context and not the non-resident payee. In view of the clear disposition of the relevant provisions of the I.T. Act, we hold that the provision of section 9(1)(vii)(b) are also satisfied and the case of the assessee is not covered by the exceptions."

115. In our considered opinion, this question is clearly liable to be answered in favor of the appellant for reasons which follow. Undisputedly, IPL in 2009 and 2014 though originally slated to be held in India, was, for exceptional reasons, shifted out and ultimately held in South Africa and UAE respectively. The services which were rendered by IMG in connection with those two events were clearly utilized outside India and were availed of for the purposes of earning income from a source outside India. The geographical shift meant that the services rendered by IMG were utilized outside India and were integral to earning income from sources outside India. The Tribunal clearly glossed over the significance of this relocation and which had

fundamentally altered the context in which IMG's services were availed. The Tribunal thus clearly erred in failing to appreciate the significance of the event itself having shifted out of India and the services thus coming to be utilized in the nations noticed above and the same being indelibly connected to the earning of income from a source outside India.

116. In our considered opinion, the Explanation which has come to be incorporated in Section 9 neither erases nor overrides the exception which continues to exist in clause (vii). It is also pertinent to note that the exception forming part of clause (vii) existed on the statute book at the time when Finance Act, 2010 came to be introduced. Notwithstanding the above, Parliament in its wisdom chose not to delete or restructure clause (vii).

117. According to us, while the Explanation does declare that FTS earned by a non-resident would be deemed to accrue or arise in India irrespective of whether it have a place of business or business connection therein or having rendered services in India, the same would not result in FTS paid by a resident for services utilized in connection with a business outside India or for the purposes of earning income from a source outside India becoming liable to tax.

118. The territorial nexus which must imbue the issue of taxability was duly recognized by the Supreme Court in *GVK Industries*, where it held as follows: -

"**23.** At this juncture, it is demonstrable that NRC is a non-resident

company and it does not have a place of business in India. The Revenue has not advanced a case that the income had actually arisen or received by NRC in India. The High Court has recorded the payment or receipt paid by the appellant to NRC as success fee would not be taxable under Section 9(1)(*i*) of the Act as the transaction/activity did not have any business connection. The conclusion of the High Court in this regard is absolutely defensible in view of the principles stated in *CIT* v. *R.D. Aggarwal and Co.* [*CIT* v. *R.D. Aggarwal and Co.*, (1965) 56 ITR 20 (SC)] , *CIT* v. *T.I. and M. Sales Ltd.* [*CIT* v. *T.I. and M. Sales Ltd.*, (1987) 3 SCC 132 : 1987 SCC (Tax) 240 : (1987) 166 ITR 93] and *Barendra Prasad Ray* v. *ITO* [*Barendra Prasad Ray* v. *ITO*, (1981) 2 SCC 693 : 1981 SCC (Tax) 149 : (1981) 129 ITR 295] . That being the position, the singular question that remains to be answered is whether the payment or receipt paid by the appellant to NRC as success fee would be deemed to be taxable in India under Section 9(1)(*vii*) of the Act? As the factual matrix would show, the appellant has not invoked Double Taxation Avoidance Agreement between India and Switzerland. That being not there, we are only concerned whether the "success fee" as termed by the assessee is "fee for technical service" as enjoined under Section 9(1)(*vii*) of the Act. The said provision reads as follows:

"**9. *Income deemed to accrue or arise in India***.—(1) The following incomes shall be deemed to accrue or arise in India—

***

(*vii*) income by way of fees for technical services payable by—

(*a*) the Government; or

(*b*) a person who is a resident, except where the fees are payable in respect of services utilised in a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India; or

(*c*) a person who is a non-resident, where the fees are payable in respect of services utilised in a business or profession carried on by such person in India or for the purposes of making or earning any income from any source in India:

Provided that nothing contained in this clause shall apply in relation to any income by way of fees for technical services payable in pursuance of an agreement made before the 1st day of April, 1976, and approved by the Central Government.

