IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'F' : NEW DELHI

BEFORE SHRI R.P.TOLANI, JM AND SHRI K.D.RANJAN, AM

ITA Nos.2423/Del/2008, 2424/Del/2008 & 2425/Del/2008
Assessment Years : 2002-03, 2003-04 & 2004-05

M/s Nimbus Sport International Pte Ltd., (formerly World Sport Nimbus Pte.Ltd.), 100 Beach Road, # 17-08, Shaw Tower, Singapore – 189702.	Vs.	Deputy Director of Income Tax, Circle – 2(2), International Taxation, New Delhi.
(Appellant)		(Respondent)

Assessee by : Shri S.R.Wadhwa, Advocate.
Respondent by : Shri A.K.Mahajan and
Shri A.D.Mehrotra, CIT-DRs.

ORDER

PER R.P.TOLANI, JM :

These are three appeals filed by the assessee. Following common grounds are raised:-

"1. The order of the ld.CIT(A) is bad in law and on facts.

2. The ld.CIT(A) has erred on facts and in law in approving the action of the ld. Dy.Director of Income-tax (International Taxation), Circle 2(2), New Delhi in assuming jurisdiction whereas the assessee was being assessed to tax by the Dy.DIT (International Taxation), Circle-2, Mumbai and thereby upholding the validity of the assessment order.

3. The ld.CIT(A) has erred on facts and in law in upholding the validity of the assessment order without there being any valid notice u/s 143(2)(ii) of the Act.

4. The ld.CIT(A) has erred on facts and in law in upholding that the assessee had a "permanent establishment" in India.

5. The ld.CIT(A) has erred on facts and in law by upholding the action of the AO in treating the gross receipts of Rs.5,26,26,383/- from Prasar Bharti, as "fee for technical services" and imposing the tax of 20% (Rs.1,05,25,276/-) on such receipts.

AY	Gross Receipts	Tax
2003-04	7,64,27,368/-	1,52,85,474/-
2004-05	7,01,68,520/-	1,40,68,520/-

6. The ld.CIT(A) has erred on facts and in law in not treating the receipts from Prasar Bharti as business income being purely commercial receipts, not liable to tax in India in the absence of any PE.

7. The ld.CIT(A) erred on facts and in law in confirming the estimate of income of Rs.80,32,331/- in respect of amount received by the assessee in Singapore from Indian parties towards services rendered outside India and applying the rate of tax at 48% thereon.

AY	Income
2003-04	11,73,262/-
2004-05	2,07,607/-

8. The interest levied u/s 234A, 234B and 234C is against the law and facts and deserves to be deleted."

2. At the time of hearing, the assessee has not pressed ground Nos.1, 2 & 3 in respect of the grounds relating to jurisdiction and issue of notice u/s 143(2). Thus, the effective grounds will be as under:-

(i) Whether the assessee has a Permanent Establishment in India.

(ii) Alternatively, whether the receipts from Prasar Bharti amount to business income for assessee having no Permanent Establishment.

(iii) Whether the receipts from Prasar Bharti can be treated as fee for technical services and taxed accordingly at the rate

of 10% as claimed by assessee or 20% as held by the Revenue.

(iv) Whether the assessee's receipt of advertisement revenue in Singapore from Indian parties can be taxed on the basis as adopted by the lower authorities.

3. Brief facts are that the assessee company M/s World Sports Nimbus Pte Ltd, now known as M/s Nimbus Sport International Pte Ltd, (NSI in short) was incorporated on 21.03.2000 under the Singapore Companies Act. The primary objective of the company is to engage itself in the business of sports coverage/production and/or distribution and/or events management and/or sponsorship. It is a 50:50 joint venture between two independent and unrelated companies i.e. Nimbus Communication Worldwide Ltd (NCWL) a company incorporated in Mauritius under the laws of Mauritius and M/s World Sports Group Ltd. (WSG), a company incorporated under the laws of British Virgin Islands. Being incorporated in Singapore, the assessee company is a tax resident in Singapore. It is wholly managed and controlled from there and claims not to have any permanent establishment (PE) in India, whether by way of a tangible fixed place PE or Service PE or agency PE or other type of PE.

4. The assessee company entered into an agreement with Prasar Bharti (PB in short) – a broadcaster owned by the Government of India, being the lowest bidder in the face of international bidding, for the telecasting production of cricket events held during the period from February 2002 to October 2004. The assessee company was to produce, for broadcasting, live television signals of international quality meeting PB's specifications and which were of a quality acceptable to international broadcasters for coverage of international cricket events. The list of services provided by the company has been furnished in detail in its agreement with Prasar Bharti.

5. Assessee company claims that it was incorporated in Singapore and was resident in Singapore for tax purposes and was wholly managed and controlled from Singapore and did not have any PE in India within the meaning of Article-5 of India-Singapore Tax Treaty, it filed its returns of income for A.Ys. 2002-03 and 2003-04 on 21.11.2003 in Mumbai with Dy. Director of Income-tax (International Taxation)-2(2), Mumbai, which the Company honestly believed had jurisdiction over the assessee company, and which jurisdiction was accepted by the AO as per order u/s 197 of the Income-tax Act, 1961 dated 11.02.2002 regarding tax deduction at source, passed by the Asst. Director of Income-tax (International Taxation)-2(2), Mumbai. The return of income for A.Y. 2004-05 was filed on 28.10.2004 also with the Dy. Director of Income-tax (International Taxation)-2(1), Mumbai declaring nil income.

6. The AO did not agree with the submissions of the assessee and held that the assessee had a PE in India. Alternatively, he held that the income of the assessee was in the nature of 'fees for technical services'. He taxed the gross receipts @ 20% u/s 44D read with section 115A of the Act ignoring the plea of the assessee that income was in the nature of business profits and was not taxable in India under the India- Singapore DTAA in the absence of a PE. CIT(A) upheld his orders.

7. Now, we advert to the arguments of both parties.

Ground No. 4 -- Whether assessee had permanent establishment (PE) in India in the years under consideration namely, A.Ys. 2002-03 to 2004-05

8. It was submitted by the assessee's AR that the only activity of the assessee company in India was to produce and supply live television signals of international quality meeting PB's technical specifications in

terms of its agreement dated 11th February, 2002. It is a standard activity of a commercial nature with well known procedures for producing the TV feed and it's live telecasting. The PB had acquired the telecasting rights of cricket matches from the Board of Control for Cricket in India (BCCI in short), during the term 1999-2004.

9. The award of the contract and its execution involved the following material; steps:-

(i) Making a pre-qualification bid sent from Singapore to PB.(copy at pp39-59/PB/)

(ii) After the assessee company's approval in the pre-qualification bid, making a financial bid through international tenders which was also sent from Singapore.

(iii) Selection being lowest of the three bidders, the remaining two being TWI and Worldtel (Letter dt 17-12-2001 from NSI's Group Counsel, Mr. David Mallinson from Singapore at pp 451-52)

(iv) Award of the contract for Rs 28.41 crores by PB vide its letter dated 25-01-2002 (pp-60-61/PB- mention of negotiations with Mr. Venu Nair) - No mention of any training to the technicians of PB.

(v) Pre-agreement correspondence between PB and Group Counsel- Mr. David Mallinson letter dated 07-02-02(p.453/PB) from PB with Coverage Plan and Placement of Cameras and other technical details 454-463/- PB in reply to latter's letters dated 31-01-02 and 01-02-02 on the format of the agreement.

(vi) Letter dt 08-02-02 from PB to the Group Counsel at Singapore sending revised agreement and format of the Bank guarantee(p. 470/PB)

(vii) Agreement dated 11.02.2002 with PB signed by NSI at Singapore-The Chairman, Mr. Seamus O'Brien and the witness, his Secretary, at Singapore.

