

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

Reserved on: 15.11.2016
Pronounced on: 30.11.2016

+ **W.P.(C) 10307/2016, C.M. APPL.40563/2016 & 40564/2016**
FORMULA ONE WORLD CHAMPIONSHIP LIMITED

..... Petitioner

versus

**COMMISSIONER OF INCOME TAX, INTERNATIONAL
TAXATION-3 & ANR.** Respondents

+ **W.P.(C) 9509/2016, C.M. APPL.38021/2016, 41063/2016,
41235/2016 & 41236/2016**

**COMMISSIONER OF INCOME TAX INTERNATIONAL
TAXATION-3, DELHI** Petitioner

versus

FORMULA ONE WORLD CHAMPIONSHIP LTD. & ANR.
..... Respondents

+ **W.P.(C) 10145/2016, C.M. APPL.40169/2016**
JAIPRAKASH ASSOCIATES LTD. Petitioner

versus

COMMISSIONER OF INCOME TAX Respondent
Through : Sh. S. Ganesh, Sr. Advocate with Ms.
Anuradha Dutt, Ms. Fereshte Sethna, Sh. Sachit
Jolly, Sh. Gautam Swarup, Sh. Siddhartha Singh
and Sh. Amaya Pant, Advocates, for petitioner in
W.P.(C) 10307/2016 and for Respondent No.1 in
W.P.(C) 9509/2016 & W.P.(C) 10145/2016.

Sh. Arvind Datar, Sr. Advocate with Sh. Kamal
Deep Dayal, Sh. Ankur Saigal and Sh. Shayan,
Advocates, for JAL.

Sh. G.C. Shrivastava, Sr. Standing Counsel and Sh.
Rahul Chaudhary, Sr. Standing Counsel, for
Income Tax Department.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE NAJMI WAZIRI

MR. JUSTICE S. RAVINDRA BHAT

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1. This judgment would dispose of three writ petitions: WP 9509/2016 (preferred by the Commissioner of Income Tax, hereafter "the revenue's petition"; WP 10145/2016 (preferred by Jaypee Sports International Limited, hereafter called "Jaypee") and WP 10307/2016 (Formula One World Championship Limited (FOWC) hereafter called "the F1 Championship Ltd" petition). Both Jaypee and FOWC had filed applications before the Authority for Advance Ruling ("AAR"). The AAR held one question in favour of the revenue and the other question in favour of the said two companies. All three parties have, thus approached this court, under Article 226 of the Constitution.

2. A brief background of the facts is necessary. FOWC is a UK tax resident company incorporated on 7 March 2001. Consequent to agreements entered into between the Federation Internationale de l'Automobile ("FIA" an international motor sports events regulating association), Formula One Asset Management Limited ('FOAM') and FOWC, FOAM licensed all commercial rights in the FIA Formula One World Championship (Championship') to FOWC for 100-year term effective from 1 January 2011. FOWC entered into a "Race Promotion Contract" ('RPC') dated 13 September 2011, by which it granted to Jaypee Sports the right ('Right') to host, stage and promote the Formula One Grand Prix of India event for a consideration of USD 40 millions. An Artworks License Agreement (ALA) contemplated in RPC was also entered into between FOWC and Jaypee the same day, i.e. 13.09.2011, permitting the use of certain marks and intellectual property belonging to FOWC for a consideration of USD 1. The RPC of 2011 was preceded by another RPC of 25-10-2007; FOWC and Jaypee signed it.

3. FIA is a regulatory body; it regulates the FIA Formula One World Championship which has been the premier form of motor racing since its inception in 1950. The formula, so called is with reference to a set of rules that all participants' cars must conform to. F1 seasons consist of a series of races, known as *Grand Prix* (from French, meaning grand

prizes), held across the world on specially designed and built F1 circuits across 26 different locales.

4. F1 Grand Prix events are held under the *aegis* of the FIA F1 World championship's competition -in which F1 racing cars, assembled and manufactured strictly in terms of the F1 Technical regulations, compete against each other, under F1 Sporting Regulations and the F1 International Sporting Code framed and made effective by the FIA. F1 drivers across the world have the ability, competence and skill to drive an F1 car and participate in F1 racing events. About 12 to 15 teams typically compete in these championships in any one annual racing season. Some celebrated and well-known participants are the Ferrari, McLaren, Red Bull teams etc. The teams assemble and construct their vehicles, which comply with defined technical specifications and engage drivers who can successfully maneuver the F1 cars in the racing events. All teams known as "Constructors" enter into a contract, known as the "Concorde Agreement" with FOWC and the FIA. In these agreements they undertake to participate to the best of their ability, in every F1 event included in the official annual F1 racing calendar. They also bind themselves to an unequivocal negative covenant with FOWC that they would not participate in any other similar motor racing event whatsoever nor would they promote in any manner any other rival event. The F1 racing teams exclusively participate in about 19 to 21 listed F1 annual racing events on the official racing calendar, set by the FIA. This is, in effect, a closed circuit event since no team other than those bound by contract with FOWC are permitted participation.

5. Every F1 racing event is hosted, promoted and staged by a promoter with whom FOWC as the right holder, enters into contract and whose event is nominated by the CRH (i.e Contract Right Holder, which is in effect, FOWC), to the FIA for inclusion in the official F1 racing calendar. In other words FOWC is the exclusive nominating body at whose instance the event promoter is permitted participation. The points scored by each F1 racing team in every event is listed in the official racing calendar and it counts towards the Constructors championship and the Driver's championship for the racing season as a whole. Any team's position in these championships at the end of the season determines, together with certain other factors which are elaborately dealt with in the Concorde

agreement,(which in the present instance, was latest in the series of Concorde agreements the last being the one of 2009) the prize money payable to the teams for their participation during the season. Grant of a right to host, stage and promote the F1 racing event therefore carries with it a covenant or representation that F1 racing teams with their cars, drivers and other auxiliary and supporting staff will participate in the motor racing event hosted at the promoter's motor racing circuit displaying the highest levels of technical skill achievement etc. in the fields of construction of single seat motorcars to attain the highest levels of performance in the world. These teams and the FOWC also represent that the highest levels of skill in racing management and maintenance of the cars would be on display in the event. All these are a part of the relevant contractual provisions, embodied in RPC 2011.

6. FOWC and Jaypee both approached the AAR as did other entities such as Beta Prema 2 (BP2); All Sports Management (Allsport); and Formula One Management (FOM) with other applications. This judgment is not concerned with the applications that sought advance ruling filed by other entities; the fate of those is apparently pending consideration. The queries made for consideration and decision by the authority by FOWC and Jaypee were *firstly* whether the payment of consideration receivable by FOWC outside India in terms of RPC from Jaypee was or was not royalty as defined in Article 13 of the Avoidance of Double taxation agreement entered into between the Government of UK and the Republic of India ("the DTAA") and *secondly* whether FOWC was justified in its position that it did not have a permanent establishment (PE) in India in terms of Article 5 of the DTAA. A subsidiary question was whether any part of the consideration received or receivable from Jaypee by FOWC outside India was subject to tax at source under section 195 of the Indian income tax Act.

7. The submissions of FOWC and Jaypee on the question of amounts received by the former were that the entire consideration received/ receivable under the RPC was in nature of business income and not 'royalty' as defined both under the Act and the DTAA because what was granted to Jaypee was a commercial right (i.e. hosting right) and the consideration received/ receivable by FOWC was not for use of trademark, copyright, equipment, etc and hence, was not in the nature of 'royalty'. It was contended, in this

context that no separate consideration was payable by Jaypee for the limited permitted use of Formula One ('F1 ') Mark which was only to enable the Promoter to advertise the Indian Grand Prix. It was routine and customary in business parlance to reproduce the names (of sports events) in the same manner as they were known to the public at large. As a consequence, the Artwork License Agreement ('ALA') was executed solely to enable the Promoter for a limited use of F1 marks and to prevent it from using the marks for any commercial exploitation. Such grant was similar to sale of prepackaged or branded product; the main emphasis is sale of the product, the use of the mark was part of the sale. The applicants relied on Para 10.1 of the OECD commentary on Article 12 of the Model Convention which states that payments for the exclusive distribution rights of a product or a service do not constitute royalties. Furthermore, according to FOWC, the sporting event was known by the name F1 World Championship world over due to its fame and reputation. The applicants - Jaypee and FOWC relied on *Dy Director of Income Tax v. Sheraton International Inc* (2009) 313 ITR 276, of this Court. The court had held that as long as the main object of the agreement did not relate to the use of the trademark, the amount could not be characterized as royalty payment for use of trademark. The applicants also relied on a tribunal decision in *Harvard Medical International USA* ('HMI') (2011) (13 ITR 503). Apart from this, it was emphasized that the definition of royalty under the India-UK Tax Treaty is narrower than the definition under the Act. The transactions in question involve payment of a lump sum amount, which does not involve any payment dependent upon the use of the mark. As the consideration received by FOWC was a lump sum amount for granting to Jaypee the right to host, stage and promote the event, it did not qualify as 'royalty' under the provisions of the India-UK Tax Treaty. Reliance was placed on this court's judgement in *Director of Income Tax Vs. Ericsson A.B* (2012) (343 ITR 470).

8. The revenue had opposed the arguments of the applicants and urged that the principles enunciated in *Sheraton's* case were inapplicable because the consideration comprised of both, hosting rights and permitted use of F1 Marks and the entire consideration of US\$ 40 million was attributable to the usage of F1 Marks in terms of the ALA. The revenue submitted that the RPC and Artwork License Agreement had to be

read together for a comprehensive view of the matter. The applicants deliberately did not make reference to the ALA in question though it was also entered into between the parties on the same day i.e. 13.09.2011.

9. There was no agreement between FOWC and Formula One Licensing B.V., proprietor of the trade marks, for transfer or licensing of such rights in favour of FOWC. The license was given by FOWC to Jaypee for the permitted use, in the territory, of the licensed marks and materials. The licensed marks and materials are defined to include marks stated above. The "permitted use" is defined to mean incidental use of the licensed marks strictly for the purpose of hosting, staging and promoting the event. It was furthermore argued that from a combined reading of Concorde and other agreements what emerged was that Jaypee did not have to make any payment to FOWC for hosting, staging and promoting any motor racing event. The payment became necessary for one and the only reason that the mark of "Formula One World Championship" or "Grand Prix of India" was to be used to make the event a part of the calendar of F1 World Championship. It was also asserted that the marks were not used in a secondary manner, or incidentally, rather, Jaypee used the marks prominently because of their fame and reputation. Licensing of the mark gave Jaypee the right to hold the F1 championship or Grand Prix of India event. This position was also supported by the fact that the promoter's rights stipulated in the Concorde agreement clearly list out as being (i) right to promote the event. (ii) right to designate the event as Formula One Championship event. Given the relative lack of knowledge of the F1 sporting event, use of the mark became crucial and necessary. The crowds visiting the circuit or watching from home were drawn towards the name F1, which they were familiar with and not the car or circuit specifications that the event associates itself with. The revenue arising from the commercial rights, be it sale of tickets, advertisement rights or broadcasting rights are, therefore, all attributable to the name of the event more than anything else.

10. The revenue also urged that the definition of royalty both under the Indian Income-tax Act as well as the DTAA encompasses within its ambit the use of trademark among other things. It may be noted that there is no qualification to suggest that the use must be incidental, primary, permitted or registered. As regards the issue of its taxability,

it was submitted that the subject income is taxable in India under the Act under Section 9(1)(vi)(b) since it was paid by a resident (Jaypee) to a non-resident as a consideration for the utilization of the intellectual property for the purpose of carrying on business in India or for the purpose of earning any income from any source in India. The property here is a trademark of a sporting event. When the sporting event is held and the mark is used to attract people with that mark, it is nothing but the commercial exploitation leading to generation of revenue.

11. The AAR, after hearing the parties and considering the materials on record, concluded that the amounts paid were "royalty" on the basis of the following findings:

"27. The first question in both applications relate to characterization of consideration of USD 40 million received by FOWC in the first year under the terms of RPC from Jaypee, i.e. whether it is in the nature of royalty under Article 13 of India-UK Tax Treaty. Jaypee had constructed a racing circuit in Yamuna Expressway Industrial Development Authority. Jaypee signed the RPC on 13.9.2011 with FOWC and on the same day Jaypee also entered into an Art Work License (ALA) agreement with FOWC. We have reproduced some relevant clauses of RPC and ALA earlier and wherever necessary we will reproduce again the relevant clauses at appropriate place to understand the issue in proper perspective. The RPC mentions that FOWC has the exclusive right to enter into contracts solely for the 'hosting, staging and promoting' of 'Formula One Grand Prix' events. FOWC has the exclusive right to exploit the commercial right in the championship, including the exclusive right to propose the championship calendars and to award to promoters the right to host, stage and promote Formula One Grand Prix events The RPC gives right to Jaypee to host, stage and promote the 'event' as per clause 4.1 of RPC. The event has been defined in clause 1 (t) of RPC saying that 'event shall mean the Formula One Grand Prix of India'. RPC itself envisages signing of a separate AIA for incidental use of certain of the marks and intellectual property belonging to FOWC in Clause 23.2.

28. It is relevant to point out that as per ALA, FOWC is providing Jaypee several of its intellectual property like event programme covers, templates for posters, official stationery, media kits etc. and licenced marks including FORMULA ONE GRAND PRIX of INDIA which is the name of event organized (host, stage and promote) by Jaypee.

29. It may be mentioned that the consideration as per RPC is USD \$ 40 m and consideration as per ALA is USD \$ 1 , though both agreements were signed on the same date and relate to the same event promoted by

Jaypee. It is only on the basis of ALA that Jaypee is able to organize the event which is called Formula One Grand Prix of India and is able to use all intellectual properties belonging to FOWC necessarily required to stage, host & promote the event. It is unthinkable that the event called Formula One Grand Prix of India can be organized in the absence of ALA. Use of this mark is sine qua non for organizing this event otherwise the event will not be known as 'event' in terms of RPC.

