Payment to Event Management Co. for IPL hosted in South Africa was FTS under India-UK treaty

Summary – The Delhi ITAT in a recent case of International Management Group (UK) Ltd., (the Assessee) held that Payment to Event Management Company for IPL hosted in South Africa was FTS under India-UK treaty

Facts

- The assessee a UK based company was engaged in the business of event management and talent representation activities in sports events such as golf, tennis, football *etc*. The Board of Control for Cricket in India (BCCI) entered into a Memorandum of Understanding for assistance in establishment, commercialization and operation of the India Premier League (IPL) in September 2007. According to that MoU the assessee-company was appointed to provide services for a period of 10 IPL events and subsequently, the assessee/appellant also entered into several separate agreements wherein the terms and conditions with respect to subsequent IPL events were considered.
- The assessee was to provide services in relation to IPL 2009 which was scheduled to be held in India in April - May 2009, however, as the event clashed with the multi phased 2009 General Elections in India, it was decided to hold IPL 2009 outside India which was hosted in South Africa from April to May 2009. At the time when the decision was taken to shift IPL 2009 to South Africa, the assessee had prepared for the event in India and therefore, there was presence of staff as well as third parties connected with that event on behalf of appellant in India. On the announcement that the event would be hosted in South Africa such third parties and employees moved out of India to South Africa but as the length of the stay of such staff *etc.* exceeded 90 days in a 12 months period, according to the assessee, it created a service permanent establishment of appellant in India in terms of article 5(2)(k) of the Indo-UK DTAA. Therefore, income of the assessee was chargeable to tax in India as attributable to that permanent establishment.
- The assessee received gross receipt of Rs. 33 crores from BCCI on account of this agreement and stated that only gross receipt of Rs. 9.22 crores was attributable to the Indian PE of the assessee and consequent profit of Rs. 3.28 crores was the income of the assessee under the head business income chargeable to tax under the provisions of section 44 DA.
- During assessment proceedings the Assessing Officer accepted the business income shown in return of income filed by the assessee at Rs. 3.28 crores but made an addition of Rs. 23.77 crores, being balance receipt as FTS. Thereby the assessed income of the assessee was determined at Rs. 27.05 crores as against the returned income of Rs. 3.28 crores in the draft assessment order.
- The DRP held that the receipt of Rs 23.77 crores was chargeable to tax under section 9(1)(vii)(b) and also FTS under DTAA. The DRP further directed that such receipt should be attributed to the PE and be taxed on net basis. It gave direction for taxing the sum as FTS on protective basis and considering the above sum as business income on substantive basis.
- On cross appeals:

Held

- The short controversy involved in the present case is that assessee/appellant company has received Rs. 33 crores as remuneration in terms of a contract entered into with Board of control for Cricket in India (BCCI). Out of which assessee has contended that gross receipt of Rs. 9.2 crores has already been offered for taxation claiming it attributable to its permanent establishment in India with respect to functions and activities carried out by its permanent establishment in India. Accordingly assessee offered resultant income as business income of Rs 3.28 crores after deducting expenses therefrom. However the dispute between the assessee and revenue is that whether the sum of the balance receipt from that contract amounting to Rs. 23.77 crores shall be chargeable to tax in India at all. If the same is chargeable to tax it would be considered as the business income of the assessee and subsequently whether the proportionate expenditure would be allowable from that or not. The further controversy thereto is that whether such sum is chargeable to tax as fees for technical services or not with respect to Indian tax laws as well as Double Taxation Avoidance Agreement entered into between India and UK.
- The basic edifice of the controversy is based on 2 documents entered into between the board of control for Cricket in India as well as the assessee. The 1st is the memorandum of understanding between the 2 parties in 2007 and the 2nd is the service agreement of 2009. According to the memorandum of understanding it has been agreed between the parties that assessee shall provide services by conducting research in respect of the appropriate structure for the IPL and make cut recommendations to BCCI. Further the assessee shall provide appropriate presentation documentation in the research on various presentations to be made based upon which the BCCI will decide upon the most appropriate structure for the IPL under advice from the assessee. The BCCI has required the assessee to prepare the documentation being the Constitution of the IPL, authority of the governing Council of the IPL, structure of the tournament, IPL tournament rules and regulations, the franchisee tender document, the franchisee agreement and any necessary franchisee regulations and IPL implementation budget. In addition to that the assessee was also required to develop right management process in respect of commercial rights and assets of any kind arising out of the IPL which are owned by the BCCI, it was in respect of those rights, repression and execution of marketing strategies, the management of the franchisee tender process, the management of the sale process in respect of those rights and preparation and negotiation of contracts with various parties. It was further required to prepare television production specifications and development of best practice match day guidelines for media and franchisee and further advice and assistance in connection with the development of any will relevant stadium and the Finance which may be necessary in connection therewith.
- In terms of the above memorandum of understanding entered into between the 2 parties a service agreement was entered into in 2009.