(viii) Bank Guarantee dated 05-04-02 signed by Mr. Seamus O'Brien at UK (pp.78-81/PB)

(ix) **Assembly of technicians from different countries and their total stay in India in hotels at different places of cricket matches**, in each of the three years under consideration was of less than 90 days in each year as per the following details:-

AY	Period of stay	No. of days.
2002-03	16-02-02 to 21-03- 02	34 days
2003-04	03-10-02 to 27-11-02	56 days
2004-05	3-10-03 to 21-11-03	29 days
	Total :-	**119** days

(x) Details of the cricket matches played in India:-

Dates	Tournaments	Venue	Tests	ODI	Match days
Feb/March 2002	Zim v. India	India	2	5	15
Oct/Nov. 2002	WI v. India	India	3	7	22
Oct.2003	NZ v. India	India	2	-	10
Oct/Nov. 2004	NZ v. India v. Aus.	India	-	10	10
Total			7	22	57

10. The assessee claimed exemption from income tax on the ground that its income was from business and there was no Permanent Establishment, as the stay for carrying on the business in India was less than 90 days in each of the three fiscal years, as required for service PE vide Article 5(6) of the DTAA.

I. Observations – Shareholders and their office used for rendering services .

11. According to CIT(A), Nimbus Communication Ltd. (NCL), share holder of the assessee company, had an office in Mumbai, which was used for the purposes of rendering a part of technical services. Shri Harish Thawani, Co-Chairman and Sh. Venu Nair, Director of assessee

company were having office at the business premises of NCL which were used for carrying out steps 1 to 4 of the following 7 steps of rendering technical services, namely:-

Step 1 –to understand the technical requirement of customer before submission of bid proposal.

Step 2 –to draw detail technical plan and submit bid proposal.

Step-3 –to negotiate technical plan, requirement of equipment and manpower and compensation with the PB and finalization of terms and conditions of the impugned agreement, and to sign agreement.

Step-4 –to get approval from PB of certain technical manpower, location of equipment on the respective stadium, colour design to be used for live television signal after discussions with officials of PB, BCCI and ICC.

Step 5. To send Technical Persons at site.

Step 6. Actual Recording of the event.

Step 7. Record of events in SP Tap

Shareholders were used vis-a-vis PE.

12. Ld CIT (A) held that steps 1 to 4 above were performed in India by Mr. Harish Thawani, Co-Chairman and Mr. Venu Nair Director, of the Company. With regard to step No 4, some assistance is attributable to by Shri Digvijay Singh CEO and Seamus O Brian.

13. There was absolutely no evidence that steps 1 to 4 were performed in India. The assessee was found to be the lowest tenderer through international competitive bidding, the contract was, therefore, awarded to it. Except for some routine post tendering exchange of information and clarifications to PB, Mr. Venu Nair, Director of the company did not render any service. It has been loosely mentioned as 'negotiations' in one of the communications by PB on which assessee has no control. All the pre and post tendering activities were performed from Singapore. The action of Mr Venu Nair is clearly to be excluded from the scope of PE under Article 5(8) (a) of the DTAA as all pre-tendering and post-tendering activities were performed from Singapore. Shri Nair had no authority of the company to sign the contract nor was he regularly acting on behalf of the assessee. In any case, the agreement was entered into on 12-02-2002 which in any case involves less than 90 days of **"furnishing of services"** in the fiscal year 2002-03; No PE could be attributed on this reasoning for the AY 2002-03. In the subsequent two years, the assessee having furnished services for less than 90 days in each year, there could be no PE in India.

14. The Ld CIT (A) has failed to appreciate the importance of the fact that clarifications as may be required are sought and furnished through correspondence or other wise over the phone or by e-mail or by other means of communications from Singapore without the need for personal interaction.

15. Assessee is a separate entity from Nimbus Communications Ltd (NCL in short), Mumbai whose media reporting is adversely referred by the CIT (A). It is a company of Nimbus Communication Worldwide Ltd (NCWL) - a company incorporated under the laws of Mauritius, and is a joint venture partner in the assessee company along M/s World Sports Group Ltd. (WSG) – a company incorporated under the laws of British

Virgin Islands. There were 4 directors in NCWL namely, Dr. Akash Khurana, Mr. Ashraf Ramtoola, Mrs. Rukhsana Shahabally and Mr. Harish Thavani. Thus, only Mr. Thawani is a common on the Board of Directors of the assessee company.

16. NCWL is the wholly owned subsidiary of NCL which is itself an established media and entertainment company since 1987 in India. As per the joint venture terms, NCL and WSG had the right to appoint two nominee directors on the Board of the assessee company. It is a coincidence that Shri Harish Thawani and Shri Venu Nair, who are also the directors in NCL, however, there is no evidence that Mr. Thawani's services were utilized or NCL's office was required or used for the assessee company's business. It is apparent that TV feed and its live telecast which were done only from the cricket fields/grounds where the cricket matches were played. The Ld. CIT (A) has merely presumed that the office premises of NCL may have been used for carrying out certain business activities of assessee.

17. The work plans were specified by the PB in their tender documents and are part of the standard procedures. The assessee company was required, essentially, to capture live cricket matches through its hired cameras and produce live TV signals of international quality. The plans for placement of cameras etc in the cricket field are standard practices now and the final plan was given to the assessee by PB. The CIT (A) without any material presumed that the services at steps 1-4 would have been performed and by the two Indian directors of the company.

18. To summarize, all the activities were organized and controlled from Singapore as under :-

i) Pre qualification bid submitted from Singapore against worldwide tender enquiry of PB.

ii) Agreement with Prasar Bharati was signed by the Chairman of the assessee company in Singapore Seamus O'Brien.

iii) Prasar Bharati made all correspondence at Singapore.

iv) Declaration cum Indemnity furnished from London.

v) Copy of Income Tax Return filed shows Singapore address on the PAN CARD.

vi) The Assessee Company has been managed and controlled from Singapore.

vii) Detailed working of No. of days stay of directors and crew members in India.

viii) All correspondence is at Singapore Address. **So much so, PB promised to send its agreement with BCCI by courier to Singapore. (page 453 of PB's latter dated 07.02.2002 to Mr. David Mallinson, Group Counsel at Singapore)**

ix) The equipment, cameras etc mentioned in para 7.3.3 of CIT (A)'s order is standard equipment and does not involve making available of any technology nor is it a relevant consideration for determining the PE.

x) The observation in para 7-3.4(p.37) of the order that the rendering of technical services required constant consultation with PB is also without any basis. The nature and content of services for

producing the TV feed, enumerated in para 9 above, would show that there was no constant consultation after the award of the contract. Even the position of the cameras in the cricket field was settled then and communicated by PB to assessee. The selection of a producer does not require any constant consultation as it involves approving a person from a few well known persons in this area.

xi) No technical services as enumerated in para 7.3.5 (page 38) were rendered per se. They are all standard services and may be required or incidental to production of a commercial product, namely, TV feed which has been the subject matter of the contract.

II. Observations- Pre-sales mapping and advertisement in PB matches in India

19. The CIT(A) has, noted from the interview of Shri Harish Thawani India TV as extracted in para 7.3.6 (d)(pp 40-43) that he carried out following important and core activities relating to business of advertisement of assessee company in India.

(a) carried out pre-sales mapping
(b) identified the nine categories of target from which assessee company could earn revenue
(c) negotiated agreement with advertisers in India

Assessee's explanation

20. The discussion in the TV interview was about the World Cup 2003 which was not the subject matter of contract between the Assessee and PB. Such news items relatable to subsequent period do not constitute reliable material for drawing any conclusions in income tax proceedings. Besides, assessee did not get any advertisement

business for the PB cricket matches in this period in India. Therefore, whether or not there were any negotiations carried out by Mr. Thawani with the advertisers is wholly irrelevant to the determination of the issue of PE of the assessee company. In the interview, Mr. Thawani only mentioned the achievements of his companies. He is not the Managing Director of the assessee company but only it's Co-Chairman.

III. Observations- Fixed place of business

21. The assessee company had a fixed place of business in Mumbai in the form of the offices of S/Shri Harish Thawani and Venu Nair which were located at the business premises of NCL. These fixed places were at the disposal of the Co-Chairman and Director of assessee company. The two directors also resided in India.

Assessee's explanation

(i) There was no fixed place of business at Mumbai from where the assessee carried out its business activities. Looking to the nature of the assessee's business no such place was required. Services for producing the desired "TV feed" were rendered from the cricket ground and not any other premises including Mr.Thawani and Mr.Nair. The pre-contract bidding document was prepared and submitted from Singapore, signing of contract also took place from Singapore and only a postal address in India cannot constitute existence of PE.