30. *The above mentioned facts clearly establish that art work license agreement, though signed separately, is integral to RPC. It was not a standalone agreement. Clause 23.2 of RPC stipulated that Jaypee & FOWC shall enter into art work agreement permitting incidental use of certain of the marks and other intellectual property belonging to FOWC. Insufficiency of consideration in ALC cannot diminish its prime importance and relevance in the context of use of marks and intellectual property of Jaypee. In such a situation the stand of the applicants that the use of the marks permitted by the art works agreement is purely incidental to the RPC as mentioned in clause 23.2 is not a correct description of the facts. The nomenclature in the agreement cannot decide the main purpose of the contract. The settled position of law is that the dominant intention of the parties is to be seen as decided by the apex Court in the case of Sundaram Finance Ltd. v/s State of Kerala 1977 13 SCC 17. The Court ruled in para 24 that "The true effect of a transaction may be determined from the terms of the agreement considered in the light of the surrounding circumstances. In each case, the Court has, unless prohibited by statute, power to go behind the documents and to determine the nature of the transaction whatever may be the form of the documents'. The important point is to ascertain the dominant intention of the parties to RPC and art work license agreement. FOWC has tried to project that the promoter's intention is to host various sports events, as part of the sports city developed by it and to keep the circuit occupied by hosting various such events and attract people to buy real estate around the sports city. This is completely imaginary and is nowhere reflected in RPC or ALC. We cannot import such imagination in RPC or ALA in order to know the intention of the parties to the agreement. The intention has to come out from the agreement and purpose of the agreement. FOWC has further submitted that the promoter is 'hosting, staging and promoting the 'Indian GP'. There is nothing like Indian GP. The only event as per the agreement is Formula One Grade Prix of India. We cannot accept any other name for the event. The use of words 'Indian GP' has been done by FOWC only to show that Jaypee's intention was to host various events. This does not come out from RPC or ALC. The fact remains that Jaypee is staging an event which is called Formula One Grand Prix of India which, in turn is the licensed mark of FOWC as per Art work license agreement. RPC clearly and conclusively show that FOWC granted licence to Jaypee for*

limited purpose of organizing Formula Grand Prix of India event only and for no other event. Therefore, irrespective of other limitations imposed by clause 23.2 & 23.3 of RPC the licensed mark of Formula One Grand Prix of India and other intellectual property has been actually used by Jaypee. In these circumstances the creation of a separate agreement known as art work license agreement with a nominal and insignificant consideration of US \$ 1 is purely artificial. Similarly, the use of words like 'incidental use' in these agreements will also not hide the dominant purpose. The definition of royalty in the Indo-UK DTAA covers 'payments of any kind received as a consideration for the use of trade mark'. Section 9(1)(VI) of the Income-tax Act also covers use of trade mark under royalty. Therefore, the payments made by Jaypee for use of trade mark called Formula One Grand Prix of India in the event hosted by them is in the nature of royalty."

37. We have given serious thought to the proposition formulated as above. The art work agreement also mentions that Formula One licensing BV, Netherlands, is the owner of trademarks as mentioned in clause 3.3. There is no written agreement between FOWC and Formula One licensing BV for transfer of such rights in favour of FOWC. It is also relevant to point out that there is no written agreement between Jaypee and the proprietor of trademarks i.e. Formula one licencing BV for use of trade marks. These facts were confirmed repeatedly by Shri Pardiwala, the counsel of FOWC during the course of hearing and confirmed by him in the letter dated 19.7.2016. Mr. Datar presumes that because the artwork agreement mentions the words "permitted use" in clause 2.1 and defines "permitted use" as incidental use of the licenced mark solely as part of the artwork and the licenced material in clause 1.1, Jaypee is a permitted user under section 48(2) of the trademarks Act, 1999. We are afraid this is not a correct proposition. The trademarks act defines 'permitted use' in section 2(1)(r), reproduced earlier, and this definition must be read in conjunction with section 48(2). The definition of 'permitted use' in this Act of 1999 is different from the definition given in section 2(1)(m) of the 1958 Act. The 1999 Act enlarges **the scope of permitted use to commercial use of a mark not only by the registered user, but also by an unregistered licensee who becomes entitled to use the mark by virtue of a written agreement with the registered proprietor.** The law makes it clear that such use by a unregistered licensee should comply with the conditions or limitations to which such use is subject to in terms of the agreement, besides conditions or limitations to which the registration of a trademark itself is a subject with JPSIL As a matter of fact, the applicant has submitted that Formula One Licensing BV has only entered into an oral arrangement with FOWC for the transfer of trademark. As per the above provisions, since the user (Jaypee) has not entered into any agreement

with the registered proprietor, the condition of 'permitted use' is not met and consequently Jaypee cannot be regarded as a permitted user within the meaning of section 2 (r)(ii) of the TM Act. The provisions of section 48(2) cannot be invoked in the case of an entity which is not a permitted user within the meaning of that Act. The deeming fiction of section 48 (2) cannot be pressed into service into cases of this nature.

b. The deeming fiction of section 48(2) can also not be extended to the provisions contained in section 9(1)(vi) for the reason that Explanation 5 to section 9(1)(vi) introduced by the Finance Act of 2012 provides that Royalty shall be deemed to arise whether the property is used directly or not. The implication of the Explanation would be that even if the property is deemed to be used by the proprietor and not by the licensee, it can still be regarded as indirect use of the property as the benefits of such use are flowing to the licensee and he has agreed to pay consideration to the licensor in lieu of the 'indirect' use of the property. If the interpretation of the applicant is accepted and the deeming fiction under section 48(2) is to be read in all circumstances and for the purposes of all existing laws irrespective of the context and purpose of enactment of this provision in the TM Act, the consequences would be that the use by the licensee would be of no consequence as the licensee, by the legal fiction so provided, would be deemed to have never used it, though in fact he may have actually used it. The definition of royalty under the Income Tax Act specifically includes the 'granting of a license' to use the IPR. If the fiction is imported under the IT Act, it would mean that the use by the licensee is the use by the proprietor. Such an interpretation leads to manifestly absurd results. It hits at the very root of the relationship between the licensor and the licensee in the context of IPRs and destroys the very concept of Royalty in this context. Such an interpretation is impermissible.

c. The object of law relating to Trade Marks is to protect the intellectual properties and the rights of the owner/proprietor thereof. Section 48(2) also enacts the deeming fiction to protect such rights and to regulate the relationship between different parties in law. The reference to 'other law' comes with the same object. The definition is in two parts. The first part is in respect of the use of a trademark by a registered user. The second part is in respect of the use of trademark by a person other than the registered proprietor and registered user by consent of such registered proprietor in a written agreement and complies with any conditions or limitations to which such user is subject and to which the registration of the trademark is subject. It is relevant to point out that the 'consent' envisaged in section 2(1)(r) is not oral, but by a written agreement. Against this backdrop we may consider the facts of this case. The proprietor of the trademark in this case is Formula One licensing BV

which has admittedly not entered into any written agreement with Jaypee. In fact, it has not entered any kind of agreement with Jaypee, not even oral. Even FOWC has not entered into any written agreement with the proprietor and during the course of hearing Mr. Pardiwala confirmed that there is no written agreement in respect of use of trademark between the proprietor and FOWC and/or between the proprietor and Jaypee. Therefore, in terms of provisions of the section Jaypee would not be a permitted user under the trademark Act. In view of this legal position we cannot agree with Mr. Datar that section 48(2) of the Trademark Act will apply only on the basis of artwork agreement where Jaypee has been mentioned as the permitted user. This cannot be accepted because if the benefit of section 48(2) of the Trade Marks Act is to be obtained, Jaypee has to be a permitted user as per the provisions of this Act and admittedly it is not. Once such a conclusion is reached, there is no need to deal with other objections raised by the Department of Revenue i.e., the definition of royalty as given in Explanation 5 to section 9(1)(vi) of the Income Tax Act and the context in which 'any other law' came to be used in the Trademarks Act. The fact is that Jaypee is not the permitted user under the law and therefore, it is not entitled to take recourse to provisions relating to permitted user in section 48(2) of the Trademarks Act."

12. On the second question, i.e whether FOWC had a PE in India under any of the paragraphs of Article 5 of the DTAA, the applicants (FOWC and Jaypee) asserted that no such PE existed because the revenue had to first establish that under Article 5(1) of the India-UK DTAA, FOWC had a fixed place of business in India and that it carried on business in India through such fixed place. FOWC stated that its only place of business is its office in UK and it did not have any fixed place of business or office in India. By granting the right to host, stage and promote the race, to Jaypee it did 'business with a party that is a resident of India'. It did not undertake any business operations (or part thereof) in India. FOWC stated that its business was limited to a grant outside India of the right to Jaypee and after such grant of right, it could host, stage and promote the F1 event in accordance with the FIA regulations. *Arguendo* if the limited access at the circuit granted to FOWC by Jaypee amounted a fixed place it would come into existence only at the time when the race is held which is after grant of right by FOWC. In this context, it was argued that a mere provision in the RPC for Jaypee to allow access to FOWC and its affiliates to the circuit prior to and during the F1 event could not make the circuit (which belongs to the Promoter) as a place at the FOWC'S disposal. Added to this was the

uncertainty as to the staging of the event on a regular basis, which could not result in bringing into existence, a fixed place PE of FOWC. The permanence test is with respect to both place of business (i.e. permanence of location) and duration (i.e. the business activities must be more than temporary in nature). FOWC also argued that it did not have any agent dependent or otherwise in India engaged in habitually concluding any contracts on its behalf in India. Therefore, Article 5(4) of the DTAA also did not apply. Likewise, the threshold conditions for applicability of Article 5(2)(i) of the DTAA were unmet and, hence, the 'Service PE' test too failed.

13. FOWC argued that merely because Jaypee entered into contractual arrangements with FOWC's affiliates, which were conditions precedent to the RPC, it did not extend the scope of its role nor did it result in its possessing, or operating from a fixed place of business in India. Each affiliate entered into independent commercial arrangements with Jaypee and no rights flowed from FOWC to 'BP2' or Allsport either under the FIA-FOAM-FOWC agreements or under the Concorde Agreement in relation to revenues earned by BP2 and Allsport with respect to the Indian GP. Circuit and other rights (which BP2 and Allsport exploited) arose by virtue of the ownership of the circuit, which was that of Jaypee; those rights could be exploited only when granted by it. They were neither Championship rights (emanating from the FIA) nor were they covered by the above-mentioned Agreements. Jaypee's grant of rights to BP2 and Allsport was a legitimate independent transaction consistent with the legal ownership of those rights. Jaypee and FOWC engaged FOM independently for the production of feed and data and other support services. For these reasons, FOWC urged that activities undertaken by each of the affiliates independently and on their own account and did not constitute its PE. It was also argued that even if they were dependent agents of FOWC their place of business could not be a PE of the principal i.e. FOWC.

14. The revenue argued that for deciding fixed place of business in terms of Article 5 it is adequate if the place is at the disposal of the enterprise to be used in business. He has referred to paragraph 4 of OECD commentary as under:-

"4. It is immaterial whether the premises, facilities or installations are owned or rented by or are otherwise at the disposal of the enterprise...."

Again the place of business may be situated in the business facilities of another enterprise.

4. 1 As noted above, the mere fact that an enterprise has a certain amount of space at its disposal which is used for business activities is sufficient to constitute a place of business. No formal/legal right to use that place is therefore required."

15. It was further argued that a fixed place PE may also be constituted if dependant agents work for and on behalf of the enterprise from the place made available to the enterprise and in such a situation it may not be necessary to examine the PE under para 4 or 5 of Article 5 and to apply more stringent conditions of having authority to conclude contracts. Reference was made to para 10 of OECD commentary; it reads as follows:

"The business of an enterprise is carried on mainly by the entrepreneur or persons who are in a paid-employment relationship with the enterprise personnel. This personnel includes employees and other persons receiving instructions from the enterprise (e.g. dependent agents). The powers of such personnel in its relationship with third parties are irrelevant. It makes no difference whether or not the dependent agent is authorised to conclude contracts if he works at the fixed place of business (see paragraph 35 below).

"35. Under paragraph 5, only those persons who meet the specific conditions may create a permanent establishment; all other persons are excluded. It should be borne in mind, however, that paragraph 5 simply provides an alternative test of whether an enterprise has a permanent establishment in a State. If it can be shown that the enterprise has a permanent establishment within the meaning of paragraphs 1 and 2 (subject to the provisions of paragraph 4), it is not necessary to show that the person in charge is one who would fall under paragraph 5."

16. With regard to duration of the business reliance on Para 6 of the OECD commentary was placed; it reads as follows:

"A place of business may, however, constitute a permanent establishment even though it exists, in practice, only for a very short period of time because the nature of the business is such that it will only be carried on for that short period of time."

17. According to the revenue, FOWC's business is to exploit commercial rights arising from races and this business is carried on through exploitation of these commercial rights either by itself or through any one or more members of CRH group as

mentioned in the Concorde Agreement to say that FOWC is obligated to propose consolidated accounts incorporating profits of all entities forming part of CRH group. Reference was made to the fact that commercial rights were originally owned by FIA, transferred in 2001 to SLEC Holding Company (parent company of FOWC) for a consideration, then given to FOAM and w.e.f. 1.1.2011 transferred to FOWC. It was pointed out that on the one hand, the organization Agreement between FINFMSCI was entered into on 20.01.2011, the RPC and the Artworks License Agreement are dated 13.09.2011. Going by RPC dated 13.09.2011, it is evident that GP contract did not exist on the date of the signing of the Organization Agreement in January 2011. The recital (B) in the Organization Agreement reads as under:

“The Promoter has entered into an agreement with the Commercial Rights Holder to promote the event.”

18. The revenue asserted that FOWC's stand that its agreement (RPC) was entered into with Jaypee on 13.09.2011 is inexplicable, having regard to the above Recital in the Organization Agreement in January 2011 by reference to the RPC of September 2011. Secondly, on lines similar to the RPC of September 2011, was an agreement dated 25.10.2007, between FOAL and JPSK Sports Pvt., Ltd. This agreement is in tune with the Format provided under Schedule 4 of the Concorde Agreement. It is plain that FIA could sign the Organization Agreement in January 2011 only on the basis that the Promoter had already entered into GP contract with FOAM (predecessor of FOWC) in 2007. Thirdly, discrepancies and omissions in the RPC of 2011 as opposed to the RPC of 2007 were pointed out. The revenue, to say that FOWC had a PE in India underlined all these facts. The fixed place- according to the revenue is the Buddha circuit in Greater Noida and owned by Jaypee which was designed and constructed in terms of RPC dated 25.10.2007 and RPC dated 13.9.2011 is only continuation of earlier arrangement. The revenue also stated that clause 11 of the RPC dated 13.9.2011 makes available to FOWC and other entities access to circuit, clause 8.1 obliges Jaypee to allocate promotional area in such a manner as FOWC shall specify, access to restricted area is regulated by passes and tabards issued by FOWC. He has also submitted that International Broadcast is one of the major commercial rights which vests in FOWC and because the promoter has set up a

media compound and installations necessary for national and international commentators, such business is also made available to FOWC at the circuit.

19. The revenue further stated that that the three affiliates of FOWC, i.e. Formula One Management Ltd. ('FOM'), Allsports Management SA and Beta Prema 2 Ltd. are its three agents who had carried on business of FOWC on its behalf, through the fixed place. It was contended that that all commercial rights originally vested and were granted to only FOWC under the Concorde agreement, with a stipulation that FOWC may transfer or assign such rights only to other group entities. It has further said that the commercial rights could only stay within the Commercial Rights Holder group (CRH group), which included FOWC, its affiliates and other entities. These three group entities have acted for and on behalf of Jaypee, which did not get anything from these arrangements and these entities were not holders of commercial rights. Therefore, these entities acted for and on behalf of FOWC. According to the revenue, FOM was business manager of FOWC, it had a business management agreement with FOWC, 146 employees of FOM were in India for 40 days and based on these facts Revenue's counsel has concluded that FOM managed the entire business of FOWC in India. As regards All Sports too, which carried out sale of tickets it acted on behalf of FOWC because no commercial rights were transferred to it. A like inference had to be drawn in case of Beta Prema 2 because it exploited certain commercial rights available only with FOWC. The revenue submitted that a PE gets constituted under Article 5(4) of DTAA also for the reason that FOM is agent and business manager of FOWC and Beta Prema 2 and All Sports have no independent status.