- Firstly, the various clauses of the agreement entered into by the assessee with the BCCI are examined. The BCCI entered into an agreement in 2009 with the assessee which is a company incorporated in England and having its registered office there as preferred agent and representative to advise and assist in the exploitation of the rights and in the provision of the services throughout the territory during the representation period commencing from January 2009 and on the date of conclusion of 9th complete session thereafter. Therefore in a nutshell the BCCI has entered into a contract with the assessee for holding the IPL from January 2009 and subsequent season of IPL. By virtue of this agreement the assessee was 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 those rights. The obligation of the IMG was to provide the services set out in the service agreement and it is acknowledged between the parties that a significant portion of the services constitutes advice provided to the BCCI from outside India using assessee's international expertise and resources.
- The obligations as set out above have been further assigned between the UK office of the assessee and the Indian permanent establishment as set out in the transfer pricing study report produced by the assessee before the revenue.
- Based on the above FAR analysis of the Indian permanent establishment of the assessee, the TPO passed order under section 92CA (3) on 31-12-2013 wherein he has examined the transfer pricing documentation of the assessee with respect to fees for technical services amounting to Rs. 9.22 crores, event management expenses of Rs. 1.19 crores and reimbursement of expenses of Rs. 5.34 crores totalling in all to Rs. 15.76 crores pertaining to the transaction entered into with its associated enterprise *i.e.* IMG, UK and IMG USA applying the transactional net margin method for determining the arm's length price and has held that as stated in the prior year order, article 13 of the India UK Treaty read with article 7 of the treaty states that if assessee constitutes a service PE, the profits attributable to the PE are to be taxed in the other contracting states that is in India. This implies that profits of the PE are rightly attributable to it should be taxed in India. He further held that after going through the facts and information submitted by the assessee during the course of the assessment proceedings, it is noted that the facts and circumstances of the IPL 2009 event are different from IPL 2008 event since IPL 2009 took place in South Africa unlike the previous IPL event 2008 which was hosted in India during April to June 2008. On the basis of the above facts no adverse inference was drawn towards the amount of revenue of Rs. 9.22 crores attributable to the Indian permanent establishment. Therefore, on reading the TPO's order it is apparent that according to him no further profit is required to be attributed to the permanent establishment of the assessee. However, these attribution of the profit is undisputedly based on the functions performed by the permanent establishment of the assessee, assets employed by the permanent establishment in performing those functions and risk assumed by it while performing those functions. However, it is to be noted that over and above those functions performed by the permanent establishment of the

assessee in India there are certain functions which have been performed from its head office from outside India by the assessee which are not at all connected with the permanent establishment of the appellant in India. Appellant has submitted that it has a permanent establishment of India as it is deputed some of its employees and also appointed third-party freelancers for undertaking the on-ground implementation and related event management and supervision activities in India which has created a permanent establishment as the threshold limit of 90 days has exceeded and, therefore, it constitutes a service permanent establishment in India according to the Indo UK Double Taxation Avoidance Agreement. Based on this premise which has been accepted by the revenue has resulted into the exercise of attribution of profit to the permanent establishment and taxation of income of the appellant to that extent on net basis after deduction of the expenses. It is interesting to note that in the instant case there is only a service PE which has come into existence only because of the on-ground implementation and related event management and supervision activities in India by deputation of staff and appointing third parties. It does not talk about the services which have been rendered by the IMG UK directly from the head office to the board of control for Cricket in India. On specific query by the bench that how the services rendered by the UK company to BCCI were effectively connected with the permanent establishment in India the appellant has given an answer stating that the contract is in all circumstances is effectively connected with the permanent establishment and, therefore, the conclusion that the instant case only article 7 will apply. The appellant further stated that the effective connection has to be read in relation to the contract and not in relation to the services rendered and during the year assessee has only one contract entered into by the appellant with the BCCI for IPL 2009 event and due to that contract only the service PE is coming into existence and, therefore, the whole contract has been effectively connected with the permanent establishment. The appellant has further submitted that in case if the bench is of the view that the balance consideration is not attributable to the permanent establishment for the services rendered by the appellant and it is in the nature of the fees for technical services as per the provisions of article 13 (4) (c), then also because of the PE the receipts would be taxed as business income under article 7 of the Tax treaty. Admittedly appellant is a UK resident and without any doubt the provisions of the Income Tax Act or the provisions of the Double Taxation Avoidance Agreement whichever is more beneficial to the assessee shall be applied for determining the tax liability of the assessee in India. In view of this undoubtedly the appellant is entitled to the benefit of Indo UK Double Taxation Avoidance Agreement. Therefore, to examine this argument of the appellant the provisions of article 13 of the Indo UK DTAA need to be examined.