(ii) All important decisions to negotiate and conclude the agreement with Prasar Bharti were taken by the Board of Directors of assessee at Singapore. The management and control was vested in the Board of Directors, except for one meeting, all the Board meetings, during the period 2002-04 were held outside India. Details of all the

Board meetings for the A.Ys. 2002-03 to 2004-05 have already been furnished at p.212/PB.

III. Residence of the Directors and the domestic law – Section 6(3)(ii) of the Act

22. Even under the domestic law, the residence of a director is immaterial for the purpose of determining the residence or PE of a non-resident Company. Relevant Section 6(3) (ii) stipulates that a company is resident in India **only** if "*during that year the control and management of its affairs is situated wholly in India" Even* if a slight control and management is exercised outside India, it would be treated as a non-resident company. Following facts demonstrate that the assessee company's control and management was located wholly outside India:

(i) Registered office of the Company is at Singapore. The certificate of incorporation dated 21.03. 200 is also from Singapore. (p 1/ PB)
(ii) Tax Residency Certificate is issued by the Singapore tax authorities. (p 213/ PB)
(iii) Seamus O'Brien Co-chairman of the Company and directors, other than Mr. Thawani and Mr. Venu Nair, were permanent residents out side India including Singapore
(iv) Except one, all Board meetings were held at Singapore or in other foreign countries (p 212)
(v) Statutory auditors of the Company were appointed at Singapore and also belong to Singapore.
(vi) Maintenance of statutory books of account including record of minutes were maintained and kept at Singapore.
(vii) The management of the company including its day to day affairs was conducted from Singapore.

(viii) The annual general meeting of the shareholders was held at Singapore.

(ix) The bank accounts and their operations were done at Singapore.

(x) The correspondence relating to the business affairs was carried out at Singapore.

(xi) The corporate existence of the company was being maintained at Singapore.

(xii) The legal adviser of the company was located out side India.

(xi) The company Secretary and also the CEO (Mr. K. Digvijay Singh were permanently located at Singapore.

(xii) The tax returns were regularly filed at Singapore.

23. Company is a non-resident for the purpose of the domestic law of India, it is a resident of Singapore under Article 4 of the DTAA because it is a resident under the domestic law of Singapore and "its *place of effective management"* is located at Singapore.

24. ITAT, Delhi Bench in Radha Rani Holdings (P) Ltd. v. Addl. Director of Income-tax (2007) 110 TTJ (Del) 920, held that the stay of a director in India does not make the company a resident of India. In that case also the company was registered in Singapore and one of the two directors was a permanent resident of India. It is the situs of the Board of Directors which exercises control and perform management functions that is the relevant consideration.

IV. Observations- Service PE- the duration test.

25. According to CIT(A), the technical services were rendered by various persons like Co-Chairman, technical crew, TV crew, programmer and engineers of PB and other supporting staff which started with initial Step-1- ascertaining the technical requirements i.e. October, 2001 whereas assessee had erroneously determined 90 days

duration test by taking into account the stay period of TV crew only and had not taken into account the stay of Chairman, director of assessee company, programmers and engineers of PB and other technical manpower. Taking support from certain observations from the Commentary on PE by Mr. Arvind A Skaar in the context of Construction PE, (para 7-3.12), lower authorities worked out the total duration and since it comes to more that 90 days in each of the three years, it has been held that the assessee company had a Service PE also. The period calculated in para 7.3.13 (f) [pp 53-55] of CIT(A)'s order is summarized as under:-

Particulars	AY 2002-03	AY 2003-04	AY 2004-05
TV Crew	36 days	58 days	51 days
Mr. Seamus O'Brien	8 days	4 days	3 days
Programmer & engineers	365 days	365 days	365 days
Mr. Venu Nair	365 days	365 days	365 days
Mr. Harish Thawani	365 days	365 days	365 days
Technical personnal	54 days	78 days	69 days
Mr. Digvijay Singh	-	34 days	39 days

Assessee's explanation

26. The stay of none of the above persons, except the actual period of stay of the technical personnel, is relevant in determining the period for "furnishing services" in connection with the performance of the contract. In response to the tender enquiry No. 2/42/2001 from PB in October 2001, the assessee company sent from Singapore the pre-qualification bid offer vide letter dtd. 12.12.2001 (p.57/PB). The bid document was prepared at Singapore and was sent from there to the PB. The media reports, relied upon by the CIT (A) - even if were to be regarded as correct, do not show that Mr. Harish Thawani rendered any

services in this regard. The newspaper report show some knowledge of Mr. Harish Thawani about the contract which is natural considering that he was Co-Chairman of the assessee company. Shri Venu Nair, Director, did appear before the Negotiating Committee on 16.1.2001 as per letter dated 25.01.2002 (p. 60/PB) of Prasar Bharti. The acceptance of the bid was sent to the assessee company at Singapore and the contract was executed at Singapore on 11.02.2002 by Mr. Seamus O'Brien, Co-Chairman for the assessee company in the presence of his Secretary, Katy MacLean.

27. The stay of the directors of the assessee company is not relevant for purposes of determining PE since the management and control was in the hands of Board of Directors whose meetings were held outside India except one on 02.04.2002 at Mumbai. The details of the Board meetings are given on pg. 212/PB. The Ld. CIT (A) has taken into consideration the stay of programmers and engineers of Prasar Bharti in determining the PE which is totally incorrect. These persons are not employees of the assessee company and under the contract; their services were not at all to be provided by the assessee Company. They may have been present during the days of matches to supervise the production of live television signals. By no stretch of imagination their stay in India can be included for determining the PE of the assessee Company. The names of technical personnel were furnished to the Ld. CIT (A) and their names and period of stay were duly furnished before the AO and have been reproduced in the assessment order for A.Y. 2002-03. (pp. 5-6) They were also furnished to the Ld. CIT(A) and are available at pp. 111-112/PB for A.Y. 2002-03 and on pp. 131-132/PB for A.Y. 2003-04. The stay of the TV crew and other technical personnel including Mr. Seamus O'Brien Chairman and Mr. Digvijay Singh, CFO sent to India for the production of TV feed and other allied activities was as follows:-

A.Y.	No. of days	Relevant page no. of paper book
2002-03	42	212-A
2003-04	56	212-B
2004-05	60	212-C

28. It does not exceed the requirement of 90 days as provided in Art. 5(6) of the DTAA. And as such, according to the assessee, there was no service PE in India. The reliance on the commentary by A Skaar is misplaced. The LD author was commenting on the scope of the expression "*carries on supervisory activities"* with in the meaning of the construction PE in Article 5(4) of the OECD model DTAA. It was in that context that he opined that *"the physical start of the actual construction is not required. This conforms best with the way the basic rule is interpreted, where a PE is established as soon as preparatory business activities are commenced in the country, provide that the activity later leads to the performance of a core business activity. A practical starting point for the time limit is the day when the first employee of the contractor arrives at the building site".* In the present case the issue is whether there was a Service PE or not with in the meaning of Art. 5(6) of the DTAA under which one has to see for how long the foreign enterprise "***furnishes services***" in the Contracting State. The word " furnishes services" is narrower in scope than the expression "carries on supervisory services" But even then the Ld author has taken the starting point as the date of arrival of the first employee of the contractor for performing the services required under the contract but NOT the period of stay of the persons not required to perform any activities under the contract or visiting India for other purposes (e.g. visit of Mr. Digvijay Singh CEO) or making presumptive calculations or prime-facie incorrect computations as will be explained below:-

V. Addition of 2 days for the stay of crew members on an adhoc basis.

29. The Ld CIT(A) has added two days for the duration of the crew members stay on account of their alleged advance visit vide para 7.3. 13 (f) of his order. There was no justification for making this adhoc addition when advance arrival is evident from the year wise dates of arrival and departure of the crew and other technical personnel required for "furnishing the services" under the contract. The relevant dates have been produced in the order of the CIT (A) itself on page 34 of his order. **As against the duration of the matches for the three years of 57 days, [15 + 32 + 10] the period of stay of the crew is 119 days [34 + 56+ 29]**

(ii) Addition of 20 days for stay of technical crew- due to their alleged advance visit.