15. The AAR's findings on the question of existence of a PE in India, of the FOWC, are as follows:

“47. Determination of PE is question of fact and the provisions of Article 5 of DTAA lay down several tests. If an enterprise qualifies to be PE on these laid down tests then only it can be considered to have a PE and in that case only that portion of income will be taxable in the country of PE which is attributable to PE. Under Article 5(1) the first test is place of business test. Its concept in terms of PE can be seen as any substantial, physical object which is commercially suitable to serve as the basis of business activity. It also encompasses separate part of an enterprise, foreign branches or place of management or office etc. Revenue's contention that mere access to the racing circuit owned by JP amounts to

place of business through which business activity of FOWC is carried out is completely misleading. FOWC is commercial rights holder and has to be necessarily involved in design of the circuit and other related activities from the beginning so that required specifications for Formula One Grand Prix events are maintained in design and build of the circuit. Equating such access with the place of business is not at all appropriate. Moreover, as per RPC the promoter is to ensure that the pit and paddock buildings and surrounding areas with circuit and land are open to receive competitors, FOWC, Affiliates of FOWC, FOWC's contractors and licensees and their respective personnel and equipment. This is to facilitate the work relating to event. This does not mean that all entities getting access to the circuit have PE. Such an inference will be completely misleading.

48. The second test in respect of deciding PE is location test and a movable activity like a concert tour or circus or racing event meets this test if the activity is regularly repeated at the same spots, or the work is commercially integrated as one project performed for one client. For example travelling circus, ice skating shows and similar business enterprises which carry on their business on an itinerant basis do not create a PE at the places where they perform for no more than a short period, as mentioned by Vogel K. in his authoritative book on Double Taxation Conventions, third edition. In the US also dancing and music groups who come to the source state only once in a year or a repeated entry of a horse in race within the source state have not been treated as PE. Both the applicant and the Department have cited the rulings given in the case of 'Golf in Dubai' wherein the observation was made that if a short term activity is carried out even once a year but on a regular basis if it is repeated, the same may constitute a PE provided the same place is kept at the disposal of the enterprise and there is certainty that the event will be repeated. Mere intention to repeat is not sufficient. We do not think this ruling is appropriate in this case because even if there is an event for a short period and there is intention to repeat it in future but not certainty, the main ingredient is missing, i.e., whether FOWC is carrying on any business activity through the circuit. The definition of PE presupposes that the business of the enterprise must be carried on through this fixed place of business. FOWC is not carrying on any business activity here unless we accept the theory of Revenue that all three entities Beta Prema, Allsports, FOM are acting on behalf of FOWC. Unfortunately, this is not true and we have rejected such presumption in the section on tax avoidance. Therefore, the business activity test also fails because we have already concluded in the section of issue of tax avoidance that there is no evidence to suggest that Beta Prema 2, All Sports and FOM are acting on behalf of the FOWC and all arrangements and agreements in relation to activities performed by these 3 entities are sham. It is also relevant that USD 40 m

has been paid for use of certain marks and intellectual property of FOWC and this use cannot be equated with business activity in India.

49. Article 5(5) has several pre-requisites if an entity has to be treated as dependent agent. The agent must have the authority to conclude contracts which bind the represented enterprise and it habitually exercises such authority. If these positive preconditions are met, then only an enterprise shall be deemed to have a PE in that state in respect of any activities, which that person undertakes for the enterprise. Here again Shri Srivastava has given same argument that because the 3 entities were acting on behalf of FOWC they become dependent agents. Such insinuations made by Revenue are based only on selective reading of some clauses in agreements and making facetious presumptions based on that. We are of the firm view that FOWC had no fixed place of business, is not doing any business activity in India and has not authorized any organization or entity to conclude contracts on their behalf and therefore has no PE in India.”

Contentions of parties: FOWC and Jaypee

16. Arguing first on the issue of royalty, both FOWC and Jaypee contend, through their Senior Counsel, Mr. S. Ganesh and Mr. Arvind Datar, that AAR's order is premised on a fallacious premise, i.e that FOWC's grant to the promoter (Jaypee) under the RPC is a permission given to the latter to use F1 trademarks, logos and other intellectual property rights ("I.P. rights"). The AAR assumed that if Jaypee described or advertised any racing event as "Indian Formula One Grand Prix", *ipso facto* that was sufficient to make the race an F1 event; the premise was unfounded. It was this erroneous assumption which prompted the AAR to record that "royalty" within the meaning of Article 12 of the DTAA comprehended the amounts paid by Jaypee. Here it is argued that the IP rights given to Jaypee were only for the purpose of facilitating the event that was to be held in terms of the RPC, and for no other purpose whatsoever. If the RPC were to be terminated under any of the circumstances set out in Clause 28.1 of the RPC, then too Jaypee continued to be liable to pay the contracted amounts in the year of termination and in the next year; but the user of all I.P. rights ceased the moment the RPC was terminated. This clearly established that the amounts paid under the RPC were for the rights and privilege of hosting and staging the event and not for IP rights.

17. The relevant clauses of the RPC relied on by FOWC and Jaypee are discussed as follows. (a) Recital 'B', which states that the FOWC has the exclusive right to exploit the commercial rights in the championship and to award Jaypee the right to host, stage and promote Formula One Grand Prix events; (b) Recital 'D', which states that the RPC sets out the terms and conditions on which FOWC has granted to Jaypee the privilege of hosting, staging and promoting the event at the motor racing circuit owned by Jaypee situated in N.C.R (National Capital Region). Reliance is also placed on Clause 1 (t), which defines "Event" to mean the Formula One Grand Prix of India designated as a round of the FIA Formula One World Championship. (d) Clause 4, which set out the grant by FOWC to Jaypee of the right to host, stage and promote the 'Event' and clarified that the right was limited to the event. (e) Clause 17, which stated that FOWC would use its reasonable endeavors to ensure that at least sixteen cars participate in the Event. (f) Clause 18, which forbids Jaypee from making any audio or visual image of the event. (g) Clause 23.2, permits FOWC to make incidental use of I.P. rights solely for the limited purpose of facilitating Jaypee to promote the event and (h) Clause 28.2 refers to termination of the RPC on the declaration by FOWC that an "event of default" has occurred, upon which the RPC stood terminated forthwith. However, it is of importance to note that Jaypee's liability to make payments under the RPC continues, not only in respect of the year in which the termination has taken place but also in the immediate subsequent year. Therefore, even though FOWC remained liable to pay the full contractual amount in the year of termination and in the subsequent year, the right to use trademarks, logos and IP Rights ceases instantly, the moment the termination takes place. This was a clear indication that the amounts payable by Jaypee to FOWC under the RPC are really for the privilege of hosting and staging the championship race and not for the IP rights, which in any event, could be utilized by it only to promote the race and for no other purpose. It was also urged that by virtue of the Artwork License Agreement (ALA), clauses 23.3 and 23.4 of the RPC had to be read in conjunction with the ALA. Mr. Ganesh emphasized that the said Artwork agreement did not confer any additional rights, nor could too much significance be attached on its provisions beyond what was actually said and that in the circumstances of the case, neither was a license nor any form of right

to use the trademark given to Jaypee by FOWC which resulted in royalty payment within the meaning of Article 13 of the DTAA.

18. It was argued on behalf of FOWC that the judgment in *Director of Income Tax v. Ericsson A.B.* [2012] 343 ITR 470 (Del), which held that a lump-sum payment which is not based on or connected with the extent of the user of the IP rights would not constitute "royalties" within the meaning of the DTAA. In the present case, the payments made under the RPC were separate lump-sum amounts in respect of the three separate race events held in each of the three (3) years 2011 to 2013. It is not a payment, which is based on either the number of tickets, sold or the total amount of revenue earned by Jaypee in each of the said years or indeed on any other measure. It is submitted that such a lump-sum payment is squarely covered by the *Ericsson*(supra) case.

19. It was next highlighted by Mr. Datar that recital (B) of the ALA specifically stated that FOWC wished to grant a license to Jaypee permitting only the incidental use of certain IP rights and artwork "*solely for the limited purpose of facilitating the hosting, staging and promotion of the event*". The definition of "permitted use" in clause 1.1 of the ALA again states that it means only the incidental use of the licensed marks and materials "*for the purpose of hosting, staging or promoting the event, but for the avoidance of doubt, not to include use for any merchandising or other products or services whatsoever, whether distributed free of charge or for sale*". It was argued that Clauses 2.2 and 6.2 of the ALA provide that the ALA will continue only until the RPC terminates or expires; Clause 2.3 of the ALA prohibit Jaypee from using any of the licensed marks, or as part of the name of the circuit, any corporate name, any domain name, website address or other URL identification or equivalent used in association with Jaypee. Jaypee thus has no IP rights whatsoever independently of the staging and hosting of the Event. To the same effect are the undertakings given by Jaypee, set out in Clauses 3.1(e) and 3.6 of the ALA. Counsel also argued that the definition of "*royalty*" as set out in Explanation 2 to Section 9(1)(vi) of the Act, is significantly broader than the definition of "royalties" set out in Article 13(3) of the India-UK DTAA. The definition in the Act specifically covers and includes lumpsum payments, whereas Article 13(3) of the DTAA only refers to payments. The impugned order neither contains any discussion nor finding whatsoever on this

crucial issue even though it goes to the root of the entire case. It is argued that the payments made to it under the RPC are not "royalty" either under the Act or the DTAA, these payments are in reality not for the use of trademarks or IP rights, but rather for the grant of the privilege of staging, hosting and promoting the Event at the promoter's racing circuit in Noida(NCR). FOWC under the RPC, made available to Jaypee all of the elements which constitute the event. In particular, this includes nominating (to FIA) the promoter's event for inclusion in the official Formula One racing calendar; after such inclusion the Formula One racing teams with their Formula One cars and drivers were bound to participate in Jaypee's event held at the Promoter's racing circuit, strictly in conformity with the requirements of the F1 Sporting and Technical Regulations and the FIA Sporting Code. Therefore, the grant of Formula One rights by the FOWC to Jaypee is merely incidental to the hosting and staging of the event by the Promoter, and this is clear from the fact that the use of rights by Jaypee has been strictly confined and limited to use only for the promotion of the event, and for no other purpose and in no other manner whatsoever.

20. Reliance is placed on the decision in *Director of Income Tax v. Sheraton International Inc.*[2009] 313 ITR 267, which held that if a contract for the supply of goods and services also permits "incidental use" of trademarks, logos and other I.P. rights, only in connection with such supply of goods and services and not for any independent purpose, then in such a case the payments made under the contract cannot be considered to be "royalty" either under the Act or the DTAA. In the *Sheraton* case (supra), this Court had used the said term "incidental" only in the sense of "ancillary to" or "connected with" the supply of goods and services under the Agreement. This Court did not use the term "incidental" to convey the idea that trademarks and IP rights were of reduced value or importance as compared to the supply of goods and services under the contract. In other words, the use of the word "incidental" by this Court in *Sheraton* (supra) is not based on any value judgment regarding the relative importance of the supply of goods and services as compared to permitting the use of the trademarks and I.P. rights. This used the term "incidental" only to connote the close and immediate connection between the supply of goods and services and the user of the trademarks/ I.P.

rights that are inextricably interconnected with such supply. Thus, when no autonomous I.P. rights are created that are *de hors* or independent of the supply of the goods and services, then the payments under the contract cannot be regarded as consideration for the user of the trademarks / I.P. rights and, therefore, would only constitute 'business income' and not "royalty" in the hands of the recipient. It is argued that the judgment fully covers the present case in favor of FOWC, and the AAR committed an egregious and patent error of law in not following the binding principles of law laid down. It is further argued that the term "*incidental*" used by this court in *Sheraton* is in conformity with the sense in which the Supreme Court has understood the said term. Learned senior counsel relied on *Works Manager Central Railway vs. Vishwanath & Ors.* (1969) 3 SCC 95, *State of Orissa vs. Chakobhai* [1961] 1 SCR 719 and *Shroff & Covs Municipal Corporation of Greater Bombay* (1989) Supp. 1 SCC 347. It is urged that the AAR fell into error in interpreting the expression "incidental" in a completely different sense than what was held in *Sheraton* thereby in effect re-writing it. Furthermore, the impugned order is flawed because it holds that the dominant purpose of the RPC is to grant I.P. rights because the Promoter has been given the right to use the F1 name and marks, overlooking that this was exclusively so that the F1 racing event could be staged and hosted by the Promoter in full accordance with the F1 rules and regulations. Mr. Datar lastly relied on Section 48 of the Trademarks Act and said that use of the mark by a permitted user is not considered to be grant of any property right and in fact, such use inures to the benefit of the I.P proprietor.

21. It is argued, next, on the issue of existence of PE in India, that the preconditions for creation of a permanent establishment where, or through which business is earned in India, have not been proved. Learned counsel relied on the OECD Model Tax Convention on Income and on Capital, Para 10, which reads as follows:

"10. The business of an enterprise is carried on mainly by the entrepreneur or persons who are in a paid-employment relationship with the enterprise (personnel). This personnel includes employees and other persons receiving instructions from the enterprise (e.g. dependent agents). The powers of such personnel in its relationship with third parties are irrelevant. It makes no difference whether or not the dependent agent is authorized to conclude contracts if he works at the fixed place of business

(see paragraph 35 below). But a permanent establishment may nevertheless exist if the business of the enterprise is carried on mainly through automatic equipment, the activities of the personnel being restricted to setting up, operating, controlling and maintaining such equipment. Whether or not gaming and vending machines and the like set up by an enterprise of a State in the other State constitute a permanent establishment thus depends on whether or not the enterprise carries on a business activity besides the initial setting up of the machines. A permanent establishment does not exist if the enterprise merely sets up the machines and then leases the machines to other enterprises. A permanent establishment may exist, however, if the enterprise, which sets up the machines also operates and maintains them for its own account. This also applies if the machines are operated and maintained by an agent dependent on the enterprise.”

22. Mr. Ganesh learned senior counsel argued that under Article 5.1 of the DTAA, a permanent establishment is said to exist in relation to a business and income is said to be earned in India, if it has a “fixed” place of business “through” which income is earned by means of an economic activity. It is argued that the limitation and framework within which tax incidence can be said to arise, if at all, is that of the need for an enterprise to have a fixed place. The OECD commentary states that the premises need not be owned or even rented by the enterprise. What is however, essential is that the premises or place should be at the disposal of the enterprise. Mr. Ganesh submitted that there was nothing in the RPC or any agreement with FOWC whereby a fixed place was ever placed at its exclusive disposal. Thus, a place of business, which houses the fixed “place” would not imply mere empty space, available for some such purpose, but existence of objects in that place, such as furniture, equipment, etc which facilitate business, needed for the concerned commercial activity. The place of management, though considered a PE, requires existence of an office or similar facility in order to constitute a PE and the management activities should be conducted through such fixed place. Counsel relied on the decision reported as *Director of Income Tax v. E Funds Corporation* [2014] 364 ITR 256 (Delhi) which, after quoting from various authors, states that “*The term 'through' postulates that the taxpayer should have the power or liberty to control the place and, hence, the right to determine the conditions according to its needs*”. It is urged that Jaypee neither leased the stadium, or its premises or any part thereof to FOWC or granted

license to FOWC. That FOWC facilitated the drivers and constructors to use them did not further the revenue's case in any manner, because they were professionals, and had independent contracts. The access provided to them, or that provided to Allsports, or FOM, or Beta Prema2 did not mean that they, or FOWC had a fixed place of business. No part of the income generating activity of FOWC actually arose in India.

