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

+ **ITA 367/2024**

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

Through: Mr. Prakash Kumar, Adv.

versus

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

Through: Mr. Aseem Chawla, SSC with
Ms. Pratishtha Chaudhary, Adv.

CORAM:

HON'BLE MR. JUSTICE YASHWANT VARMA

HON'BLE MR. JUSTICE RAVINDER DUDEJA

ORDER

% **22.07.2024**

CM APPL. 40757/2024 (Exemption)

Allowed, subject to all just exceptions.

This application stands disposed of.

ITA 367/2024

1. The appellant/assessee assails the order of the Income Tax Appellate Tribunal [“**Tribunal**”] dated 15 February 2024 for Assessment Year [“**AY**”] 2021-22 and frames the following questions of law for our consideration:-

“A. Whether, the Income Tax Appellate Tribunal was correct in law and on facts in holding that the receipts amounting to Rs. 13,41,45,740/- arising out of the Contract entered by the Appellant Company with BCCI, is not effectively connected with admitted Service PE and should not be governed by the provisions of Article 7 of India UK Tax Treaty?

B. Whether, the Income Tax Appellate Tribunal erred in not appreciating that the 'attributable to' and 'effective connection' are two different concepts and the concept of apportionment cannot be



read into the provisions of Article 13(6) of India UK Tax Treaty?

C. Whether the Income Tax Appellate Tribunal erred in law in not appreciating that for applying Article 13(6) of the India UK Tax Treaty the effective connection is to be seen qua the contract and not the services/activities?

D. Whether, the Income Tax Appellate Tribunal erred in not appreciating that taxability of entire revenue of Rs.23,97,37,894/- should be governed by Article 7 of the India UK Tax treaty and only the receipts amounting to Rs. 10,55,92, 156/attributable to the Service PE in India on the basis of FAR analysis duly accepted by TPO can be taxed in India?

E. Whether, the Income Tax Appellate Tribunal erred in law in holding that the receipts of the Appellant Company satisfy the make available principle as per Article 13(4)(c) of India UK Tax Treaty and accordingly be taxed as Fees for Technical Services ('FTS')?

F. Whether, the Income Tax Appellate Tribunal erred in law in not appreciating that the Article 5(2)(k) and Article 13(4)(c) of India UK Tax Treaty are mutually exclusive and in the case of admitted service PE the question of FTS does not arise?

G. Whether the Income Tax Appellate Tribunal erred in law in not appreciating that source of income for BCCI from IPL 2009 event is outside India (United Arab Emirates) and accordingly, the payment made by BCCI to the Appellant Company falls under the exclusion clause as provided under section 9(1)(vii)(b) of the Act?"

2. We note that *inter partes* while examining the view taken by the Tribunal pertaining to AYs 2010-11 to 2018-19, we had considered a batch of appeals, with the lead matter being ITA 218/2017 and which ended with us rendering our judgment in **International Management Group (UK) Ltd. vs. Commissioner of Income Tax-2, International Taxation, New Delhi** [2024 SCC OnLine Del 4558].

3. Before us, it is conceded that the issues which are raised here stand answered in favour of the assessee in terms of the judgment rendered in the aforesaid set of appeals. For the purposes of clarity, we



extract the following passages from the aforesaid decision:-

“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 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 liasoning and implementation support activities undertaken 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 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 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 is 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.”

4. Accordingly, and in light of the above, we find ourselves unable to uphold the impugned order of the Tribunal. The appeal shall consequently stand allowed and the impugned order of the Tribunal dated 15 February 2024 is hereby set aside. The appellant/assessee shall be entitled to consequential reliefs.

YASHWANT VARMA, J.

RAVINDER DUDEJA, J.

JULY 22, 2024/tp