30. On the basis of a newspaper report as appeared in the daily newspaper, "The Telegraph", Calcutta on 18.10.2002 the CIT (A) concluded that in order to produce and generate a live television signal, the assessee company had sent its technical personnel, Mr. Joe Lopez 20 days in advance from the date of the match to inspect the stadium, to identify the location of the installation of the equipment, to study pitch condition and for other technical discussions with Bihar Cricket Association. He has therefore increased the duration span by 20 days in all the three years and added them to the stay of the crew to make additional stay of 54, 78 and 69 days in the AYs 2002-03. 2003-04 and 2004-05 respectively.

Assessee's explanation

31. As per the extracts from the Telegraph in para 7.5.13 (p.52), Mr. Joe Lopez visited Jamshedpur on 17.10.2002 to inspect the stadium for the match to be played on 06.11.2002. As per details furnished on

page 212/PB, and also reproduced on pp 5-6 of the AO's assessment order for the AY 299-03, Mr. Joe Lopez (shown at sl No 3), along with twenty six other crew and other technical members including the producer Margaret Hutchings (at Sl No. 20 in the list), came to-gather and was in India for 56 days during F.Y. 2002-03 from 3.10.2002 to 27.11.2002. This period included the inspection visits to each of the venues. Since he was in India, he may have visited Jamshedpur on 17-10 2002 i.e. the day reported by the Telegraph. There was no material with the Ld. CIT (A) to add 20 days to his stay much less make an adhoc addition of 20 days stay for the other two years also and that too by adding it to the stay of the other crew members to make addition of 54, 78 and 69 days in each of the three years.. No opportunity was allowed during the course of proceedings before drawing this unwarranted inference.

(iii) Addition on account of O'Brian and Digvijay Singh's stay.

32. Shri Digvijay Singh, CEO of the assessee company (w.e.f. 26.07.2002) and Mr. Seamus O'Brien, Co-Chairman had also visited India in years under consideration to finalize technical plan and to attend co-ordination meeting for production and generation of TV signals.

Assessee's explanation

33. Shri Digvijay Singh was in India for 8 days out of 34 days as per details given on page 212B of PB and 31 days in F.Y. 2003-04 as per details given on p.212C. These details were duly furnished before the Ld. CIT (A) and are available at pp. 111-112/PB for A.Ys. 2003-04 and 2004-05. Mr. K. Digvijay Singh was also a director of Thomas Cook in India for whose Board meetings; he used to be in India, as is specifically mentioned against the dates of his visit to India. Mr.

Digvijay Singh has been permanently staying at Singapore at 61, Grange Road, #04-04, Beverly Hills, Singapore-249570 ever since he had been the Chief Executive Officer of the assessee company from 26.08.2002. His visit also included home leave for 21 days and meetings with Thomas Cook where he was a director. His visits synchronized with the visit of the crew and holding of matches in India. Like wise, the visit of O, Seamus Brien synchronized with the visit of the crew and holding of matches. In any case, wherever applicable, they have been taken into consideration as per calculations on pp. 212A to 212C/PB. No further addition in the number of days is called for.

(iv) Counting of 365 days for each of the three years of the programmers and engineers of the PB for cricket matches held for a few days:

34. The above addition in the number of days made by the Ld CIT (A) is also without any basis. All technical details, including final placement plan of cameras (p. 454/PB) were finalized before 07.02.2002 when a revised agreement was signed (pp. 453-469/PB). There is no such requirement under the contract with Prasar Bharti to provide any of the programmers or engineers. At worst, even if we presume that some persons were from PB, their services to NSI would only be for the duration of the matches and not before and after. No separate addition to the number of days of rendering services is called for on this score.

(v) Addition by the CIT (A) of 365 days to the number on account of the stay in India of each of the two directors.

35. As regards the stay of two directors in India for 365 days for each of the two directors to the total number of days, there is no evidence,

except of some negotiation of Mr. Venu Nair that any services were rendered by him or by Mr. Harish Thawani. T**heir stay in India does not constitute a PE either under the domestic law [section 6(3) (ii) of the Act] as** has been explained in paras 24 to 26 above. The number of days as worked out by the assessee on pp. 212-A to 21-C and reproduced against item-5 above are the only days used for producing TV feed of cricket matches.

Exclusionary clauses (d) and (e) of Art 5 of DTAA not applicable.

36. As per page 56 of CIT (A)' s order, none of the exclusionary clauses (d) and (e) as provided under Article 5(7) of DTAA between India and Singapore are applicable and hence the assessee company had PE in India in two forms namely (a) fixed place of PE under Article-5(1) of DTAA and (b) service PE under Article 5(6) under DTAA.

Assessee's explanation

37. The reasoning given by the Ld CIT (A) is not correct, Articles 5(1) and 5(6) are independent of Art 5(7) of the DTAA and the tests laid there have to be independently satisfied. Klaus Vogel in his Commentary has defined the expression 'fixed place' as under:-

> *"The fixed place of business must be more than merely temporarily at the enterprise's disposal. A fixed place of business owned by an enterprise but placed at the disposal of a third party for the latter's own purpose (and hence not for the enterprise's) would not be a permanent establishment of the enterprise ....."*

38. Further as per the Commentary of the author Klaus Vogel:-

"The enterprise must carry on its business activities in the other State through a fixed place. The term 'fixed' implies that a certain length of time is required for such business activities. The place of business must have been designed to serve the enterprise with a certain degree of permanence rather than merely temporarily ..... On the other hand of the place where the business is exercised is often changed, even a long period of activity in a contracting state does not lead to the existence of a permanent establishment".

39. Paras 5 & 6 of OECD Commentary on Article -5 of Model Tax Convention state:-

"5. According to the definition, the place of business has to be a 'fixed' one. Thus in the normal way, there has to be a link between the place of business and a specific geographical point. It is immaterial how long an enterprise of a Contracting State operates in the other Contracting State if it does not do so at a distinct place.

6. Since the place of business must be fixed, it also follows that a permanent establishment can be deemed to exist only if the place of business has a certain degree of permanency, i.e., if it is not of a purely temporary nature ..... Whilst the practices followed by member countries have been consistent in so far as time requirements are concerned, experience has shown that permanent establishments normally have not been considered to exist in situations where a business had been carried on in a country through a place of business that was maintained for less than six months (conversely, practice shows that there were many cases where a permanent establishment

*has been considered to exist where the place of business was m*aintained for a period longer than six months).

40. From the above extracts of commentaries, it may be noted that there should be a "place of business" which should be "fixed or permanent in nature "to constitute a permanent establishment". The assessee company did not have a PE in India during the relevant period namely, A.Ys. 2002-03, 2003-04 and 2004-05. Even if the assessee's presence in India is to be reckoned, then the same was purely temporary in nature and would not result into any kind of any fixed place. During the cricket series, the matches were played in different cities in India. The crew had to move from one city to another to produce the live feed as required under the agreement with PB. Therefore, the presence of the assessee company at any given location was temporary, which could not grant any degree of permanence.

Service PE

41. Para-6 of Article-5 of the DTAA provides that an enterprise shall deem to have PE in a Contracting State (India) if it renders services in India through its employees or other personnel, but only if the activities of that nature continue within that Contracting State (India) for a period aggregating more than 90 days in any fiscal year.

42. The agreement between assessee company and PB was in relation to the cricketing events taking place during the period February, 2002 to October, 2004. For rendering production services, the assessee company's production crew was present in India for a period of 34 days during F.Y. 2001-02, 56 days during F.Y. 2002-03 and 29 days during F.Y. 2003-04. The time spent in negotiating and signing the contract is not to be taken into consideration to determine

the period of stay in India. Reliance is placed on Klaus Vogel's commentary which states that:-

> "A *permanent establishment begins to exist when the enterprise commences to carry on its business through a fixed place of business*".

43. Further, in relation to a building project which also requires completion of a minimum period of stay, Klaus Vogel commentary states that:-

> "*The minimum period begins when the enterprise starts to perform business activities on the spot in connection with a building site or construction or assembly project ..... Actual work on the building project is required for the minimum time period to begin. Thus, legal acts such as the signing of a contract or registration are not part of the project and are not included in calculating the time*".

44. Applying the same analogy in case of a service contractor, it could be said that the minimum period would begin only from the date on which the rendering of service commences.