23. It is submitted that the entire right to promote, stage, host and endorse the event, i.e the F1 Grand Prix race, vested with Jaypee; FOWC only got the fee for assuring participation of the teams and constructors, in the agreed manner. That it was entitled to the live feed from the event, which it used, did not mean that any part of its business was transacted in India. The agreement, i.e the RPC, nor any other agreement containing any significant stipulation conferring it with a right to set up office in India, in relation to the F1 event, ever entered in the country; it did not have or set up even a liaison office for the purpose of its F1 event work or transaction. Therefore, the question of FOWC having a fixed place of business, even for a transient place, did not arise.

24. It was next argued that the question of any PE existing through Articles 5 (4) or (5) also could not have arisen, in the circumstances of the case. It is highlighted by Mr. Ganesh that none of the three companies, which entered into agreements with Jaypee, has or had any office in India; though they were subsidiaries of FOWC, such status arose because of acquisition of their shares in 2006. The transactions by them with Jaypee were independent. Moreover, the three companies did not act on behalf of FOWC, nor could they ever be said to have acted "habitually" in that regard, because the contract with Jaypee was a "one off" transaction. Thus, none of the ingredients of Article 5(4) of the DTAA applied. Equally, provisions of Article 5 (5) of the DTAA had no application because, none of the subsidiaries' activities were "*carried out wholly or almost wholly for*" FOWC. It was submitted that there was, nor could there have been, any finding that the said subsidiaries (Allsports, Beta Prema2 or FOM) acted "wholly" in the course of their business for FOWC or for its benefit. There was no material or evidence shown by the revenue in support of its contention. It is submitted that the business contracts therefore, entered into between FOWC's subsidiaries were independent bargains and

concluded on principal to principal basis. The benefit or amounts derived from those contracts did not flow back to FOWC. Lastly, learned counsel submitted that the reliance placed by the revenue on the AAR's ruling in the case of *Re Golf in Dubai 2008* (306) ITR 374 is inappropriate, because in that case, the arrangement was such that the premises were in fact leased for a period for use. In the present case, no space for work or commercial activity was offered to or taken by FOWC.

Revenue's contentions

25. The revenue argues that a (PE) defined under Article 5 of the may exist under Para (1) of Article 5, if there is a fixed place of business available to the enterprise through which its business is wholly or partly earned on. A PE may also get constituted under Para (4) of the said Article, if the enterprise carries on its business functions through a dependent agent who has an authority to conclude contracts on behalf of the enterprise. If the agent works wholly or almost wholly for the enterprise, he shall be deemed to be a dependent agent under Para (5) of Article 5, subject to other conditions. Relying on its Director's report, Mr. Srivastava, learned counsel argues that FOWC's business is to exploit commercial rights arising from the conduct of FIA Formula One World Championships in various parts of the world, including India in the relevant years.

26. It is argued that FIA, the international regulatory body, organizes and controls motor races in various parts of the world. For the F-1 championship, it enters into an 'Organization Agreement' with the local Promoter. The format of such 'Organization Agreement' is contained in Schedule 6 to the Concorde Agreement (the mother agreement). The Concorde Agreement provides that the 'Organization Agreement' would be entered into only after the Promoter has entered into an agreement with the Commercial Rights Holder. The Organization Agreement makes it explicit that FIA is the sole and exclusive owner of the Formula One World Championship event

27. FIA entered into an agreement with FOAM (predecessor of FOWC) under which FOAM was given the right to exploit commercial rights and it became the Commercial Rights Holder (CRH). On the back of the above agreement, FOAM (CRH) entered into an RPC with JPSK (Jaypee's predecessor) in 2007. The promoter (JPSIL), entered into an

'Organization Agreement' with FIA and obtained the right to organize the FIA Formula One World Championship in India. In the meanwhile, by a new 'Concorde Agreement' of 2009, FOWC became the new commercial rights holder (CRH). As per the stipulation in the 'Concorde Agreement', the commercial rights could not be assigned/transferred by the commercial rights holder (CRH) to any entity other than its affiliates. Under the terms of such Concorde Agreement, FOWC could exploit such rights either directly or through its affiliates.

28. It is argued that the Buddh International Circuit (Noida), which includes not only the racing circuit but all the attached buildings in the complex, including vending areas, hosting and broadcasting facilities, media centres, administrative offices etc. as widely defined in the Race Promotion Contract itself was available to FOWC and its affiliates (including their employees and third party contractors appointed by them) for carrying on their business operations. This circuit along with all the facilities was constructed in a form and manner approved by both FOWC and FIA. (Clause 5(e) of RPC). FOWC and its affiliates have complete access to the circuit in all its dimensions for a period beginning 14 days prior to the event and ending 7 days after the event. The place is available not only to FOWC but to its contractors, licensees, FOWC's affiliates, their personnel etc. (Clause 11 of RPC). Further, access to the restricted area is regulated by passes and tickets issued by FOWC. In effect, FOWC had complete control over the entire area during the term of the event. (Clause 14 of RPC) The fixed place is available to FOWC under the terms of the RPC for carrying out its business functions for a period of 5 years, extendable by another 5 years.

29. It is argued that consistent with the stipulations of the Concorde Agreement, FOWC exploited certain commercial rights directly (such as media rights) and certain other commercial rights indirectly through other group entities, namely Allsports Management SA ('Allsports') and Beta Prema 2 Ltd. The business functions were given to the affiliates by interposing the promoter, Jaypee being oblivious of the fact that under the Concorde Agreement, FOWC could not have transferred such rights to JPSIL. The effect of such interposition was that while the terms of Concorde Agreement were not violated, the exposure of FOWC to a PE in India was sought to be avoided. Despite the fact that the

RPC of 2007 was not rescinded, FOWC entered into a fresh Race Promotion Contract with JPSIL (successor of Jaypee) in departure from the RPC of 2007 on 13.09.2011. (both agreements were signed by Mr. B. Eccelstone for EGA and FOWC). Some of the changes made in the latter agreement were:

- Under RPC of 2007, the promoter was given only the right to 'promote' the event but in the RPC of 2011, the words 'host' and 'stage' were inserted before the word 'promote' solely with a view to escape the tax incidence.
- As a condition precedent, JPSIL (R 2) was mandated to transfer the commercial rights back to the group entities of FOWC (R 1), namely Allsports Management SA and Beta Prema 2 Ltd. and to obtain the services of FOAM for executing certain obligations pertaining to the exploitation of media rights, which FOWC had undertaken directly.
- The declaration in the RPC of 2007 that FOAM acted as a Business Manager and agent of FOWC was deliberately dropped, without the business model undergoing any change.
- Clause 18.3 was introduced, casting an obligation on JPSIL to engage FOAM to carry out services for the origination of international television feed, to be provided to telecasting companies with which FOWC had already made agreements.

30. It is argued that Beta Prema 2 had transferred title Sponsorship rights to Bharti Airtel Ltd. on 16.08.2011 for a consideration of USD \$ 8 million, long before it acquired these rights from Jaypee on 13.09.2011. On 16.08.2011, when such rights existed only with FOWC, Beta Prema 2 could have concluded an agreement with Bharti Airtel only on behalf of FOWC or as an agent of FOWC and not otherwise. It is argued thus by Mr. Srivastava that a holistic reading of these agreements particularly the five agreements executed simultaneously on 13.09.2011 leads to the following irresistible inferences:

- (i) FOWC alone was the commercial rights holder (CRH) for the championship under the Concorde Agreement.
- (ii) FOWC could exploit the commercial rights either itself or through its group entities only and the same could not have been transferred to a third party, outside the group, including JPSIL.
- (iii) The entire arrangement of showing that the rights moved from FOWC to JPSIL and then from Jaypee to Allsports and Beta Prema 2 is wholly artificial and far removed from

the true state of affairs and intent of the parties.

(iv) Jaypee was interposed in the above arrangement only to avoid the exposure of FOWC to a PE in India. The commercial rights, in effect and for all intent and purposes, remained only with FOWC or its affiliates.

(v) The transfer of commercial rights to Jaypee on 13.09.2011 and its further transfer to the affiliates of FOWC on the same day shows that the rights did not rest with Jaypee for any period of time and the entire arrangement was pre-ordained.

31. The revenue argues that the agreements entered into by Jaypee with Beta Prema 2 and Allsports stipulate that entire revenues from exploitation of commercial rights arose only to Beta Prema 2 and Allsports, as the case be, and Jaypee would not have any share in the same. The agreements also provide that there does not exist any agency relationship between the affiliates and Jaypee (clause 26 of the Beta Prema 2 agreement and clause 19 of the Allsports agreement). Seen from this backdrop, the stipulations in the agreements to the effect that these entities acted on behalf of Jaypee are misleading and made only to project a wholly unreal state of affairs. The transfer of such valuable rights which yielded revenues worth US \$ several millions (exact amount of revenues not provided) to these entities was made for a pittance (USD 1 million each), making the whole arrangement commercially unrealistic and wholly artificial.

32. It is argued that the AAR had correctly understood and enunciated the test, in the *Golf in Dubai*(supra) decision, but failed to apply it correctly in the facts of the present case. FOWC was responsible for inclusion of the F1 event in the Budh Circuit, which was built according to specifications suited for F1 Formula One championship. The circuit was made available to FOWC as the entity which guaranteed the participation of a minimum number of teams; the circuit itself constituted a fixed place of business for FOWC. No other event could or was staged for the duration the event was held; moreover, the RPC stipulated that the circuit had to be kept free only for the F1 racing event in which FOWC chosen and contracted teams participated. The promoter, Jaypee only had the privilege of being called “event promoter” in reality, the entire ownership of the event and the economic advantages, in the form of media and television rights, were exclusively owned by FOWC. Even though the promoter was obliged to get in equipment

and infrastructure to enable feed creation and transmission, it could not avail any benefit from it: that belonged, in every sense of the term, to FOWC and none else.

33. FOWC's business is the exploitation of commercial rights arising from races which is carried on through exploitation of these commercial rights either by itself or through any one or more members of CRH group mentioned in the Concorde Agreement. Counsel urged that commercial rights were originally owned by FIA, transferred in 2001 to SLEC Holding Company (parent company of FOWC) for a consideration, then given to FOAM and w.e.f. 1.1.2011 transferred to FOWC. He also pointed out certain inconsistencies as under:-

(a) The Organization Agreement between FINFMSCI was entered into on 20.01.2011. The RPC and the Artworks License Agreement are dated 13.09.2011. Going by RPC dated 13.09.2011, it is evident that GP contract did not exist on the date of the signing of the Organisation Agreement in January 2011. It would be relevant to refer to recital (B) in the Organization Agreement which reads as under:

“The Promoter has entered into an agreement with the Commercial Rights Holder to promote the event.”

According to FOWC, its agreement with Jaypee was entered into on 13.09.2011. It would be difficult to explain the Recital in the Organization Agreement in January 2011 by reference to the RPC of September 2011.

(b) The agreement, dated 25.10.2007, between FOAL and Jaypee, is on the same lines as RPC of September 2011. This agreement is in tune with the Format provided under Schedule 4 of the Concorde Agreement. It is obvious that FIA could sign the Organization Agreement in January 2011 only on the basis that the Promoter had already entered into GP contract with FOAM (predecessor of FOWC) in 2007.

(c) The RPC of 2007 has the following distinguishing features:

- i) The right given to the Promoter is only to promote the event under clause 4(1) thereof.
- ii) Clause 18.3 appearing in RPC of 2011 is not there in the RPC of 2007.
- iii) The conditions precedent in Clause 2 are limited to obligating the Promoter to enter into an agreement with APM (Ireland) Ltd. (APM). Nothing is known about this entity or the role to be played by it in the exploitation of commercial rights. In fact, nothing is

known to Revenue about the ownership of this entity or its business nature or the functions performed by it. There is no reference of any agreement with Beta Prema 2, Allsports or FOAM in this RPC.

d) Recital (D) clearly records as under:

“FOA has appointed its subsidiary, Formula One Management Limited ('FOM') as its agent and business manager to conclude contracts on its behalf and to exercise its rights and perform its obligations under such contracts.”

34. The revenue urges that FOWC's contention that the 2007 agreement was not acted upon is incorrect. Mr. Srivastava, therefore, argues that FOWC has a PE in India. The fixed place is Buddha circuit located in Greater Noida and owned by Jaypee which was being designed and constructed in terms of RPC dated 25.10.2007 and RPC dated 13.9.2011 is only continuation of earlier arrangement. He further urges that clause 11 of the RPC dated 13.9.2011 makes available to FOWC and other entities access to circuit, clause 8.1 obliges the promoter to allocate promotional area in such a manner as FOWC shall specify, access to restricted area is regulated by passes and tickets issued by FOWC. He has also submitted that International Broadcast is one of the major commercial rights which vests in FOWC and because the promoter has set up a media compound and installations necessary for national and international commentators, such business is also made available to FOWC at the circuit.

35. The revenue further argued that that the three affiliates of FOWC, i.e. Formula One Management Ltd. ('FOM'), Allsports Management SA and Beta Prema 2 Ltd. are FOWC's agents who carried on its business and on its behalf, through the fixed place. It has submitted that that all commercial rights originally vested and were granted to only FOWC under the Concorde agreement, with a stipulation that FOWC may transfer or assign such rights only to other group entities. It is argued that each of FOWC's affiliates acted on its behalf; the rights they exploited were ostensibly that of Jaypee; however, a close reading of the agreements with that concern showed that their own rights originated in effect from the arrangements entered into FOWC; the contracts with Jaypee were mandated by the RPC between FOWC and Jaypee, where the latter was bound to enter into agreements and contracts with these affiliates. Given the admitted relationship

between FOWC and each affiliate and the fact that they collected huge sums of money through the contract, in lieu of which Jaypee was given US \$ 1 million in each contract, the only inference that could reasonably be drawn was that they entered into contracts on behalf of FOWC.

36. On the issue of whether the payment by Jaypee was royalty, the revenue argued that the RPC and Artwork License Agreement had to be read together for a comprehensive view. It is argued that there is no agreement between FOWC and Formula One Licensing B.V., proprietor of the trademarks for transfer or licensing of such rights in favour of FOWC. The latter stated this in its letter, dated 19.07.2016. What FOWC licensed to Jaypee was the permitted use, in the territory, of the licensed marks and materials. The licensed marks and materials are defined to include marks stated above. The "permitted use" is defined to mean incidental use of the licensed marks strictly for the purpose of hosting, staging and promoting the event.

37. Mr. Srivastava urges that a combined reading of Concorde Agreement and other agreements reveals that Jaypee was not required to make any payment to FOWC for hosting, staging and promoting any motor racing event. The payment was for only the reason that the mark of "Formula One World Championship" or "Grand Prix of India" had to be used to make the event a part of the calendar of F1 World Championship. Thus, it is the staging of Formula One World Championship which is an event involving use of the FOWC's marks and this factor impelled payment of USD 40 million by Jaypee to FOWC. Thus, the right given by FOWC entailed the right to use the mark and licensed material to characterize the event as Formula One World Championship event. FOWC could only grant Jaypee, the right to use the mark to identify it as Formula One World Championship and/or Grand Prix of India. Jaypee could have entered into Artworks license Agreement with FOWC and the Organization Agreement with FIA and could have acquired the rights necessary for hosting, staging or promoting the event (Formula One World Championship). FOWC's attempt to show a consideration of US \$ 1 was an attempt to show the consideration of USD \$40 million for rights different from what it was actually paid.