Explanation 1.—For the purposes of the foregoing proviso, an agreement made on or after the 1st day of April, 1976, shall be deemed to have been made before that date if the agreement is made

in accordance with proposals approved by the Central Government before that date.

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'."

24. Explanation to Section 9(2) was substituted by the Finance Act, 2010 with retrospective effect from 1-6-1976. Prior to the said substitution, another Explanation had been inserted by the Finance Act, 2007 with retrospective effect from 1-6-1976. The said Explanations read as under:

As amended by Finance Act, 2010

"*Explanation*.—For the removal of doubts, it is hereby declared that for the purposes of this section, income of a non-resident shall be deemed to accrue or arise in India under clause (*v*) or clause (*vi*) or clause (*vii*) of sub-section (1) and shall be included in the total income of the non-resident, whether or not—

(*i*) the non-resident has a residence or place of business or business connection in India; or

(*ii*) the non-resident has rendered services in India."

As amended by Finance Act, 2007

"*Explanation*.—For the removal of doubts, it is hereby declared that for the purposes of this section, where income is deemed to accrue or arise in India under clauses (*v*), (*vi*) and (*vii*) of sub-section (1), such income shall be included in the total income of the non-resident, whether or not the non-resident has a residence or place of business or business connection in India."

25. The principal provision is sub-clause (*b*) of Section 9(1)(*vii*) of the Act. The said provision carves out an exception. The exception carved out in the latter part of sub-clause (*b*) applies to a situation when fee is payable in respect of services utilised for business or profession carried out by an Indian payer outside India or for the purpose of making or earning of income by the Indian assessee i.e. the payer, for the purpose of making or earning any income from a source outside India. On a studied scrutiny of the said clause, it becomes clear that it lays down the principle what is basically known as the "source rule", that is, income of the recipient to be

charged or chargeable in the country where the source of payment is located, to clarify, where the payer is located. The clause further mandates and requires that the services should be utilised in India.

26. Having stated about the "source rule", it is necessary to appropriately appreciate how the concept has developed. At the time of formation of "League of Nations" at the end of 1920, it comprised of only 27 countries dominated by the European States and the United States of America. The United Nations that was formed after the Second World War, initially had 51 members. Presently, it has 193 members. With the efflux of time, there has been birth of nation States which enjoy political independence and that has led to cross-border and international trade. The State trade eventually has culminated in formulation of principles pertaining to international taxation jurisdiction. It needs no special emphasis to state that the said taxation principles are premised to promote international trade and to allocate taxation between the States. These rules help and further endeavour to curtail possibility of double taxation, tax discrimination and also to adjudicate resort to abusive tax avoidance or tax evasion practices. The nation States, in certain situations, resort to principle of "tax mitigation" and in order to protect their citizens, grant benefit of tax abroad under the domestic legislation under the bilateral agreements.

27. The two principles, namely, "situs of residence" and "situs of source of income" have witnessed divergence and difference in the field of international taxation. The principle "Residence State Taxation" gives primacy to the country of the residency of the assessee. This principle postulates taxation of worldwide income and worldwide capital in the country of residence of the natural or juridical person. The "Source State Taxation" rule confers primacy to right to tax to a particular income or transaction to the State/nation where the source of the said income is located. The second rule, as is understood, is transaction specific. To elaborate, the source State seeks to tax the transaction or capital within its territory even when the income benefits belongs to a non-residence person, that is, a person resident in another country. The aforesaid principle sometimes is given a different name, that is, the territorial principle. It is apt to state here that the residence based taxation is perceived as benefiting the developed or capital exporting countries whereas the source based taxation protects and is regarded as more beneficial to capital importing countries, that is, developing nations. Here comes the principle of nexus, for the nexus of the right to tax is in the source rule. It is founded on the right of a country to tax the income earned from a source located in the said State, irrespective of the country of the residence of the recipient. It is well settled that the

source based taxation is accepted and applied in international taxation law.