45. In addition to the above, the assessee company relies upon the following decisions:-

> (i) Radha Rani Holdings (P) Ltd. v. Addl. DIT (2007) 110 TTJ (Del) 920 - Residence of directors not relevant for PE.
> (ii) Extracts from Commentary by Klaus Vogel on Double Taxation Conventions, South Asian Reprint Edition - P.287, para-27 - Residence of General Partner not relevant for PE.

(iii) K.T. Corporation, In re (2009) 23 DTR (AAR) 361 - Liaison office not to secure orders - No PE.

(iv) UOI v. Azadi Bachao Andolan (2003) 263 ITR 706 (SC) - DTAC takes precedence over domestic law and Board's circular accepting Residency Certificate issued by a foreign jurisdiction is valid.

(v) CIT v. Visakhapatnam Port Trust (1983) 144 ITR 146 (AP) - Services of a German engineer as in charge of supervision of assembly and installation operations did not give rise to PE.

(vi) Knowerx Education (India) (P) Ltd (2008) 217 CTR (AAR) 50 - No authority to conclude contracts

(vii) XYZ, In re (1997) 228 ITR 55 (AAR) – Contracts lasting for 7 and 39 dates did not constitute PE

(viii) Sheraton International Inc. v. Dy. DIT (2007) 106 TTJ (Del) 620 confirmed by Delhi High Court at 313 ITR 267 (Del) – Payment for advertising, publicity and sale promotion are business income.

(ix) Worley Parsons Services Pty. Ltd., In re (No.1) (2009) 312 ITR 273 (AAR) – Services provided must relate to the PE (Office space provided to the non-resident)

(x) TVM Ltd v. CIT 237 ITR 230 (AAR) - Development and sale of TV programmes is a business activity. Common shareholders do not constitute PE. For an agency PE, even for a dependent agent, there has to exist a legal authority to conclude contracts which he "habitually exercises" being a systemic course of conduct on the part of the agent.

(xi) Golf in Dubai LLC. In. re (2008) 306 ITR 374 (AAR) – Holding of golf tournaments in Delhi and Bangalore each of one week, through independent contractors, do not constitute fixed place or service PE in India.

Ground Nos. 5 & 6 – Receipts are of business nature and not 'Fee for technical services'

46. The Assessing Officer has treated the payments received from Prasar Bharti as fee for technical services. He has given the following reasons in the assessment order for A.Y. 2002-03:-

"The assessee was engaged in making available to Prasar Bharti technical knowledge for production of TV Signal for cricket series in India. These activities involve use of skill and expertise since it is a highly specialized job done with the help of supporting sophisticated equipment which not everybody can handle..... In the entire process skilled and technical services are made available to Prasar Bharti enabling it to earn revenue there from.

In view of the above discussion, it is evident that the nature of services provided by the assessee falls within the purview of Clause 4 of Article 12 of the DTAA and is hence chargeable to tax." (Pg.5 of the assessment order)

47. The Ld. CIT (A) has upheld the view taken by the AO. He has held that the amounts received from Prasar Bharti are fee for technical services within the meaning of section 9(1) (vii) of the Income-tax Act, 1961 as well as under para-4 of Article-12 of DTAA between India and Singapore. He has observed that services of production and generation of live television signals were in the nature of technical services. The assessee company had made available to Prasar Bharti technical knowledge, experience, skill, know-how and processes which consisted of development and transfer of technical plan and design relating to production and generation of live television signals. Therefore the consideration received from Prasar Bharti for rendering such

technical services are in the nature of fee for technical services within the meaning of clauses (b) and (c) and paragraph-4 of Article -12 of DTAA between India and Singapore.

48. The assessee company submits that both the lower authorities namely Assessing Officer as well as CIT (A) have arrived at wrong conclusion that the amounts received from Prasar Bharti are fee for technical services. Article 12(4) (b) of the DTAA provides that the technical services will be said to have been provided if the assessee company was to:-

(b) 'Make available technical knowledge, experience, skill, know-how or processes, which enables the person acquiring the services to apply the technology contained therein"; or (Emphasis supplied).

49. As per the requirement of clause (b) of para 4 of Article 12, a technical knowledge, experience, skill, know-how or process can be said to be made available if the person acquiring such services is able to apply the technology contained therein. In other words, the person availing the services should be able to independently apply the technical knowledge on its own for its operations.

50. The Assessing Officer has erroneously / wrongly relied upon the ruling of Advance Tax Authority in the case of Ericsson Telephone Corporation of India AB v/s. CIT (224 ITR 203), stating that 'where the assessee has a permanent establishment in India its income is taxable under head "Fees for Technical Services" and

tax will be payable at 20% in view of provision of section 44 D read with section 115A of the Income Tax Act, 1961.

51. The ratio of the above referred advance ruling is not at all applicable to the Assessee Company for following reasons;

i. The Advance Ruling Authority has not at all given any such ruling and issue involved related to percentage of withholding tax.

ii. The AAR has very clearly stated that “the authority does not express any opinion about the net profit of the applicant company and leaves the question open to by agitated by the applicant and appropriate proceedings.” In assessee’s case, the AO has made regular Assessment and the ratio of AAR in the above cited case is not applicable even remotely.

iii. The Mumbai ITAT ‘C’ Bench recently had occasion in passing judgement in the case of Deputy Commissioner of Income Tax Vs. Boston Consulting Group Pte. Limited wherein the respondent company was also governed by DTAA with Singapore and it was held that “The law is trite that in a case where India has entered into a Double Taxation Avoidance Agreement with any other country, so far as the assessees which are covered by such an agreement are concerned, the provisions of that Act will apply only to the extent to which the provisions of the Act are more beneficial to the Assessee. It is a settled legal position that whenever there is a conflict between the provisions of the tax treaty and the domestic law, the provisions & of the tax treaty will prevail. These tax treaties have a significant place in the scheme of the

Indian income tax legislation, in as much as these treaties lay down an alternate scheme of taxation, so far as the beneficiaries of the applicable tax treaty are concerned. These alternate paradigms are entirely optional to the assessee because it cannot be thrust upon an assessee and the provisions of the Act continue to be applicable to the extent these provisions are more favourable to the assessee. Once the assessee chooses to be covered by the provisions of an applicable tax treaty, it is not open to the revenue to thrust the provisions of the Act on the assessee. Further, the Apex Court in Union of India v. Azadi Bachao Andolan 263 ITR 706(SC) and CIT v. PVAL Kulandagan Chettiar 267 ITR 654, as also AAR in Sutron Corpn. In re 268 ITR 156 and Emirates Fertilizer Trading Co. Will, In re 142 Taxman 127, have held that where there is conflict between provisions of the Act and the DTAA, the terms of DTAA would prevail over the provisions of the Act, and further, that the agreement being in the nature of a document providing for relief against taxation, beneficial reading of the terms of the DTAA was required.

52. In the protocol note attached to and forming part of the Double Taxation Avoidance Agreement, between USA and India, on the interpretation of an identical provision has provided as follows:

"Paragraph 4(b) of article 12 refers, to technical or consultancy services that make available to the person acquiring the services technical knowledge, experience, skill, know-how, or processes, or consists of the development and transfer of a technical plan or technical design to such person. (For this purpose, the person, acquiring the service shall be deemed to include an agent, nominee, or transferee of such person.) This category is narrower because it excludes and services that does not make

technology available to the person acquiring the service. Generally speaking technology will be considered 'make available' when the person acquiring the services is enabled to apply that technology. The fact that the provisions of the service may require technical input by the person providing the services does not per se mean that technical knowledge, skills, etc. are made available to the person purchasing the services, within the meaning of paragraph 4(b)."

53. Further, the Memorandum of Understanding of India – US tax treaty also states that generally technology will be considered to be "made available" when the person **acquiring the services is enabled to apply the technology. The fact that the provision of services may require technical inputs by person providing the service does not per se mean that technical skills, etc. are made available to the person purchasing the service.**

54. In the present case, the services rendered by the assessee of producing the TV signal are technical in nature. However, by no means could it be regarded as 'making available' technical knowledge to Prasar Bharti. The agreement entered into between the assessee and the Prasar Bharti was to produce the feed that could be broadcasted on television channels. As per the said agreement, the primary services to be rendered by the assessee were of production of the feed. Any other service proposed to be rendered- training was ancillary to the primary service. The payments made by Prasar Bharti to the assessee were only with respect to the production of feed, as per the specifications provided by the Prasar Bharti and not for training.