38. The revenue resists the argument that there was an incidental use of the mark in these circumstances. The use was in fact, primary and the only use. The mark's licensing gave Jaypee the right to hold the F1 championship or Grand Prix of India event. This fact is supported by the circumstances that Jaypee's rights as stipulated in the Concorde agreement are clearly listed as (i) right to promote the event. (ii) right to designate the event as Formula One Championship event.

39. The revenue argues that the SLEC group (of which FOWC is a part) had acquired the 'Formula One' trademark for a substantial consideration from FIA. It is unrealistic that a mark acquired for a hefty consideration, would be licensed to a third party (Jaypee) without consideration. Counsel argues that the trademark's significance is evidenced by the fact that there are several other motor sport racing events held in India such as 'Honda 1 Make Race', 'JK National Tyre Racing Championship', 'MRF 1600 Championship', 'Maruti Suzuki National Superleague' etc. Yet these events hardly come in the public eye; and saying that the revenues from such events are miniscule as compared to that of FOWC would be an understatement. Given the relative ignorance of motor sports in India, crowds, visiting the circuit or watching from home are thus drawn towards the name 'Formula One', that they are familiar with and not the car or circuit specifications that the event associates itself with. The revenue arising from the commercial rights, be it sale of tickets, advertisement rights or broadcasting rights are, therefore, all attributable to the name of the event more than anything else.

Analysis and Conclusions

Re question no. 1: whether FOWC had a fixed place permanent establishment (PE) under Article 5(1) of the DTAA in the facts of the present case -

40. Article 5(1) defines the term "PE" as "a fixed place of business through which the business of an enterprise is wholly or partly carried on". Article 5(2) enumerates - by way of an inclusion "especially various places such as place of management; a branch; office; a factory; a workshop; premises used as sales outlet or for receiving or soliciting order; the ware house in relation to a person providing store facilities for others; a mine; an oil

or gas well etc. used for extraction of natural resources; an installation/structure used for exploration or exploitation of natural resources; a building, site or construction; installation or assembly, project or supervisory activities in connection therewith where the site, project or supervisory activity continues for more than six months etc; furnishing services including managerial services other than those taxable under Article 13 within a contracting state by an enterprise through employees or other personnel subject to specific conditions etc. Article 5(3) contains a "negative list", enumerating what is not deemed to be a PE.

41. FOWC and Jaypee argue that there is no "fixed place PE" in the sense of the term under Article 5(1). It is emphasized that FOWC merely sought right to exploit commercial rights in the championship and is awarded the permission and right to hold and promote Formula One Grand Prix events and that the RPC sets out the terms and conditions for the grant of privilege of hosting, staging and promoting the event to Jaypee. FOWC only assures that it would use its reasonable endeavor to ensure that at least 16 cars participate in the event. It is stated that no part of the RPC or artwork license or indeed any contract between other entities which assures specific services to Jaypee (All Sports, Beta Prema 2 and FOM) ever mentioned that FOWC had any place at its disposal for any point of time. It neither had any office nor any place of business in the sense as is commercially understood, from where its personnel were allowed to operate. At all relevant and material times, the ownership and exclusive possession of the stadium and all the premises therein vested and continued with Jaypee. Since the concept of a fixed place PE is entirely dependent upon functioning of a company or commercial entity within a physical place provided for that purpose (not necessarily for whole year but at least a substantial period thereof), the question of FOWC ever having functioned in any premises or even licensed to do by Jaypee did not arise. It is furthermore urged that the revenue's argument that the AAR fell into error is baseless because the impugned order correctly concluded that there was no fixed place of business from where FOWC operated. Furthermore, it was argued that each participating team was under a contract and none of its members were engaged as employees of FOWC in the sense that they were performers whom the FOWC assured, would participate. Moreover, there was no

activity on part of the FOWC within such fixed place that yielded income in India. It is emphasized that the relationship between the fixed place and the business carried on through it has to be established in any case to say that income arising from such activity is taxable in India. Reliance is placed upon the OECD Model Convention on Income and Capital, 2010, para 10, which elaborates that mainly the enterprises or persons who are in paid employment relationship with it carry on the business of an enterprise. Such personnel would include employers and other persons receiving directions from the enterprise, learned counsel relied upon the decision reported as *E Funds (supra)*. The revenue argues that the entire event is the creation of FOWC, which is an extension of FIA. Elaborating on this submission, it is stated by the revenue that inclusion of any circuit in the FIA's calendar of events is through the FOWC. Therefore, from the inception, i.e. inclusion of event in a circuit till the conclusion of the event itself, (i.e. Formula One Grand Prix Championship race in any circuit), the FOWC's role dominates. Elaborating on this, it is argued that the Buddh Circuit was built to suit the specifications needed for a Formula One race, including the Grand Prix Championship. For three weeks before the event and a week after it, the entire circuit or any part thereof was exclusively meant for the event; FOWC or its personnel or agent had access to every part of the circuit. Moreover, every team that participated in the event was under contract with FOWC and had to do so as a condition precedent for the payment of consideration and importantly prize money and share of its prize money. In other words, though seemingly independent contractors of FOWC, in reality, the teams were bound to honor the commitment of FOWC. This was the business model adopted by it and in any given year, FOWC's mandate bound each team to participate in a certain preordained manner, in events stipulated by it. Furthermore, even though the right to promote, host and endorse the event ostensibly was that of the Jaypee, it could not in real sense of the term exploit its rights. Under the RPC, it was bound to contract out those rights to three sport entities; what is even more important is that it did not even possess any copyright or intellectual property right in respect of the media and television recordings created of the event. The ownership and exploitation of those rights exclusively vested with the FOWC. Most crucially, the revenue argues that the entire ownership of the live feed and the right to

exploit it through sport contracts for media, television network, gaming, rights etc. were exclusively that of FOWC. In the real sense of the term, therefore, FOWC was the commercial owner which yielded income - in the form of consideration for facilitating the event, its inclusion in the FIA calendar and the revenues derived from the contracts, especially media, television network contracts.

42. Since both the parties relied on the provisions of the RPC, it would be useful to extract some of its relevant conditions. They are reproduced below:

"WHEREAS

(A) *The Federation Internationale de l'Automobile (FIA) is the governing body of world motor sport. The FIA is responsible for the sporting organization and regulation of the FIA Formula One World Championship (the Championship), and has the right to supervise the sporting organization of individual rounds of the Championship.*

(B) *Pursuant to various agreements between the FIA, POWC and its Affiliates (as defined in Clause I(p) etc. FOWC has the exclusive right to exploit the commercial rights in the Championship, including the exclusive right to propose the Championship calendar and to award, to promoters the right to host, stage and promote Formula One Grand Prix events that count towards the Championship, exclusive media rights (including all use of audio-visual material and data in the media space).*

(C) *FOWC has the exclusive right to enter into contracts solely for the hosting, standing and promotion of Formula One Grand Prix events entered on the FIA International Sporting Calendar and counting towards the Championship, it being understood that such a contract will govern exclusively the commercial and financial management of the Event (as defined in Clause 3.1(xx not legible).*

(D) *The Promoter is the owner of a motor racing circuit in the National Capital Region of India which is capable of hosting various motor racing events. The Promoter wishes to host various motor racing events at such circuit, to include the hosting of Formula One Grand Prix events. The Promoter had secured the privilege to host such events and is no executing this agreement with FOWC to set out the terms and conditions on which it will host, stage and promote Formula One Grand Prix events at such circuit.*

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Definitions and Interpretation

1. In this Agreement unless the context requires otherwise:

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(q) **Circuit** shall mean a motor racing circuit suitable in every respect for the staging of the Event (including permanent buildings, permanent infrastructure, track layout, amenities, spectator viewing facilities, the pit/paddock, building, media centre, car parks, helipads, garages, race control and administration, office administration, fuel and tyre storage, utilities (including back up power supplies), concrete based areas suitable to host the Competitors and sponsors, vending and exhibition areas, international TV compounds, host and broadcast facilities and medical centre);

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(t) **Event** shall mean the FORMULA 1 GRAND PRIX OF INDIA (including all support events therein and peripheral entertainment), designated and endorsed as a round of the FIA Formula One World Championship, which shall commence at the Circuit at the time scheduled by the FIA for Scrutinizing and Sporting Checks and including all Practice and the Race itself and ending at the later of the time for the lodging of a Protest under the terms of the Sporting Code and the time when a technical or sporting verification has been carried out under the terms of the Sporting Code; and

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Conditions Precedent

2.1 The grant of rights by FOWC to the Promoter under this Agreement is conditional on the Conditions having been fulfilled or waived in accordance with this Agreement and the Promoter shall use its best endeavour to satisfy the Conditions in accordance with this Clause 2.

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Term

3.1 This Agreement shall commence and become operative when it is signed by the parties and dated.

3.2 Subject to Clause 2 the rights granted to the Promoter under this Agreement shall be exercisable from the Unconditional Date. Accordingly, the initial term of this Agreement (the Initial Term) shall begin on the Unconditional Date and shall expire on 31 December 2015 and shall apply to the Championship for the calendar years 2011 to 2015 (inclusive).

3.3 On or before 30 June 2015, FOWC shall in its absolute discretion be entitled to give notice to the Promoter which, if given, shall be effective to extend the Term for a further period of up to five calendar years (the **Extended Term**). The terms of this Agreement shall apply to the Extended Term save for this Clause 3.3.

3.4 The term of this Agreement as prescribed in this Clause 3 shall be referred to as the **Term** and shall include the initial Term and (if applicable) the Extended Term.

3.5 Subject to the performance by FOWC of its obligations contained in Clause 4, the Promoter agrees to host, stage and promote the Event as the FORMULA 1 GRAND PRIX OF INDIA or [Year] GRAND PRIX OF INDIA in accordance with this Agreement once in every calendar year of the Term commencing 2011 at the Circuit on the date approved and announced by the FIA on and subject to the terms of the Regulations and the Sporting Code.

FOWC's Obligations and Warranties

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Promoter's Warranties

(e) On the area of land, the outer perimeter of which is edged in red, depicted on the document attached to this Agreement as the Annex and initialed by the Parties for identification, the Circuit shall be constructed, laid out and prepared in accordance with this Agreement, in a form and manner approved by both FOWC and the FIA, meeting all requirements of the Regulations (including as to timing of inspections) and completed in good time for final inspection by the FIA not later than 12 October 2011;

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Access to Circuit Prior to Event

11. The Promoter shall take whatever action is necessary to ensure that the pit and paddock buildings and surrounding areas within Circuit and the Land are open to receive the competitors, FOWC, Affiliates of FOWC, FOWC's contractors and licensees and their respective personnel and equipment (if any) at all times during the period commencing fourteen days before the day of the race and ending seven days after the Race (the Access Period) and the security of the paddock and garage area is properly safeguarded at all times during the Access Period.

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Competitor/Media Facilities

13.1 *The Promoter will in so far as the same is practicable provide an entrance for the Competitor personnel and for Officials separate from the public entrance to the Circuit.*

13.2 *The Promoter will provide free of charge a zone measuring whichever is the greater of that which has last been provided in respect of a round of the FIA Formula One World Championship at that Circuit and 140 metres by 100 metres or 15,0000 square metres within or adjoining the paddock for the promotional facilities of the Competitors and/or their sponsors.*

13.3 *The Promoter undertakes to set up a media compound and telephones and facsimile equipment, Press Room plus the installations and premises necessary for national and international television commentators and journalists (such premises and installations to meet the prestige of a World Championship) and to grant professional accredited journalists use of all facilities for the exercise of their profession as well as the organization of a Press Conference with the winner of the Race immediately after the Podium Ceremony.*

13.4 *Upon the arrival of the Formula One cars and their spares and ancillary equipment at nearest suitable International airport (as such is determined by FOWC) (the Landing) the Promoter will transport them free of charge from the Landing to the Circuit and from the Circuit back to the Landing. The Promoter shall procure that transportation from the Circuit to the Landing shall take place on the day following the Race. All ancillary costs including airport taxes customs clearance handling, loading and unloading both at the Landing and at the Circuit shall be paid by the Promoter. The Parties agree to liaise with each other throughout the Term with a view to discussing and implementing all reasonable measures which may reduce such ancillary costs.*

13.5 *The Promoter undertakes to provide all such other facilities as specified in the Circuit General Specifications Manual.*

Access to Restricted Areas

14. *The Promoter undertakes to ensure that:*

(a) *only Passes and tabards issued by FOWC under the authorization of the FIA will authorize access to parts of the Circuit not open to the paying public;*

(b) *notwithstanding Clause 14(a) above, the public do not have access to the cars in any of the places where any Competitor's mechanics may be called upon to work on them and without prejudice to the generality of the*

foregoing there is at no time any obstruction to the free passage of the cars and Competitor personnel in the paddock or pit area;

(c) the validity of any Passes and tabards issued by FOWC under the authorization of the FIA is upheld; and

(d) the necessary steps are taken to ensure that all police and Circuit officials are familiar with the Passes and tabards and uphold their validity.

Insurance

15.1 The Promoter shall provide at its expense third party liability insurance (in a form approved by FOWC and the FIA insuring FOWC and all its Affiliates, Beta Prema 2 Limited and all its Affiliates, the Competitors, Drivers and guests of any of the above mentioned parties (such parties to include where relevant all directors, officers, employees, agents and contractors) and such other persons involved in the organization of the Event (including officials, marshals, rescue and medical staff) as the FIA or FOWC may from time to time advise the Promoter (the Insured Parties) against all risks (including death of or bodily or mental injury to any person) relating to (i) the event (ii) support races and (iii) peripheral entertainment organized as part of the Event, for the Access Period. If such insurance is not permitted under the law of the country in which the Event takes place or the FIA is satisfied that such insurance is not commercially viable then the insurance shall be the maximum permitted by that law or the market conditions. The insurers must be a company recognized by Standard and Poor's and/or AM. Best and must be of first class international standing with sufficient resources to honour and discharge in full the insurance requirements prescribed in this agreement. A copy of the relevant policy will be given to FOWC by the Promoter at least 60 days before the start of the first practice session (with the exception of the year 2011, when such copy will be given to FOWC at least 30 days before the start of the first Practice session of the Event in 2011). If the language of the relevant policy is in a language other than English, FOWC shall obtain a translation of the policy at the expense of the Promoter.

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Filming/Recording at the Event

18.1 Save with the prior written consent of the FOWC and save for the Promoter's obligation in Clause 18.3, throughout the Term during the Access Period (and any test session held at the Circuit in which more than one Competitor is participating (Non-Private F1 Test Series) the Promoter shall not (nor shall the Promoter permit, enable, assist, procure

or encourage others to) make, create, store, record or transmit an kind of sound recording or visual or audio-visual footage (Recording) whatsoever, whether for broadcast or any other purpose.

(a) of at or pertaining to the Event (including cars, Drivers, Competitors), any Non-Private F1 Test Session or any aspect of them; or

(b) within the confines of the Circuit or the Land (or any other part of its surroundings over which the Promoter has control).