28. The two principles that we have mentioned hereinabove, are also applied in domestic law in various countries. The source rule is in consonance with the nexus theory and does not fall foul of the said doctrine on the ground of extra-territorial operation. The doctrine of source rule has been explained as a country where the income or wealth is physically or economically produced. [See *League of Nations, Report on Double Taxation* by Bruins, Einaudi, Saligman and Sir Josiah Stan (1923)]. Appreciated on the aforesaid principle, it would apply where business activity is wholly or partly performed is a source State, as a logical corollary, the State concept would also justifiably include the country where the commercial need for the product originated, that is, for example, where the consultancy is utilised.

29. From the aforesaid, it is quite vivid that the concept of income source is multifaceted and has the potentiality to take different forms [See *Klans Vogel, World-wide* v. *Source Taxation of Income — Review and Revision of Arguments (1988)*]. The said rule has been justified by Arvid A. Skaar in *Permanent Establishment; Erosion of Tax Treaty Principle* on the ground that profits of business enterprise are mainly the yield of an activity, for capital is profitable to the extent that it is actively utilised in a profitable manner. To this extent, neither the activity of business enterprise nor the capital made, depends on residence."

119. Of equal significance are the following conclusions which were rendered by the Supreme Court in *Ishikawajima*:-

"**90.** Section 9(1)(*vii*)(*c*) of the Act states that:

"9. (1)(*vii*)(*c*) a person who is a non-resident, where the fees are payable in respect of services *utilised* in a business or profession *carried on by such person in India* or for the purposes of making or earning any income from any source in India:"

(emphasis supplied)

Reading the provision in its plain sense, it can be seen that it requires two conditions to be met—the services which are the source of the income that is sought to be taxed, has to be rendered in India, as well as utilised in India, to be taxable in India. In the present case, both these conditions have not been satisfied simultaneously, therefore, excluding this income from the ambit of taxation in India. Thus, for a non-resident to be taxed on income for services, such a service

needs to be rendered within India, and has to be a part of a business or profession carried on by such person in India. The petitioners in the present case have provided services to persons resident in India, and though the same have been used here, it has not been rendered in India.

91. Section 9(1)(*vii*) of the Act whereupon reliance has been placed by the learned Additional Solicitor General, must be read with Section 5 thereof, which takes within its purview the territorial nexus on the basis whereof tax is required to be levied, namely: (*a*) resident; and (*b*) receipt or accrual of income.

92. Global income of a resident although is subjected to tax, global income of a non-resident may not be. The answer to the question would depend upon the nature of the contract and the provisions of DTAA.

93. What is relevant is receipt or accrual of income, as would be evident from a plain reading of Section 5(2) of the Act. The legal fiction created although in a given case may be held to be of wide import, but it is trite that the terms of a contract are required to be construed having regard to the international covenants and conventions. In a case of this nature, interpretation with reference to the nexus to tax territories will also assume significance. Territorial nexus for the purpose of determining the tax liability is an internationally accepted principle. An endeavour should, thus, be made to construe the taxability of a non-resident in respect of income derived by it. Having regard to the internationally accepted principle and DTAA, it may not be possible to give an extended meaning to the words "income deemed to accrue or arise in India" as expressed in Section 9 of the Act. Section 9 incorporated various heads of income on which tax is sought to be levied by the Republic of India. Whatever is payable by a resident to a non-resident by way of fees for technical services, thus, would not always come within the purview of Section 9(1)(*vii*) of the Act. It must have sufficient territorial nexus with India so as to furnish a basis for imposition of tax. Whereas a resident would come within the purview of Section 9(1)(*vii*) of the Act, a non-resident would not, as services of a non-resident to a resident utilised in India may not have much relevance in determining whether the income of the non-resident accrues or arises in India. It must have a direct live link between the services rendered in India, when such a link is established, the same may again be subjected to any relief under DTAA. A distinction may also be made between rendition of services and utilisation thereof.

94. Section 9(1)(*vii*)(*c*) clearly states "where the fees are payable in respect of services utilised in a business or profession carried on by such person in India". It is evident that Section 9(1)(*vii*), read in its

plain, same envisages the fulfilment of two conditions: services, which are source of income sought to be taxed in India must be (*i*) utilised in India, and (*ii*) rendered in India. In the present case, both these conditions have not been satisfied simultaneously.