55. During the course of hearing before the Ld. CIT (A), a reference was made to the certificate issued by the Director (Sports) in which, it was clearly mentioned that *"WSN produced*

live signals as per the production requirement stipulated under the Agreement. WSN acted as producer, which involved hiring professionals including professionals from Prasar Bharti to produce live television signals. However, it did not involve transfer of technology, know-how or develop/transfer any technical plan/design to Prasar Bharti under the Agreement". The Ld. CIT (A) has refused to take cognizance of this important peace of evidence by observing as under:-

> *"(a) It is matter of record that no reference was ever made to Director General of Doordarshan and the letter was not issued either to AO or any other Income Tax Authority.*
>
> *(b) Whether a service fall u/s 9(1)(vii) of the Act or 12(4) of DTAA is subject matter of interpretation by Income Tax Authorities and judicial authorities, an employee of Directorate General Doordarshan has no power to make such interpretation both under the Act and DTAA.*
>
> *(c) The content of letter is contrary to terms and conditions of the Agreement as stipulated under clause (xxvii) of para-5 of the Agreement"*.

56. The above observations of the Ld. CIT (A) are not correct and are out of place. He should not have rejected the certificate issued by a senior officer of the rank of a Director of a public sector undertaking namely, the Prasar Bharti. If he had any doubt about the authenticity of the certificate, he should have made a reference to the Prasar Bharti instead of rejecting the certificate summarily.

57. In view of the above, it is submitted that the assessee was merely rendering the service of producing TV signals as per the specification provided by the Prasar Bharti and did not 'make

available' any technical knowledge, as noted by the AO. Accordingly, the income received by it is not taxable as 'fees for technical services' under para 4 of Article 12 of the treaty.

58. In the case of **Raymonds Ltd. (80 TTJ 120)**, while discussing the meaning of the term 'make available' under the India – UK tax treaty, the ITAT, Mumbai observed as under:

"*Thus, the normal, plain and grammatical meaning of the language employed, in our understanding, is that a mere rendering of services is not roped in unless the person utilising the services 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 performer of the services in future. The technical knowledge, experience, skill, etc. must remain with the person utilising the services even after the rendering of the services has come to an end. A transmission of the technical knowledge, experience, skills, etc. from the person rendering the services to the person utilising the same is contemplated by the article. Some sort of durability or permanency of the result of the "rendering of services" is envisaged which will remain at the disposal of the person utilising the services. The fruits of the services should remain available to the person utilising the services in some concrete shape such as technical knowledge, experience, skills, etc.....*

..... The addition of the words in the Singapore DTAA merely make it explicit what is embedded in the words 'make available' appearing in DTAA with UK and USA."

59. In the case of **NQA Quality Systems Registrar Ltd. (92 TTJ 946)** wherein, in the context of India – UK tax treaty, the Delhi ITAT observed as under:

".....Generally speaking, technology will be considered "made available" when the person acquiring the service is enabled to apply the technology. The fact that the provision of service may require technical input by the person providing the service does not per se means that the technical knowledge, skills, etc. are made available to the person purchasing the service, within the meaning of para 4(b)....."

a) DCIT vs. Boston Consulting Group Pvt. Ltd. (Mumbai ITAT) – 93 TTJ 293

60. The above case is directly on the interpretation of Article 12(4) (b) of India-Singapore Tax Treaty. The provisions of said article 12(4) (b) of India Singapore Tax Treaty are, to a limited extent, in *pari materia* with the definition of 'fees for included services' under article 12(4) (b) of Indo USA DTAA which is as follows:

"*(b) make available technical knowledge, experience, skill, know-how, or processes, or consist of the development and transfer of a technical plan or technical design."*

The scope of India-Singapore tax treaty is narrower in the sense that specifically provides the services should be such "*which enables the person acquiring the services to apply the technology contained therein", even though as observed by a co-*

ordinate bench of this Tribunal in the case of Raymonds Ltd. v. Dy. CIT (2003) 86 ITD 791 (Mum)" ... the addition of these words in the Singapore DTAA merely make it explicit what is embedded in the words 'make available' appearing in the DTAA with UK and USA".

b) C.E.S.C Ltd. vs. DCIT (Calcutta ITAT) – 80 TTJ 806

61. In this case, the question regarding the scope of expression 'making available' came up for the consideration of the Tribunal. The majority view was that in order to be attracted by the provisions of the said article of the tax treaty, "not only the services should be technical in nature but should be such as to result in making the technology available to person receiving the technical services in question"..... The Tribunal also referred to. with approval, extracts from the protocol to the Indo-US tax treaty to the effect that "generally speaking, technology will be considered 'made available' when the person acquiring the service is enabled to apply the technology". The majority view in CESC's case (supra) was also on the same lines.

c) Mckinsey & Co., Inc. (Phillippines) & Ors. vs. ADIT (Mumbai ITAT) – 99 ITD 549

62. After an elaborate analysis of the entire case law and the examples on 'making available' given in Indo-US Tax Treaty, it was held that the person acquiring the service must be made available and he should be able to use the technology without the assistance of the provider of the service.

63. In addition to the above, the assessee company also relies upon the following decisions:-

(I) Payment not fee for technical services even under Explanation-II to section 9(1) (vii) of the Act

(i) Skycell Communications Ltd. v. Dy. CIT (2001) 251 ITR 53 (Mad) (pp. 583–588/PB-III) - Fee for rendering standard facility is not fee for technical services

(ii) CIT v. Sundwiger EMFG & Co. (2003) 262 ITR 110 (AP) (pp. 589–591/PB-III) – Services rendered by experts for delivery and installation of a product are not fee for technical services

(iii) CIT v. Estel Communications (P) Ltd. (2008) 217 CTR (Del) 102 (pp. 592–593/PB-III) – Payment for use of internet facility, though requiring use of sophisticated equipment, is not fee for technical services

(ii) Intertek Testing Services India (P) Ltd., In re (2008) 307 ITR 418 (pp.594–607/PB-III) - Inspection charges for inspection by experts are not fee for technical services.

(II) Under DTAA also, not fee for technical services

(i) Annexure to Indo-US Tax Treaty vide Notification No. GSR 990(E) dated 20th December, 1990 (pp.608–619/PB-III)

(ii) CIT v. Siemens Aktiongesellschaft (2009) 310 ITR 320 (Bom) (pp.620–641/PB-III) – Assistance for manufacture of X-ray tubes is not fee for technical services

(iii) ABC Ltd, In re (2006) 284 ITR 1 (AAR) (pp.642–644/PB-III) – Business information reports being publicly available are not technical services

(iv) Dun & Bradstreet Espana, S.A., In re (2005) 272 ITR 99 (AAR) (pp.645–648/PB-III) – Business information reports

downloaded by Indian company constitute business income which is not royalty or fee for technical services

(v) Tata Consultancy Services v. State of Andhra Pradesh (2004) 271 ITR 401 (SC) (pp.694–709/PB-III) – Sale of intangible property is also sale of goods.

(vi) Samsung Electronics Co. Ltd. v. ITO (2005) 93 TTJ (Bang) 658 (pp. 710–712/PB-III) – Payment for purchase of software is not royalty.

64. Before the Ld. CIT (A), it was contended that, without prejudice to the stand that assessee company did not have PE in India nor the payments received from Prasar Bharti were fee for technical services, the Assessing Officer was not correct in taxing the gross receipts at the rate of 20% u/s 44D read with section 115A of the Income-tax Act, 1961. In fact, the assessee company had suffered losses in this venture in two years namely A.Y. 2003-04 and 2004-05 as per details given below:-

A.Y.	Profit/loss incurred (Rs.)
2002-03	58,50,314/-
2003-04	(-) 11,36,184/-
2004-05	(-) 37,52,659/-

65. The above figures of profit/loss are before depreciation. If depreciation as per I.T. Rules is allowed, the profit for A.Y. 2002-03 will be converted into loss and or A.Ys. 2003-04 and 2004-05, the loss shall further increase.