18.2 Without prejudice to the generality of Clause 18.1, the Promoter shall ensure that the terms of sale of tickets giving admittance to an Event include acceptance by a ticket holder:

(a) that he shall not make, create, store, record or transmit any Recording of the Event (including cars, Drivers, Competitors) or any aspect of it, and shall not take into the Circuit any equipment that may enable him to do the aforementioned acts (other than mobile telephones use of which is subject to this Clause 18 and Clause 19.1 below);

(b) that as a spectator he may be filmed and sound made by him may be recorded for broadcast (or similar transmission); and

(c) of such other terms and conditions as FOWC(acting reasonably) may request the Promoter to include from time to time provided that the Promoter is notified in due time and that such terms and conditions are compatible with applicable local laws.

18.3 The Promoter shall engage a third party (the Identity of which shall be approved by FOWC in its sole discretion) to carry out and perform on behalf of the Promoter all services relating to the origination of the international television feed and host broadcasting for each Event during the Term as are specified in guidelines published annually by FOWC and provided to the Promoter from time to time.

Intellectual Property

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19.2 The Promoter hereby irrevocably and unconditionally;-

(a) assigns to FOWC with full title guarantee all copyright and other intellectual property rights and all other rights, titles and interests (if any) which it may now or in the future have in any Image or Recording or any other representation or recording in any media whether now known or hereafter invented or developed in, of or pertaining to the Event, any Non-Private F1 Test Session or any aspect of them (irrespective of who

originated the same)for the duration of those rights (including all renewals, extensions, reversions and revivals thereof); and

(b) gives its consent (if such consent should be required) for FOWC to deal in such rights in any way it may see fit.

Accreditation for Filming/recording

20.1 The Promoter shall ensure that persons accredited and authorized by FOWC are permitted to enter upon the Circuit to make sound, television or other recordings or transmissions or to make films or other moving picture and use the facilities throughout the Access Period and the Promoter shall accord all such persons the help and facilities that they or FOWC may reasonably require for such purposes, including assistance with obtaining any necessary consents, permissions or authorizations with any local authority.

20.2 The Promoter undertakes to Notify FOWC of the dates of any test sessions which are proposed to be held at the Circuit.

Circuit Advertising

21. The Promoter shall not cause, permit, enable, assist, procure or encourage the display of any advertising (other than the advertising normally displayed on any Competitor's cars, Drivers or personnel) or other displays on, near or which can be seen from the Circuit and/or the Land which might (in the opinion of FOWC which shall be final and binding upon the Parties) Prevent the lawful transmission of Images or Recordings of the Events or any part of it in any country."

43. The OECD Model Tax Convention on Income and on Capital,(Condensed Version- July 2010) contains a useful commentary on what could be said to constitute fixed place of business. The relevant extracts of the same are reproduced below:

"3. It could perhaps be argued that in the general definition some mention should also be made of the other characteristic of a permanent establishment to which some importance has sometimes been attached in the past, namely that the establishment must have a productive character, i.e. contribute to the profits of the enterprise. In the present definition, this course has not been taken. Within the framework of a well-run business organization it is surely axiomatic to assume that each part contributes to the productivity of the whole. It does not, of course, follow in every case that because in the wider context of the whole organization a particular establishment has a "productive character" it is consequently a permanent establishment to which profits can properly be attributed for the purpose of tax in a particular territory (see Commentary on paragraph 4).

4. The term "place of business" covers any premises, facilities or installations used for carrying on the business of the enterprise whether or not they are used exclusively for that purpose. A place of business may also exist where no premises are available or required for carrying on the business of the enterprise and it simply has a certain amount of space at its disposal. It is immaterial whether the premises, facilities or installations are owned or rented by or are otherwise at the disposal of the enterprise. A place of business may thus be constituted by a pitch in a market place, or by a certain permanently used area in a customs depot (e.g. for the storage of dutiable goods). Again the place of business may be situated in the business facilities of another enterprise. This may be the case for instance where the foreign enterprise has at its constant disposal certain premises or a part thereof owned by other enterprise.

4.1 As noted above, the mere fact that an enterprise has a certain amount of space at its disposal which is used for business activities is sufficient to constitute a place of business. No formal legal right to use that place is therefore required. Thus, for instance, a permanent establishment could exist where an enterprise illegally occupied a certain location where it carried on its business.

4.2 Whilst no formal legal right to use a particular place is required for that place to constitute a permanent establishment, the mere presence of an enterprise at a particular location does not necessarily mean that that location is at the disposal of that enterprise. These principles are illustrated by the following examples where representatives of one enterprise are present on the premises of another enterprise. A first example is that of a salesman who regularly visits a major customer to take orders and meets the purchasing director in his office to do so. In that case, the customer's premises are not at the disposal of the enterprise for which the salesman is working and therefore do not constitute a fixed place of business through which the business of that enterprise is carried on (depending on the circumstances, however, paragraph 5 could apply to deem a permanent establishment to exist).

4.3 A second example is that of an employee of a company who, for a long period of time, is allowed to use an office in the headquarters of another company (e.g. a newly acquired subsidiary) in order to ensure that the latter company complies with its obligations under contracts concluded with the former company. In that case, the employee is carrying on activities related to the business of the former company and the office that is at his disposal at the headquarters of the other company will constitute a permanent establishment of his employer, provided that the office is at his disposal for a sufficiently long period of time so as to constitute a "fixed place of business" (see paragraphs 6 to 6.3) and that

the activities that are performed there go beyond the activities referred to in paragraph 4 of the Article.

4.4 A third example is that of a road transportation enterprise which would use a delivery dock at a customer's warehouse every day for a number of years for the purpose of delivering goods purchased by that customer. In that case, the presence of the road transportation enterprise at the delivery dock would be so limited that that enterprise could not consider that place as being at its disposal so as to constitute a permanent establishment of that enterprise.

4.5 A fourth example is that of a painter, who, for two years, spends three days a week in the large office building of its main client. In that case, the presence of the painter in that office building where he is performing the most important functions of his business (i.e. painting) constitute a permanent establishment of that painter.

4.6 The words "through which" must be given a wide meaning so as to apply to any situation where business activities are carried on at a particular location that is at the disposal of the enterprise for that purpose. Thus, for instance, an enterprise engaged in paving a road will be considered to be carrying on its business "through" the location where this activity takes place.

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, but this does not mean that the equipment constituting the place of business has to be actually fixed to the soil on which it stands. It is enough that the equipment remains on a particular site (but see paragraph 20 below).

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10. The business of an enterprise is carried on mainly by the entrepreneur or persons who are in a paid-employment relationship with the enterprise (personnel). This personnel includes employees and other persons receiving instructions from the enterprise (e.g. dependent agents). The powers of such personnel in its relationship with third parties are irrelevant. It makes no difference whether or not the dependent agent is authorized to conclude contracts if he works at the fixed place of business (see paragraph 35 below). But a permanent establishment may nevertheless exist if the business of the enterprise is carried on mainly through automatic equipment, the activities of the personnel being restricted to setting up, operating, controlling and maintaining such

equipment. Whether or not gaming and vending machines and the like set up by an enterprise of a State in the other State constitute a permanent establishment thus depends on whether or not the enterprise carries on a business activity besides the initial setting up of the machines. A permanent establishment does not exist if the enterprise merely sets up the machines and then leases the machines to other enterprises. A permanent establishment may exist, however, if the enterprise which sets up the machines also operates and maintains them for its own account. This also applies if the machines are operated and maintained by an agent dependent on the enterprise."

44. *Klaus Vogel* in the commentary Double Taxation Conventions (Kluwer Law International, 2005) states that the main features of Article 5(1) are: (a) existence of an enterprise; (b) its carrying on a business; (c) existence of a place of business, the nature of such place being fixed and (d) through which (i.e. through the place) the business should be carried on.

45. *Vogel* further states that a place would mean an establishment and, therefore, comprehend all the tangible assets used for carrying on a business and "*Rights, such as participation in a corporation, claims (as well as accounts) or intangible property rights (patents, software etc.) do not amount to permanent establishment.....the term covers both premises and other tangible assets used by the enterprise, i.e. the place of business as a whole must be of 'used' and not necessarily each of its component parts. Special facilities for carrying on business are not necessarily required.*" A room in which the enterprise's business is carried on could qualify for "permanent establishment." Weight is attached to "used" criterion. That is why the living accommodation of a travelling salesman may well be classifiable as PE. The place of business must be "fixed one", the existence of link between the place of business and the specific geographical bond would be sufficient. *Vogel* further states that:

"d) Power of disposition: 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 purposes (and hence not for the enterprise's), would not be a permanent establishment of the enterprise. It is sufficient if the

entrepreneur has the power of disposition through an employee; even if he himself is forbidden to enter the State in question this does not preclude the existence of a permanent establishment in that State....."

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*It is not necessary for the enterprise **alone** to have power of disposition; in fact, several parties may have such power, whether jointly or severally. If jointly, the fixed place of business may constitute a permanent establishment of each of the parties involved....."*

46. In *E-Funds*(supra), though the court discussed what could constitute "fixed" place of business and did conclude that a physical presence in a geographical area is essential, the decision was more related to an interpretation of who is a dependent agent, so as to bring within the fold of domestic taxation an enterprise that has an overseas tax resident status.

47. For a better understanding, the court proposes to consider a few illustrative cases that have ruled- across various jurisdiction how permanent is "permanent" and how "fixed" should the establishment be. In this regard, this Court has relied upon the commentary in *Taxmann's Permanent Establishment in International Taxation* by Dr. Amar Mehta, May 2012. In *Universal Furniture Ind. AB v Government of Norway* (Stavanger Court, Case No. 99-00421, dated 19-12-1999 referred to in *Principles of International Taxation* by Anghard Miller and Lyn Oates, 2012) a Swedish company sold furniture abroad, that was assembled in Sweden. It hired an individual tax resident of Norway to look after its sales in Norway, including sales to a Swedish company, which used to compensate him for use of a phone and other facilities. Later, the company discontinued such payments and increased his salary. The Norwegian tax authorities said that the Swedish company had its place of business in Norway. The Norwegian court agreed, holding that the salesman's house amounted to a place of business: it was sufficient that the Swedish Company had a place at its disposal, i.e the Norwegian individual's home, which could be regarded as "fixed".

48. In the *Swiss Server* decision[Case No. II 1224/97 dated 6 September 2001, Finanzgericht of Schleswig-Holstein (Tax Court of First Instance)], D Co –tax resident

company of Germany – owned an Internet server installed at a rented place in Switzerland. The company stored programs and dealt with its Swiss client's files, in the server. The server functioned without involvement of D Co's employees in Switzerland. A second company, S Co, which was D Co's affiliate and a Swiss tax resident, managed the server (i.e. computer programs and information about D Co's clients in Switzerland). D Co argued before the German tax authorities that its Swiss server amounted to permanent establishment and its income attributable to it was exempt from German tax. The German tax authorities rejected this argument. In D Co's appeal, the German Tax Court of First Instance held that the server constituted D.Co's fixed place of business and a fixed place permanent establishment in Switzerland. The Court's view was that, for a fixed place permanent establishment to exist, it was unnecessary that the server had to be operated by human beings (i.e. employees of D Co, a contractor or any other enterprise). The Court pointed out that any equipment could amount to a fixed place permanent establishment even if it functioned fully automatically without human intervention. In so holding the Court also took into account Art. 5(3)(a) of the Germany-Switzerland tax treaty (which was similar to Art. 5(4)(a) of the OECD MC 2010). As per that provision, the term "permanent establishment" did not include facilities used solely for the purpose of storage, display or delivery of goods or merchandise belonging to the enterprise. In that respect, the Court expressed that only the assets that could be 'itemized' on the enterprise's balance sheet could be regarded as goods and merchandise. Therefore, in the Court's view, Art. 5(3)(a) of the tax treaty did not apply to the server used for storing the information that was supplied by D Co to its customers in Switzerland.

49. The Court also examined Art. 5(3)(e) of the Germany-Switzerland tax treaty. That provision negated existence of a fixed place permanent establishment if a fixed place of business was maintained solely for the purpose of (i) advertising, (ii) for the supply of information, (iii) for scientific research, or (iv) for similar activities that were of preparatory or auxiliary character. In this respect, the Court observed, the decisive criterion was whether the activity carried on in the said place of business formed an essential and significant part of the core business of the enterprise as a whole. In that context, the Court observed, D Co's activities through the server were not preparatory or

auxiliary since the transfer of information formed part of D Co's core business. Accordingly, the Court concluded, Art. 5(3)(e) of the Germany-Switzerland tax treaty did not apply in the present case.

The German Court took note of paragraphs 42.1 to 42.10 of the OECD Commentary on Art. 5, which distinguished between server hardware and server software. As per the said commentary, a server hardware constituted a permanent establishment if the content provider owned the server and he exercised his business through the server. In such a situation, it was not relevant whether the foreign enterprise used personnel in the host country where the server was situated. Therefore, the Tax Court of first Instance concluded that the above-mentioned computer server amounted to D. Co's fixed place permanent establishment in Switzerland.

50. In *Joseph Fowler v Her Majesty the Queen* 1990 (2) CTC 2351, the issue was whether a US tax resident individual who used to visit and sell his wares in a camper trailer, in fairs, for a number of years had a fixed place of business in Canada. The fairs used to be once a year, approximately for three weeks each. The court observed that the nature of the individual's business was such that he held sales in similar fairs, for two or three week periods, in two other *locales* in the US. The court held that conceptually, the place was one of business, notwithstanding the short duration, because it amounted to a place of management or a branch having regard to peculiarities of the business. The question before the AAR in *Golf in Dubai LLC* (AAR No.770/2008) was whether it could be deemed to have a fixed PE since the tournaments which it organized lasted only for 6-7 days. The AAR concurred, however, significantly, in the course of this order, which relied upon *Applegate v. FCT* 78 ATC 4054, where it was observed that the word, "permanent" is contrasted with temporary or transitory but does not connote "everlasting" and that the question is one of fact and degree. The AAR also noted that a place of business can, however, constitute permanent establishment – relying upon para 6 of OECD commentary even though it exists in practice "only for a very short period of time because of the nature of the business." Significantly, even though in the facts of the case, the AAR ruled that a fixed place of business existed, it acknowledged that, "even if the

business was done for short duration with intermittent gaps, the existence of fixed place of business at a particular spot, i.e. golf course may not be ruled out.”, no hard and fast rule can be laid down as to the number of days which can impart a degree of permanence to the place of business to make it a fixed place.

51. It would, for the purposes of deciding whether FOWC carried on business in India, through a fixed place of business (which the revenue argues is the Buddh international circuit) be necessary to consider the conditions and stipulations in the RPC. The following, in the opinion of the Court, are material conditions necessary for determination of whether FOWC had a PE in India:

(a) The Buddh International Circuit, is defined in Clause 1(q), as one suitable in every respect for the staging of the event, including permanent buildings, permanent structure, track laid-out, amenities, spectator viewing facilities, paddock building, media centre, car parks, helipads, garages, race control and administration, office administration, fuel and storage, tyre store, utilities, including backup power supplies, concrete-based areas suitable to host competitors and sponsor, vending and exhibition areas, international TV compounds etc. These specifications are more elaborately spelt out in Clause 5(e) which states that a circuit shall be constructed, laid out and prepared in accordance with the agreement, i.e. RPC, *"in a form and manner approved by the FOWC and the FIA"*.