- On perusing article 13 of the Double Taxation Avoidance Agreement it is apparent that if the fees for technical services are effectively connected with the permanent establishment of the appellant in India then provisions of article 13 (6) shall be applicable to the assessee. In that case provisions of article 7 of the Double Taxation Avoidance Agreement shall apply to that income.
- 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 are 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 is responsible for overseeing and managing the liaisoning and implementation support activities undertaken 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 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. 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. 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 should 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 services 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 therefrom cannot be said to be effectively connected with the permanent establishment and article 7 cannot be applied to those services. In the instant case certain activities are carried out by the appellant which are not even concerned with the functioning of the permanent establishment, therefore, 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. It is also oviewed 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, 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, 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 is rejected. One more reason may be a hypothetical one which supports this view is that 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 is deputed in India 10 per cent of the gross receipt say 10 crores is attributed to permanent establishment and after claiming deduction of expenses therefrom of say 60 per cent 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 cannot 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. Such view is not acceptable and it is viewed that that such is the case of the assessee.

- Further, 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 and 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 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 the 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.

- This view is also supported by the provision of article 13 (6) of the DTAA which provides that 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.
- 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 of 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 instant case the benches raised a specific query that how the activities carried on by the UK office of the appellant arise through the permanent establishment and how the contract is effectively connected with such permanent establishment. The assessee 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 the relevant activities performed by the foreign office of the appellant as well as the permanent establishment of the appellant have been perused. It is viewed 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 about twin conditions also failed in case of the appellant. Thus, 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.
- Therefore, 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 is rejected. One more reasons for holding such a view is that 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 Indo US DTAA uses the same term 'attributable to' in place of 'effectively connected' with in article 12(6) of that agreement.Therefore, out of the total receipt of Rs. 33 crores the receipt of Rs. 9.22 crores which is attributable to the

permanent establishment in India and the balance sum of Rs. 23.77 crores shall be chargeable as fees for technical services under article 13 of the DTAA.

- 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 instant case the services are already described in the previous paragraphs and there cannot be two opinion that that mere provision of services or technical services is not sufficient, it is essential that services should 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 instant 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 agreement the intellectual property rights remains with the board of control for Cricket in India. Even assessee 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 instant case the BCCI is enabled to absorb and apply the information and the advice provided by the appellant to it for conducting such sporting events. Thus,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 naive to say that in absence of IMG services BCCI on its own cannot hold IPL tournament. Merely because the

BCCI has entered into a contract for conducting further 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 it is. In view of this the contention of the appellant that the sum of Rs. 23.77 crores 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 is rejected.

- Further, according to provisions of section 9(1) 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 under section 5 in the hands of a non-resident. The claim of the appellant is that receipt of Rs. 23.77 crores 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). 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. On consideration of the rival contentions the contention of the appellant is rejected 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, the income of the appellant of Rs. 23.77 crores is chargeable to tax under section 9(1)(vii) as Fees for technical services.
  (a) The receipts from the services rendered outside India of Rs. 23.77 crores are chargeable to tax as Fees for Technical Services in terms of article 13(4)(c) as it makes available the technology to the recipient of services and further the provisions of article 13(6) of the Indo UK Double Taxation Avoidance Agreement does not apply to this sum, as it does not arise through and also not effectively connected with the permanent establishment of the appellant.
  (b) Income of Rs 23.77 crores is chargeable to tax under section 9(1)(vii)(b) as fees for technical services and it does not fall into the exception thereof.
  (c) The receipt of the appellant satisfies the make available test as provided under article 13(4)(c) of the India UK DTAA as fees for technical services.
- In view of above facts and circumstances the appeal of the assessee is adjudicated as under:—
- In the result appeal filed by the appellant is dismissed.
- As regards the appeal of the revenue it is decided as follows:—

(a) The balance receipt of Rs. 23.77 crores shall be governed by the provisions of article 13 of the Double Taxation Avoidance Agreement as fees for technical services as it is not arising through and not effectively connected with the permanent establishment of the appellant in India.

(b) the receipt from work done outside India of Rs. 23.77 crores is assessable as fees for technical services on substantive basis.

- In the result appeal filed by the revenue is allowed.