66. The Ld. CIT (A) has not accepted our contention by saying that as per the scheme of taxation under Income-tax Act, 1961, the business profits by way of fee for technical services are taxable on gross basis without allowing any deduction of expenditure or allowances, at the

rate of 20% u/s 44D read with section 115A of the Act. He has relied upon Board's Circular No. 461 dated 09.07.1986 and the following rulings of AAR and High Courts:-

(i) Ericsson Telephone Corporation India AB v. CIT (1997) 224 ITR 203 (AAR)
(ii) No. P/6 of 1995 In re 234 ITR 371 (AAR)
(iii) Timken India Ltd; In re (2005) 273 ITR 67 (AAR)
(iv) DHV Consultants BV In re (2005) 277 ITR 97 (AAR)
(v) International Operating Services Ltd v. CIT (1997) 228 ITR 599 (Karn).

67. The reliance placed by the Ld. CIT (A) on the above rulings of AAR and High Court of Karnataka is totally misplaced as the facts of the assessee company's case are different from the facts/issues involved in these cases. First of all, none of the above case relates to the DTAA between India and Singapore. Secondly, the payments received from Prasar Bharti are in the nature of business receipts and not fee for technical services as they were to produce a TV feed of cricket matches. The assessee company's case is governed by Article-7 of DTAA between India and Singapore, which deals with taxability of business profit and hence only net income/loss is to be considered for taxation. Even for the sake of argument, and, without prejudice and in any way agreeing to this, if it is presumed that the amounts received from Prasar Bharti are fee for technical services; the same are liable to be taxed at the rate of 10% and not 20% as held by the Ld. CIT (A). Para-2 of Article-12 of DTAA between India and Singapore reads as follows:-

"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 laws of that Contracting State, but if the

recipient is the beneficial owner of the royalties or fees for technical services, the tax so charged shall not exceed 10%."

Ground Nos. 7 - Advertisement amounts received outside India not liable to tax

68. In each of the three assessment years, the AO brought to tax certain amounts representing advertisements invoiced and received out side India, by the assessee from parties in India for telecasting from Sri Lanka in connection with international cricket matches under ICC Championship Trophy and other similar cricket matches in that country. The Indian advertisers included Coca Cola India Pvt Ltd; Seagram Manufacturing Ltd, Hero Honda etc. The AO took the view that the assessee company had a PE in India; source of these receipts lay in India, the Indian team played in these matches and these matches were broadcast internationally which included India. Besides, as per clause 2 of Article 12 of the DTAA, receipts from royalty and fee for technical services are taxable in India being a source country. Accordingly, he proceeded to adopt 20% of the gross amount of advertisements and estimated 50% thereof as the net income attributable to the PE in India. He applied the maximum rate of tax on such income applicable to foreign companies and made the following computation of income and tax for each of the three years:-

A.Y. 2002-03

i)	Gross Receipts	=	Rs. 8,03,23,312/-
ii)	Net profit @ 20% of S.N. (i)	=	Rs. 1,60,64,662/-
iii)	50% of (ii) attributable to PE in India	=	Rs. 80,32,331/-

A.Y. 2003-04

i)	Gross Receipts	=	Rs. 1,17,32,618/-
ii)	Net profit @ 20% of S.N. (i)	=	Rs. 23,46,520/-

iii) 50% of (ii) attributable to PE in India= Rs. 11,73,260/-

A.Y. 2004-05

i) Gross Receipts = Rs. 20,76,072/-

ii) Net profit @ 20% of S.N. (i) = Rs. 4,15,214/-

iii) 50% of (ii) attributable to PE in India = Rs. 2,07,607/-

69. The Ld. CIT (A) has upheld the action of the A O vide discussion in paras 9 to 11 on pp 68-79 of his order. He has observed that various companies in India namely, Coca-Cola, Pepsico Food, LG Electronics etc signed contracts with the assessee company for advertising their products and since the assessee company provided advertisement to various companies located in India through live telecast which was viewed by customers in India, income arising from advertisement is taxable in India. He also held in para 9.3.1 on page 70 that the advertisement income is taxable u/s 9(1) of the Income-tax Act, 1961 as the source of income is in India. He has further held in para 9.3.2 that it is also taxable under Article-7(1) of DTAA between India and Singapore because the "assessee had carried out the core activities of advertisement business through fixed place PE in India". He confirmed the estimation of profit from advertisement by observing that the same is correct as per rule-10 of the income-tax Rules, 1962. The Ld. CIT (A) has relied upon the following judgements to confirm the quantum of the additions made by the AO:-

(i) CIT v. ONGC as representative assessee M/s Rolls Royce Plc (2007) TIOL 408; (2008) 214 CTR 135 (Uttrarakhand)

(ii) CIT v. Esufali (H.M.) Abdulali (H.M.) (1973) 90 ITR 271 (SC)

(iii) Kachwala Jain v. JCIT (2007) 288 ITR 10 (SC)

70. The Ld. CIT (A) has further observed that Article-7(1) of DTAA between India and Singapore has incorporated the principle of "force

of attraction" based on UN Model. He quoted certain paras from the book titled "Permanent Establishment- Erosion of a Tax Treaty Principle" by Arvind A Skaar and from the Book titled "Klaus Vogel on Double Taxation Convention" by Klaus Vogel.

71. The view taken by the Ld. CIT (A) is not correct. The income earned by the assessee company from advertisements received from India did not represent any income that could accrue or arise in India because all the matches were played outside India in Sri Lanka. The live telecast was made from that country and not from India. There was thus no source of income in India within the meaning of section 9(1) (i) of the Act. All the advertisements received from India were invoiced from the assessee's office in Singapore and the payments were received there in dollars. There was no agent or other fixed place for collecting the advertisements and as such their being no PE in India, the amount was not taxable in any of the three years. The fact that the live telecast from Sri Lanka could be viewed in India or that the Indian cricket team participated in the cricket matches are totally irrelevant considerations. The "force of attraction rule" provision, wrongly presumed by the Ld CIT (A), unlike the India- Canada DTAA, and some others, is absent in India- Singapore Treaty where Article 7(1) provides for the taxation of *"only so much of them (profits) as is directly or indirectly attributable to that permanent establishment"* The reliance on expert commentaries is thus wholly irrelevant and out of context.

72. The assessee company also relies upon the following judgements to support its submissions:-

(i) Lufthansa Cargo India (P) Ltd. v. Dy. CIT (2004) 140 Taxman (Del) 1 (pp.713–720/PB-III) - (Repairs and

maintenance in Germany- source of income is outside India)

(ii) Set Satellite (Singapore) Pte Ltd v. Dy. DIT (2008) 307 ITR 205 (Bom) (pp.721–731/PB-III) Advertisements collected by a Singapore telecasting Company from India is not liable to Indian tax.

(iii) ACIT v. DHL Operations B.V. (2005) 142 Taxman (Mumbai)1 (pp.732–733/PB-III) (No activity in India- no source of income in India with in the meaning of section 9(1) (i) of the Act).

(iv) Specialty Magazines P Ltd In Re (2005) 274 ITR-310-AAR. Advertisements collected in India for publication abroad are not taxable in India.

(v) Board's Circular No. 23 dated 23-07-1969 (applicable to the three years under consideration)- Para 5- No profit attributed to purchase of goods in India (in parity with purchase of advertisements in India to be telecast from Sri Lanka)

73. Alternatively, it is contended that the estimate made by lower authorities is highly excessive and arbitrary.

74. Learned DR supported the order of the learned CIT(A).

75. We have heard the rival contentions and perused the relevant material on record. The nature of assessee's work as contracted with Prasad Bharti has been narrated above. The first question which is to be determined by us is whether the assessee's activity constituted business income or fees for technical services as the determination of this important aspect will decide the taxability of the assessee having a PE or otherwise.

76. The relevant provisions about fees for technical services are contained in Section 9(1) of the IT Act, which are reproduced as under:-

> "9(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
> .....
> 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"."