(b) The inclusion of the event is through the FOWC's actions. In terms of its arrangement with the FIA, it is the exclusive agency through which any particular circuit is introduced for an event in a given calendar year.

(c) The term of the RPC is 5 years according to Clauses 3.3 and 3.4.

(d) In terms of Clause 11, Jaypee is obliged to take all action necessary to ensure that the pit, paddock buildings and surrounding areas within the circuit and land are open to receive the competitors, FOWC, affiliates of FOWC, FOWC's contractors and licensees, other personnel and equipment at all times during the period commencing 14 days before the race and ending 7 days after the race. It also has to assure security to these areas.

(e) Under Clause 14, the promoter is obliged to authorize access to parts of the circuit not open to the main public only through passes issued by the FOWC. Under Clause 14(b), the public cannot have access to the cars in any of the places where the competitor's mechanics may be called upon to work on them and under Clause 14(c), the validity of passes issued by FOWC is unquestionable.

(f) Under Clause 18.1, throughout the term during the access period, from the test session held at the circuit till the end of the event, the promoter, i.e. Jaypee cannot permit, access, enable, procure or in any manner encourage others to make, create, store, record or transmit any sound recording or visual or audio-visual footage whatsoever, for broadcast or any other purpose, of any of at or pertaining to the event, including cars, drivers, competitors etc. and in fact cannot make any such recording etc. within the confines of the circuit or the land over which Jaypee itself has control.

(g) Under Clause 18.2, Jaypee has to ensure that the terms of the ticket sale, giving admittance to the event include a condition imposed on the ticket holder not to make any kind of recording or take any recording device that can store or transmit any part of the event and that the ticket holder as a spectator could be filmed and a sound made by him could be recorded for broadcast or any other such item that the FOWC could impose on Jaypee.

(h) Jaypee is obliged to engage a third party approved by FOWC to carry out and perform on its behalf all service relating to the origination of the international television feed and host broadcasting for each event during the term specified in the guidelines published by FOWC and provided to Jaypee.

(i) Jaypee unconditionally and irrevocably under Clause 19.2 assigned to FOWC all copyright and other intellectual property rights, titles and interest which it may now or may in future possess, in any image or recording or other presentation or recording in any image/form whatsoever for the duration of the rights and also give consent to FOWC to deal with such rights as it pleased.

(j) Clause 20.1 obliged Jaypee to ensure that those accredited and authorized by FOWC were permitted to enter upon the premises to make sound, television or recordings or transmissions or make films or other pictures and use the facilities throughout the access period and also undertook to accord to such personnel all help and facilities that FOWC would require, including assistance for consent, permission or authorization with any local authority.

(k) Under Clause 21, Jaypee was prohibited from causing, permitting, enabling assisting or in any manner encouraging display of any advertisement (other than the normal advertisement displayed on any competitor's cars) or other displays on, near or which could be seen from the circuit or the land which, in the opinion of the FOWC, could prevent lawful transmission of images or recordings of the event. FOWC's say in this regard was final.

(l) In the Director's report of FOWC, the company significantly mentioned that its current company had entered into an agreement with FIA as a result of which FOWC acquired commercial interests in the championship which became operative from 01.11.2011 and that in exploitation of such commercial rights in the championship, the total revenues generated was US\$ 1205 million. There is an express advertence of the Indian part of the turn-over – inasmuch as the report said that the company paid US\$ 127 million to FOM in return of provision of services.

52. It is evident that for the duration of the event as well as two weeks prior to it and a week succeeding it, FOWC had full access through its personnel, the team contracted to it, both racing as well as spectator teams and could also dictate who were authorized to enter the areas reserved for it. No doubt, in terms of the agreement, i.e. RPC, Jaypee was designated as the promoter or the event host. A look at the RPC and its terms as well as the other terms contained in the agreement between the Jaypee on the one hand and All Sports, Beta Prema 2 as well as FOAM show that Jaypee's capacity to act - though it promoted the event, was extremely restricted. At all material times, FOWC had access - exclusively, to the circuit, and all the spaces where the teams were located. Jaypee created

the circuit for the purposes of the event and other events; yet, during the event, i.e. the F1 Championship, no other event was possible.

53. Having regard to the nature of the preceding discussion, it is evident that though FOWC's access or right to access was not permanent, in the sense of its being everlasting, at the same time, the model of commercial transactions it chose is such that its exclusive circuit access - to the team and its personnel or those contracted by it, was for up-to six weeks at a time during the F1 Championship season. This nature of activity, i.e racing and exploitation of all the bundle of rights the FOWC had as CRH, meant that it was a shifting or moving presence: the teams competed in the race in a given place and after its conclusion, moved on to another *locale* where a similar race is conducted. Now with this kind of activity, although there may not be substantiality in an absolute sense with regard to the time period, both the exclusive nature of the access and the period for which it is accessed, in the opinion of the Court, makes the presence of a kind contemplated under Article 5(1), i.e. it is fixed. In other words, the presence is neither ephemeral or fleeting, or sporadic. The fact that RPC-2011's tenure is of five years, meant that there was a repetition; furthermore, FOWC was entitled even in the event of a termination, to two years' payment of the assured consideration of US\$ 40 million (Clause 24 of the RPC). Having regard to the OECD commentary and *Klaus Vogel's* commentary on the general principles applicable that as long as the presence is in a physically defined geographical area, permanence in such fixed place could be relative having regard to the nature of the business, it is hereby held that the circuit itself constituted a fixed place of business.

Did FOWC carry on business and if so, did it carry on business and commercial activity in India?

54. For a better understanding and appreciation of this question, it would be essential to recount briefly, certain salient facts. FIA is the motorsport regulatory authority. It had a pre-existing arrangement with Formula One Administration Ltd. (FOA), which held all commercial rights. In terms of a Concorde Agreement, between FIA, FOA and FOWC, it was decided that all commercial rights would continue with FOA till 31.12.2010 and then vest for 100 years (01.01.2011 to 31.12.2110) with FOWC, which was called the

"Commercial Rights Holder" (CRH). The Concorde Agreement assured the participating teams (detailed in a schedule) that the FIA had exclusive right in the F1 Championship and was "entitled to grant to the Commercial Rights Holder" the exclusive right to exploit the commercial rights in the F1 championship." Subject to these conditions, each team undertook to "participate in the FIA F1 Championship each year for every Event" and make cars available and compete in fact, every team undertook to participate in each event with two cars. FIA undertook to ensure that events were held and the CRH (i.e. FOWC) undertook to enter into contracts with event promoters to host such events [4.3(c)]. Under Clause 10, the FOWC had the right to draw the FIA F1 Championship for any season to be approved by FIA (which could not be unreasonably withheld). FIA also gave its undertakings. Under Clause 11, the right to issue passes is with FOWC. Clause 17 sets out the conditions of payment to the teams.

55. If the terms of the Concorde Agreement are read conjointly with the RPC-2011, it is apparent that the CRH, which is the FOWC, only and none else has the right to include a venue in any FIA annual calendar. FIA is bound to accord permission for such inclusion; FOWC is the exclusive commercial rights holder of a host of rights (evident from the recital in the Concorde Agreement that FIA, FOWC and other members of the CRH group had entered into such contracts to enable commercial exploitation of the rights for a 100 year period). Under the RPC-2011, only FOWC has exclusive rights towards making sound, television and other recordings and exploitation of its media rights. FOWC has copyright over databases and all related information, etc. generated, during the event, including practice sessions etc. (Clause 22, RPC-2011). Only those accredited by FOWC can enter the promoter's premises and circuit to make sound and television recordings, etc.

56. It is quite apparent that save a limited class of rights (those relating to paddock entry, ticketing, hospitality at the venue and a restricted class of advertising), all commercial exploitation rights vest exclusively with FOWC. FOWC did accept them and was entitled to charge fees or such other consideration as it deemed appropriate for the recording, telecasting, broadcasting and creation of internet and media rights, including

data transmission, and all other such commercially exploitable rights. In addition, FOWC charged, by Clause 24 of RPC-2011, a fee of US\$ 40 million annually from Jaypee, in relation to the race event or FIA F1 Championship event conducted on the circuit in India.

57. It is also noteworthy that by virtue of the Concorde Agreement, the teams have undertaken to engage in every race - with the added condition that each team would involve two cars for every race in any circuit chosen by FOWC. RPC-2011 also assured that the FOWC would ensure that such team did in fact participate in the event in the Buddh Circuit. This is an important fact- which shows that the entire event, i.e. F1 FIA Championship in the circuit was organized and controlled in every sense of the term by FOWC. The peculiarity of this activity is such that FOWC's dominant role is evident; it is the moving spirit with all pervasive presence and control through the teams, which are contracted to participate in the event. In fact, it creates the event, i.e. the race. Each actor, such the promoter/Jaypee, the racing teams, the constructing teams and the other affiliates, plays a part in the event. FOWC's participation and the undertakings given to it by each of these actors, who are responsible for the event as a whole, brings out its central and dominant role. If Jaypee is the event promoter, which owns the title to the circuit in the sense that it owns the land, FOWC is the commercial rights owner of the event, by virtue of the Concorde Agreement. FIA parted with all its rights over each commercial right it possessed to FOWC. The bulk of the revenue earned is through media, television and other related rights. The terms on the basis of those rights is the event. The conceptualization of the event and the right to include it in any particular circuit, such as Buddh Circuit is that of the FOWC; it decides the venue and the participating teams are bound to it to compete in the race in the terms agreed with the FOWC. All these, in the opinion of the Court, unequivocally, show that the FOWC carried on business in India for the duration of the race (and for two weeks before the race and a week thereafter). Every right, which it possessed was monetized; the US\$ 40 million which Jaypee paid was only a part of that commercial exploitation by the FOWC.

58. Consequently, the Court concludes that the FOWC carried on business in India within the meaning of expression under Article 5(1) of the DTAA. It is consequently held

that the AAR fell into error of law in holding that FOWC did not function through a PE/carry on business through a fixed place of business in India.

Regarding Question No.2, did the FOWC carry on business through its agents under Article 5(4) or Article 5(5)

59. The discussion on whether there was or were dependent agents which led to FOWC's PE is rendered academic, in view of this court's finding that there was a fixed PE. However, we are conscious that this judgment is subject to appeal; therefore we proceed to discuss the issue of existence of dependent PEs.

60. The relevant provisions of the DTAA- Articles 5 (4) and 5 (5) are extracted below:

*"4. A person acting in a Contracting State for or on behalf of an enterprise of the other contracting State - **other than an agent of an independent status** to whom paragraph (5) of this Article applies, shall **be deemed to be a permanent establishment of that enterprise** in the first mentioned State if:*

*(a) **he has and habitually exercises in that State, an authority to negotiate and enter into contracts for or on behalf of the enterprise, unless his activities are limited to the purchase of goods or merchandise for the enterprise; or***

*(b) **he habitually maintains in the first-mentioned Contracting State a stock of goods or merchandise from which he regularly delivers goods or merchandise for or on behalf of the enterprise; or***

*(c) **he habitually secures orders in the first-mentioned State, wholly or almost wholly for the enterprise itself or for the enterprise and the enterprises controlling, controlled by, or subject to the same common control, as that enterprise.***

5. An enterprise of a Contracting State shall not be deemed to have a permanent establishment in the other Contracting State merely because it carries on business in that other State through a broker, general commission agent or any other agent of an independent status, where such persons are acting in the ordinary course of their business. However, if the activities of such an agent are carried out wholly or almost wholly for the enterprise (or for the enterprise and other enterprises which are

controlled by it or have a controlling interest in it or are subject to same common control) he shall not be considered to be an agent of an independent status for the purposes of this paragraph."

61. The revenue's argument was that the terms of Article 5 were satisfied if the place is at the disposal of the enterprise to be used in business. He has referred to paragraph 4 of OECD commentary as under:-

"4. It is immaterial whether the premises, facilities or installations are owned or rented by or are otherwise at the disposal of the enterprise.... Again the place of business may be situated in the business facilities of another enterprise.

4. 1 As noted above, the mere fact that an enterprise has a certain amount of space at its disposal which is used for business activities is sufficient to constitute a place of business. No formal/legal right to use that place is therefore required."

62. It was argued that dependent agents worked for and on behalf of the enterprise (FOWC) from the place made available to the enterprise and in such a situation it may not be necessary to examine the PE under para 4 or 5 of Article 5 and to apply more stringent conditions of having authority to conclude contracts. He has referred to para 10 of OECD commentary as under:-

"The business of an enterprise is carried on mainly by the entrepreneur or persons who are in a paid-employment relationship with the enterprise personnel. This personnel includes employees and other persons receiving instructions from the enterprise (e.g. dependent agents). The powers of such personnel in its relationship with third parties are irrelevant. It makes no difference whether or not the dependent agent is authorised to conclude contracts if he works at the fixed place of business (see paragraph 35 below).

"35. Under paragraph 5, only those persons who meet the specific conditions may create a permanent establishment; all other persons are excluded. It should be borne in mind, however, that paragraph 5 simply provides an alternative test of whether an enterprise has a permanent establishment in a State. If it can be shown that the enterprise has a permanent establishment within the meaning of paragraphs 1 and 2 (subject to the provisions of paragraph (4), it is not necessary to show that the person in charge is one who would fall under paragraph 5."

Since FOWC has to exploit commercial rights arising from races and this business is

carried on through exploitation of these commercial rights either by itself or through any one or more members of the CRH group as mentioned in the Concorde Agreement, FOWC is obligated to propose consolidated accounts incorporating profits of all entities forming part of CRH group. The revenue had relied on the fact that commercial rights were originally owned by FIA, transferred in 2001 to SLEC Holding Company (parent company of FOWC) for a consideration, then given to FOAM and w.e.f. 1.1.2011 transferred to FOWC. It was urged that FOWC's three affiliates i.e. Formula One Management Ltd. ('FOM'), Allsports Management SA and Beta Prema 2 Ltd. were its agents who carried on its business and on its behalf, through the fixed place. It was submitted that that all the commercial rights originally vested and were granted to only FOWC under the Concorde agreement, with a stipulation that FOWC may transfer or assign such rights only to other group entities. It has further said that the commercial rights could only stay within the Commercial Rights Holder group (CRH group), which included FOWC, its affiliates and other entities. These entities acted for and on behalf of Jaypee, which did not get anything from these arrangements, and these entities were not holder of commercial rights. Therefore, he argued that these entities acted for and on behalf of FOWC. According to him FOM was business manager of FOWC, it had a business management agreement with FOWC, 146 employees of FOM were in India for 40 days and based on these facts Revenue's counsel has concluded that FOM managed the entire business of FOWC in India. As regards Allsports, which carried out sale of tickets, it too acted on behalf of FOWC because no commercial rights were transferred to Allsports. Similar conclusion arguments were made in case of Beta Prema 2 for the reason that it exploited certain commercial rights available only with FOWC. It was also submitted that PE gets constituted under Article 5(4) of DTAA also for the reason that FOM is agent and business manager of FOWC and Beta Prema 2 and All Sports have no independent status.