95. The provisions of Section 9(1)(*vii*) of the Act are plain and capable of being given a meaning. There, therefore, may not be any reason not to give full effect thereto. However, even in relation to such income, the provisions of Article 7 of DTAA would be applicable, as services rendered outside India would have nothing to do with permanent establishment in India. Thus, if any services have been rendered by the head office of the appellant outside India, only because they were connected with permanent establishment (*sic*). Even in relation thereto, principle of apportionment shall apply."

J. CONCLUSIONS

120. Accordingly and for the reasons recorded hereinabove, we find ourselves unable to uphold the findings of the Tribunal insofar as FTS is concerned. We are of the firm opinion that the Tribunal clearly erred in holding that the advice and consultancy services rendered by IMG enabled BCCI *"to absorb and apply the information and advice"*. It clearly failed to bear in mind the distinction that must be acknowledged to exist between the mere utilisation of technical or consultancy service in aid of business and the transfer, transmission and enablement which must occur in order for the twin conditions of Article 13 being satisfied. We, for reasons assigned hereinabove, also find ourselves unable to uphold the conclusions of the Tribunal on Section 9(1)(vii)(b) of the Act.

121. Insofar as Article 13(6) and the issue of *"effectively connected"* is concerned we have, in light of our findings on FTS, desisted from expressing any final opinion. However and in light of the reservations expressed in the body of the judgment, this decision is not liable to be

construed as an affirmation of the view in law as expressed by the Tribunal.

122. That only leaves us to consider Question (i) as framed. It becomes apposite to note that the question is introduced with the appellant seeking our opinion on whether "business income" was divisible under the DTAA even though it arose out of a single contract having regard to Articles 7 and 13 of the Convention. We note that the Tribunal has founded its decision on what appears to be an admitted dichotomy between the functions performed and services rendered by the IMG UK as distinguished from those discharged by its Service PE. However, the Tribunal has while dealing with the functions performed by IMG UK linked it to the issue of "effectively connected" which was relevant for the purposes of Article 13. This becomes apparent from a reading of paragraph 38 of the impugned decision of the Tribunal which is extracted hereunder:-

> **"38.** Now the issue arises is whether the whole contract is 'effectively connected' with the permanent establishment or part of the services are 'effectively connected with the permanent establishment. On reading of. the above two agreements and the transfer pricing study report submitted by the assessee, more specifically at para number 4.4.2 ~e the functions performed by the permanent establishment of the appellant in India and para number 4.4.1 shows what are the functions performed by the IMG UK. It is further mentioned in the transfer pricing study report that certain routine services relating to on ground implementation and running of the event was subcontracted to the IMC India, branch. The IMG India PE was involved in/ responsible for overseeing and managing. The liasonsing and implementation support activities undertake taken by the IMC India branch. It is also important to note that how this functions were performed it was stated in the transfer pricing study report of the appellant that IMO UK employees came to India from time to time for short-term visits. Further few freelancers were appointed/engaged by IMO UK for undertaking the on- ground