77. The term "fees for technical services" is further defined in Article 12 Paragraph 4 of the India Singapore DTAA as under:-

> "4. The term "fees for technical services" as used in this Article means payments of any kind to any person in consideration for services of a managerial, technical or consultancy nature (including the provision of such services through technical or other personnel) if such services :
>
> (a) are ancillary and subsidiary to the application or enjoyment of the right, property, or information for which a payment described in paragraph 3 is received; or
>
> (b) make available technical knowledge, experience, skill, know-how or processes, which enables the person acquiring the services to apply the technical contained therein; or
>
> (c) consist of the development and transfer of a technical plan or technical design, but excludes any service

> that does not enable the person acquiring the service to apply the technology contained therein.
>
> For the purposes of (b) and (c) above, the person acquiring the service shall be deemed to include an agent, nominee, or transferee of such person."

78. The clauses (a), (b) & (c) of the India-Singapore treaty are mutually exclusive and any activity failing in any of the sub-clauses will amount to 'fees for technical services'.

79. Clause (b) to above paragraph is found to be relevant to the facts of assessee's case. As per this clause, the term "fees for technical services" means payment of any kind to any person in consideration for rendering of any technical services (including the provision of services of technical or other personnel) which make available technical knowledge, experience, skill, know-how or processes which enables the person acquiring the services to apply the technology. The clause (c) of above paragraph is also relevant. As per this clause, the term 'fee for technical services' means the payment to any kind to any person in consideration of rendering of any technical services which consist of development and transfer of a technical plan or technical design.

80. The list of activities are listed by CIT(A) in his order from pages 22 to 25. In view of these activities, it is evident that services of production and generation of live television signal rendered by the assessee in terms of agreement were in the nature of technical services. Assessee made available to PB the services which are based on technical knowledge, experience, skill, know-how and processes which also consisted of development and transfer to PB of technical plan and design relating to production and generation of live television signal as per clause (xxvii) of para 5 of the agreement. Therefore, the consideration received by the assessee for rendering such technical

services was in the nature of fee for technical services within the meaning of clause (b) and (c) and paragraph 4 of Article 12 of DTAA. Thus, under the DTAA also, the character of income arising to assessee from operation and maintenance of the services rendered in respect of production and generation of live television signal was in the nature of fee for technical services. It is further clear from clause (xxvii) of para 5 of the agreement that the requirements of make available such services are fulfilled in this case. Thus, the income arising to assessee from rendering of technical services for production and generation of live television signal was a character of fee for technical services under IT Act as well as under DTAA. The various case laws relied upon by the assessee find no application to the peculiar facts and circumstances of the case.

81. In view of our findings, we have no hesitation to hold that as per the reading of Article 12 of this treaty and conjoined reading with Explanation (2) to Section 9(1) clinches the issue that the services made available and rendered by the assessee were of technical nature and the amount which assessee received from Prasar Bharti was for rendering such technical services. Therefore, we are inclined to hold that the payment in question is in the nature of fees for technical services.

82. Now, we proceed to decide whether the assessee had PE in India or not. In this regard, we observe as under:-

(i) It clearly emerges from the fact that the contract was signed by the assessee at Singapore and all the activities relating to this contract were carried out from Singapore.

(ii) There is no evidence on record that the management and control of the affairs of the assessee company were situated in Singapore. Merely because holding of one board meeting in India will not lead to a

conclusion that during the years under consideration, the control and management of assessee's affairs was situated only in India.

(iii) The assessee's activities at Singapore as listed in paragraph 22 of its order clearly demonstrates that the affairs of the assessee company were wholly carried out at Singapore.

(iv) The residence of two non-residents directors in India will not make the company a resident in India as held by the Delhi Bench of the Tribunal in the case of Radha Rani Holdings (P) Ltd. (supra), which, we respectfully follow on this issue. Therefore, in view of these facts, we have no hesitation to hold that the affairs of the assessee company were carried out in India.

83. Coming to the observations about the number of days on the issue of service PE or fixed place PE, in our view, the assessee has led some sufficient evidence to establish the fact that the TV crew, Mr.Seamus O'Brien, programmer and engineers, Mr.Venu Nair, Mr.Harish Thawani, technical personnel and Mr.Digvijay Singh did not stay for more than 10 days in each year. The number of days projected by the AO and the CIT(A) is on presumptions and ignoring the fact that the assessee is a part of a worldwide group and the reports of e-mail or Mr.Thawani's interview was in respect of the overall activities of the group. In our view, the estimate of days made by the AO is not made based on the record or information but on the basis of certain news items and e-mails which, in our view, do not give an objective picture of the actual days of the stay of the employees. In view of these facts, we find merit in the contentions of the assessee that the number of stay of his representatives is less than 90 days cannot be held to be a fixed place or service PE in India in the years in question. Consequently, we uphold the assessee's contention that it had no PE in India during these years.

84. Thus, we hold that the assessee's receipts derived from Prasar Bharti are in the nature of 'fees for technical services' and not by way of 'business income'. The assessee had no fixed place or service PE in India.

85. The next issue to be decided is the rate of tax applicable to India. Since there is an India-Singapore Treaty in force, the taxability of 'fees for technical services' is governed by paragraph 2 of Article 12 of the DTAA which prescribes as under:-

> *"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 laws of that Contracting State, but if the recipient is the beneficial owner of the royalties or fees for technical services, the tax so charged shall not exceed 10%."*

86. Thus, the tax leviable on the assessee will be 10% of the gross receipts. We find merit in the argument of the learned counsel for the assessee that the situation is to be governed by the DTAA and not by domestic law in this behalf. We reverse the orders of lower authorities applying the rate of 20% by recoursing to Section 44D read with Section 115A of the IT Act. Thus, in conclusion, we hold that the assessee's activity is liable to be taxed at the rate of 10% as per paragraph 2 of Article 12 of the DTAA on the receipts which are in the nature of fees for technical services. In view thereof, we do not go into any other argument or case laws.

87. Coming to the issue about the advertisement revenue received by the assessee in Singapore for matches played abroad, it has not been disputed that the matches in question for which advertisements were given by the Indian company were all played in foreign countries.

The assessee does not have a PE in India. In this eventuality, the revenue collected by it for the matches played overseas and telecast at overseas will not attract the theory of force of attraction for taxing them in India. The force of attraction cannot apply on an assumption that some percentage of the viewers may be Indian and the advertisement made have some incremental value in India for the advertising companies. In our view, this is a pure assumption. The clincher to the issue is that the assessee does not have a PE in India, the matches were not played in India, the telecast of the matches was not in India and the indirect benefit which might have been derived by some of the Indian viewers cannot be held to be incremental for Indian companies on assumption. The dominant object of the payment by the Indian companies to assessee's Singapore office was to advertise their products in foreign territory in foreign cricket matches and the dominant object emerges to be the advertisement in foreign territories. In our view, the advertisement revenue has no attribution to India and in the absence of any PE, we have to hold that this revenue cannot be taxed in India. Our view is supported by the following judgments :-

(i) Lufthansa Cargo India (P) Ltd. (supra).
(ii) Set Satellite (Singapore) Pte Ltd. (supra).
(iii) DHL Operations B.V. (supra).
(iv) Speciality Magazines P.Ltd. (supra).
(v) Board's Circular No.23 dated 23.7.1969 (supra).

88. Apropos the chargeability of interest under Section 234B & C, we find merit in the argument of the learned counsel for the assessee that the receipts of the assessee were liable to TDS under Section 195. The receipts being liable for TDS, the same will not be liable for advance tax and the interest was not liable by them as per provisions of Section 209. In view thereof, we hold that the interest will not be chargeable

on the assessee under these Sections. Our view is fortified by the following binding judgments:-

(i) Halliburton Offshore Services Inc. (supra).
(ii) Motorola Inc. (supra).
(iii) Asia Satellite Telecommunications Co.Ltd. (supra).
(iv) Sedco Forex International Drilling Inc. (supra).

89. The issue has further been decided by the Hon'ble Delhi High Court in the case of Jacabs Civil Inc. – 235 CTR 123 (Delhi). Accordingly, we allow this ground of the assessee.

90. In the result, the appeals of the assessee are partly allowed.

Decision pronounced in the open Court on 30th September, 2011.

Sd/-	Sd/-
(K.D.RANJAN)	**(R.P.TOLANI)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated : 30.09.2011
VK.

Copy forwarded to: -

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

Assistant Registrar