implementation and related supervision activities in India. As these functions performed, assessee has claimed that it has created a service PE in India and therefore the income should be chargeable to tax according to the article 7 of the Double Taxation Avoidance Agreement. Therefore according to us the above agreements and memorandum of understanding has two limb one. with respect to the performance of the activities performed by the permanent establishment in India and another limb deals with respect to the performance of the services by the IMG UK directly for which the India PE has nothing to do. Admittedly the issue is concerned with respect to the fees for technical services. It is also admitted position that while the effective connection of royalties with a permanent establishment has to be evaluated by applying the 'assets test' , and for the purpose of fees for technical services the 'activity test? or 'functional test' should be applied as held in case of Nippon Kaiji Kyokoi V ITO 47 SOT 41 (Mum). Therefore to "effectively connect' the whole income with the PE, contending party i.e. assessee, should establish that PE is engaged in the performance of all those services or should be involved in actual rendering of such services, or (2) it shou1d arise as a result of the activities of the PE, or (3) The PE should, at least, facilitate, assist or aid in performance of such service irrespective of the other activities PE performs. Therefore according to article 7, for attribution of the profits to the permanent establishment the activity carried out by the permanent establishment is important and to that extent only the profits can be attributed to that particular permanent establishment. However if there are other activities, which are also incorporated in the agreement, which are not at all carried on with the help of, or through, or by, or under the control, or under the supervision of the permanent establishment such activities and income arising there from cannot be said to be 'effectively connected' with the permanent establishment and article 7 cannot be applied to those services. In the present case certain activities are carried out by the appellant which are not even concerned with the functioning . of the permanent establishment therefore in our view only the activities which are performed by the permanent establishment are effectively connected with the permanent establishment and activities which are not carried on by the permanent establishment but are carried out by the head office of the appellant are not 'effectively connected' with the permanent establishment. We are also of the view that the term 'effectively connected' should not be understood to mean the opposite of 'legally connected' but rather something in the sense of 'really connected'. Therefore the activities mentioned in the contract should be connected to the permanent establishment not only in the form but also in substance. It is also interesting to note that the

permanent establishment of the assessee has been admitted by the appellant only because of the reason that some of the employees of the appellant came to India from time to time for short visit and further certain freelancers were appointed for undertaking the own ground implementation related supervision activities in India. Therefore according to us there are minimum activities performed by the PE of appellant in India. Hence just performing such minimum activities it cannot be said that whole of the revenue of Rs. 33 crores involved in the contract is 'effectively connected' with the activities of the permanent establishment in India. Hence we reject the contention of the assessee that the whole of the revenue involved in the contract should be considered as effectively connected with the permanent establishment of the appellant. We also give one more reason may be a hypothetical one which supports our view. Supposedly a contract of Rs. 100 crore is awarded to an overseas entity for rendering of the management services and if such: overseas entity establishes a permanent establishment by just deputing its staff for more than 90 days, it creates a service permanent establishment of that for an entity in India. On the basis of the minimum activities performed by that particular staff which 1s deputed in India 10% of the gross receipt say 10 crores is attributed to permanent establishment and after claiming deduction of expenses there from of say 60% of the income attributed, assessee offered balance amount as profit of the permanent establishment for taxation. In transfer pricing study report, based on FAR analysis such attribution of the profit is considered to be at arm's length by the assessee and as well as by the transfer pricing officer, it cannot be said that the balance sum of Rs. 90 crores be taxed in India as the whole contract was 'effectively connected' with the permanent establishment created by the petitioner of some staff for performing some of the activities and crossing the threshold duration. We do not subscribe to such a view and we are also of the view that such is the case of the assessee before us."

123. The issue became further obfuscated with the appellant alternating between Articles 7 and 13 of the DTAA. In our considered opinion, the respondents while evaluating the attribution of income to the Service PE question were necessarily constrained to tread down this path and bear in consideration the nature of services rendered by IMG UK as distinguished from those discharged by the Service PE. In fact even the appellant does not appear to have seriously questioned the fact

that a part of the advisory work was undertaken by its UK office without the involvement of the Service PE.

124. In light of the admitted position of a Service PE existing in the relevant AYs', the income attributable to that entity was correctly offered to tax under Article 7 of the DTAA. This since the Revenue was concerned with revenue earned from the rendering of services in India and which services, concededly, fell outside the ambit of Article 13. Insofar as the revenue attributable to the UK office is concerned, we have already found that the same does not qualify for taxation under Article 13 since the "make available" test does not stand fulfilled. We consequently and on an overall analysis of all of the above, find no justification to interfere with the exercise undertaken by the Tribunal in this regard.

K. DISPOSITIF

125. We accordingly allow the present appeals and set aside the impugned orders of the Tribunal. While we answer Question (i) in the negative and against the appellants, Questions (ii) and (iii) are answered in their favour. The appellants shall be entitled to consequential reliefs.

YASHWANT VARMA, J.

PURUSHAINDRA KUMAR KAURAV, J.

JULY 03, 2024/Neha/RW