63. AAR rejected the revenue's contention, holding that the theory of Revenue that all three entities Beta Prema 2, Allsports, FOM were acting on behalf of FOWC was unfounded. It was held that there is no evidence to suggest that Beta Prema 2, All Sports and FOM are acting on behalf of the FOWC and all arrangements and agreements in

relation to activities performed by these 3 entities are sham.

64. Article 5(5) has certain preconditions if an entity has to be treated as dependent agent. The agent must have the authority to conclude contracts, which bind the represented enterprise, and *it* must habitually exercise such authority. If these positive preconditions are met, then only an enterprise shall be deemed to have a PE in that state in respect of any activities, which that person undertakes for the enterprise. The contention that because the three entities were subsidiaries of FOWC, they acted on its behalf and thus become dependent agents is insubstantial. The mere circumstance that the three subsidiaries had a connection with FOWC was not enough; what is to be shown is that the contracts they entered into and the businesses they were engaged in, was for and on behalf of FOWC. Each of the three agreements independently entered into by them with Jaypee contains no pointers to this fact.

Re Question No. 3: Was the payment made by Jaypee to FOWC in the nature of royalty, under the DTAA, for the use of the latter's trademark

65. FOWC and Jaypee argue that the rights given to the latter under the RPC was the grant of a bundle of rights the basic objective of which were to enable it, as the promoter to stage a motor racing event in India at its circuit, the Buddh International Circuit, that would be an official round of the FIA Formula One World Championship, in which all participant teams and drivers in that Championship would therefore compete. The permission to use the F1 marks for purposes limited to advertising the Event was incidental to the grant of that principal right to enable hosting of the event. They also argue that under the terms of the RPC and the ALA Jaypee had no independent right of commercial exploitation of the marks. Therefore, the two independent contracting parties agreed that no consideration was payable to FOWC in relation to the use of the marks. Though the right included the right to name the event specifically, it was predominantly in the nature of a pure commercial right. It was argued that the payment to FOWC was the dominant purpose of securing the right to "put on" (i.e. host, stage and promote) at its circuit and as its own commercial venture, an official round of a globally popular international sporting series. The consideration was not paid for the use of any copyright, trademark or other intellectual property mentioned in the definition of 'royalty', whether

under second Explanation to Section 9(1)(vi) of the Act or Article 13(3) of the India-UK DTAA. The ALA was incidental to and a mere consequence of the RPC. Its purpose was to ensure that the use of F1 and related marks would be strictly controlled and limited to the sole purpose of promoting the event(s), and that Jaypee and other third parties would not be permitted to use the marks in connection with any other unauthorized activity or commercial venture that could damage or dilute the reputation and prestige of the Championship. FOWC and Jaypee therefore urge that the AAR's finding that the payment amounted to "royalty" is contrary to law. They argue that the AAR also erred in distinguishing and not following *Sheraton*(supra). The revenue on the other hand, supports the AAR's conclusions and findings; it urges that the terms of the ALA and the RPC clearly show that the payment of US\$ 40 million was to enable Jaypee the use of the F1 trademark and logo; they point out that these marks figured prominently in the trackside advertisements and the tickets that were printed. The use of the logo, to promote the event, therefore meant use of the F1 marks. The nomenclature or terms of an agreement are not always determinative of the true nature of the transaction; in this case, it clearly was to permit the use of the F1 mark. The character of the event would have been different had the F1 marks not been used by Jaypee. It was held that the popularity of the event is a result only of the use of the Marks, and that without those marks it would not enjoy its popularity otherwise.

66. Under trademark law, particularly in India, trademark use even for advertisement purposes is to be preceded by prior consent of the proprietor and any unauthorized use of the trademark without such prior permission of the proprietor could lead to an infringement of the trademark (in India, under section 29 of the Trade Marks Act,1999). To secure registration for the marks in India from the Trademark Registry, FOWC and Jaypee entered into the ALA. The function of the ALA was (a) to provide for a strictly limited usage of the marks i.e. only for advertisement and promotion of the Indian Grand Prix Event; (b) to provide for restrictions on usage of such marks, i.e. not for any commercial purposes such as use on merchandise, etc.

67. The grant of a right, in the form of license to use the trademark is primarily to be utilized in the licensee's product. In a typical case of licensing, the trademark proprietor

does not wish to mark its products in an area; it licenses the mark, to be used by the licensee's products, subject to limitations. The licensee has no right to initiate legal proceedings, in the event of infringement, unless specifically authorized; the property in the mark always vests with the owner. Even the use of the mark by the licensee inures to the owner, as the latter's continuous use, in terms of Section 48 of the Trademarks Act. Typically, therefore when a trade vendor or establishment sells branded goods, it is incorrect to state that the income earned by the vendor is generated from the brand or mark, associated with the product, rather than from sale of the product itself. It would be incorrect therefore, to conclude that income earned is not from the sale of the product, but from marketing intangibles connected with the reputation of the mark, though that reputation guarantees a high demand for the product, from which the seller benefits. Likewise, in the case of distribution, a distribution agent is under an agreement with the manufacturer to sell its good; it also possesses the right to advertise the goods and brands of the manufacturer. This implies a license of the manufacturer's trademark. In such an event, the distributor need not pay for the right to use the intellectual property under which the goods are sold; he merely pays for obtaining the exclusive commercial right to sell the goods he buys from the manufacturer for enabling onward sale.

68. Para 10.1 of OECD commentary on Article 12 of the Model Convention states that payments solely made in consideration for obtaining the exclusive distribution rights of a product or service in a given territory are not royalty, since the resident distributor does not pay for the right to use the trade name or trade mark under which the products are sold but merely obtains the exclusive right to sell in his state of residence the product that he is agreeing to buy from the manufacturer; such payments will be characterized as business income.

69. It is relevant here to consider the conditions in the RPC and the ALA, which FOWC entered into with Jaypee. Under recital B to the RPC, FOWC clearly has the exclusive right to exploit the commercial rights in the championship and to award Jaypee the right to host, stage and promote F1 Grand Prix events. Clause 17, states that FOWC would through reasonable endeavors ensure that at least sixteen cars participate in the Event. Clause 18 forbids Jaypee from making any audio or visual image of the event;

likewise there are restrictions in clause 19 of the RPC. Clause 23.2 permits FOWC to make incidental use of I.P. rights solely for the limited purpose of facilitating Jaypee to promote the event. Under the RPC Jaypee remains liable to pay the full contractual amount in the year of termination and in the subsequent year, the right to use trademarks, logos and IP Rights ceases instantly, the moment termination takes place. This is a strong pointer to the fact that the amounts payable by Jaypee to FOWC under the RPC are really for the privilege of hosting and staging the championship race and not for the IP rights, which in any event, could be utilized by it only to promote the race and for no other purpose.

70. Clauses 23.3 and 23.4 of the RPC are to be read in conjunction with the ALA. The ALA does not confer any additional rights, neither was a license nor any form of right to use the trademark given to Jaypee by FOWC which resulted in royalty payment within the meaning of Article 13 of the DTAA.

71. The judgment in *Director of Income Tax v. Ericsson A.B.* [2012] 343 ITR 470 (Del), held that a lump-sum payment which is not based on or connected with the extent of the user of the IP rights would not constitute "royalties" within the meaning of the DTAA. In the present case, the payments made under the RPC were separate lump-sum amounts in respect of the three separate race events held in each of the three (3) years 2011 to 2013. It is not a payment, which is based on either the number of tickets sold or the total amount of revenue earned by Jaypee in each of the said years or indeed on any other measure. In the present case, the lump sum payable to FOWC by Jaypee would likewise, not constitute royalties. Importantly, recital (B) of the ALA specifically stated that FOWC wished to grant a license to Jaypee permitting only the incidental use of certain IP rights and artwork "*solely for the limited purpose of facilitating the hosting, staging and promotion of the event*". The definition of "permitted use" in clause 1.1 of the ALA states that it means only the incidental use of the licensed marks and materials "*for the purpose of hosting, staging or promoting the event, but for the avoidance of doubt, not to include use for any merchandising or other products or services whatsoever, whether distributed free of charge or for sale*". Clauses 2.2 and 6.2 of the ALA provide that the ALA will continue only until the RPC terminates or expires; Clause 2.3 of the ALA

prohibits Jaypee from using any of the licensed marks, or as part of the name of the circuit, any corporate name, any domain name, website address or other URL identification or equivalent used in association with Jaypee. Jaypee thus has no IP rights whatsoever independently of the staging and hosting of the event. The undertakings given by Jaypee, set out in Clauses 3.1(e) and 3.6 of the ALA too reinforce this conclusion. These are strong indications that the parties did not intend, through the RPC and the ALA, to license the trademark. Thus, it does not amount to royalty under the DTAA. The court is in agreement with FOWC's position on the definition of "royalty" as set out in the second Explanation to Section 9(1)(vi) of the Act; it is significantly broader than the definition of "royalties" set out in Article 13(3) of the India-UK DTAA. The definition in the Act specifically covers and includes lump-sum payments, whereas Article 13(3) of the DTAA only refers to payments.

72. The impugned order neither contains any discussion nor finding whatsoever on this crucial issue even though it goes to the root of the entire case. The entire tenor of the agreement- even the main purpose of the RPC, is not for the grant of trademark rights or privilege or license to use. The payments made to it under the RPC are not "royalty" either under the Act or the DTAA, they most certainly are not for the use of trademarks or IP rights, but rather for the grant of the privilege of staging, hosting and promoting the Event at the promoter's racing circuit in Noida(NCR). FOWC under the RPC, made available to Jaypee all of the elements which constitute the event. In particular, this includes nominating (to FIA) the promoter's event for inclusion in the official F1 racing calendar; after such inclusion the F1 racing teams with their F1 cars and drivers were bound to participate in Jaypee's event held at the Promoter's racing circuit, strictly in conformity with the requirements of the F1 Sporting and Technical Regulations and the FIA Sporting Code. Therefore, the grant of F1 rights by the FOWC to Jaypee is merely incidental to the hosting and staging of the event by it, and this is clear from the fact that the use of rights by Jaypee has been strictly confined and limited to use only for the promotion of the event, and for no other purpose and in no other manner whatsoever.

73. In *Sheraton International Inc* (supra), this court upheld the findings of the ITAT, which had concluded that when the main work of the foreign collaborator was to render

services in relation to advertisement, publicity and sales promotion, its incidental use of the trademark did not amount to receipt of royalty by it:

“As regards the payments received on account of SCI and FFP the Tribunal noted that since the job undertaken by the assessee company was in the nature of „integrated business” arrangement, whereby services were rendered to its client-hotels in relation to advertisements, publicity and sales promotion of hotel business worldwide to further their mutual interest all services including the use of trademark and other services enumerated in the Article including the programmes, in issue, such as SCI and FFP were incidental to the said business arrangement between the assessee and its client- hotels. It concluded by holding that these programmes were not independent or separate from the main job undertaken by the assessee and since, the entire amount towards the service had been held by the Tribunal as business income, the contributions received by the assessee towards the said programmes i.e., SCI and FFP were also in the nature of business income. It thus rejected the contention of the Revenue that these contributions were in the nature of included services under Article 12 (4) (a) of the DTAA (see paragraph 114).

13. *In view of the aforesaid findings of the Tribunal that the main service rendered by the assessee to its client-hotels was advertisement, publicity and sales promotion keeping in mind their mutual interest and, in that context, the use of trademark, trade name or the stylized "S" or other enumerated services referred to in the agreement with the assessee were incidental to the said main service, it rightly concluded, in our view, that the payments received were neither in the nature of royalty under Section 9(1)(vi) read with explanation 2 or in the nature of fee for technical services under Section 9(1)(vii) read with explanation 2 or taxable under Article 12 of the DTAA. The payments received were thus, rightly held by the Tribunal, to be in the nature of business income. And since the assessee admittedly does not have a permanent establishment under the Article 7 of the DTAA „business income” received by the assessee cannot be brought to tax in India. The findings of the Tribunal on this account cannot be faulted. The Tribunal pointedly observed that there was no evidence brought on record by the Revenue to enable them to hold that the agreement was a colourable device, in particular, that the payments received were for use of trade mark, brand name and stylized mark "S". We agree with reasoning adopted by the Tribunal.”*

There is no doubt that the main object of the RPC and the relevant provisions of the ALA was not the permission to use the trademarks, but granting and designating Jaypee as the promoter of the event and laying out the rights of the parties, particularly FOWC as

regards the event, the spaces to be made available to it exclusively, the sole and exclusive rights over all event related activities, the right to exploit them commercially, etc. The use of the mark on the tickets sold by Jaypee was only incidental. The AAR's findings that the use of the mark and intellectual property rights benefited Jaypee, which paid for them, is entirely erroneous. Jaypee's permitted use, as it were, was for a limited duration and of an extremely restricted manner; this is contained in the definition of "permitted use" in the ALA:

"Permitted use means incidental use of the Licensed Marks solely as part of the Artwork and the Licensed Materials in accordance with the Design Guidelines and strictly as approved by FOWC, for the purpose of hosting, staging and promoting the Event but, for the avoidance of doubt, not to include use for any merchandising or other products or service whatsoever, whether distributed free of charge or for sale."

As event promoter and host Jaypee had to publicize the F1 Grand Prix Championship. Therefore, it was bound to use the F1 marks, logos and devices; however, it was not authorized to use the marks on any merchandise or service offered by it. This condition, in the opinion of the court, places the matter beyond the pale of controversy; the use of the trademarks were purely incidental. The conclusion of the AAR is therefore, incorrect. The answer to the question is that the amounts paid to FOWC by Jaypee were not "royalty" within the meaning of Article 13 of the DTAA, as they were business income and could not be brought to tax under the head of "royalty".

Question No. 4: Whether the AAR erred in its interpretation of Section 195 in Jaypee's application

74. Section 195 of the Income Tax Act reads as follows:

"195. Other sums

(1) Any person responsible for paying to a non- resident, not being a company, or to a foreign company, any interest (not being interest on securities) or any other sum chargeable under the provisions of this Act (not being income chargeable under the head "Salaries"³) shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, deduct income- tax thereon at the rates in force:

Provided that in the case of interest payable by the Government or a

public sector bank within the meaning of clause (23D) of section 10 or a public financial institution within the meaning of that clause, deduction of tax shall be made only at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode.

Explanation.- For the purposes of this section, where any interest or other sum as aforesaid is credited to any account, whether called " Interest Payable Account" or " Suspense Account" or by any other name, in the books of account of the person liable to pay such income, such crediting shall be deemed to be credit of such income to the account of the payee and the provisions of this section shall apply accordingly.

(2) Where the person responsible for paying any such sum chargeable under this Act (other than interest on securities, and salary) to a non-resident considers that the whole of such sum would not be income chargeable in the case of the recipient, he may make an application 1 to the ² Assessing] Officer to determine, ³ by general or special order], the appropriate proportion of such sum so chargeable, and upon such determination, tax shall be deducted under sub- section (1) only on that proportion of the sum which is so chargeable:

(3) Subject to rules made under sub- section (5), any person entitled to receive any interest or other sum on which income- tax has to be deducted under sub- section (1) may make an application in the prescribed form to the Assessing Officer for the grant of a certificate authorising him to receive such interest or other sum without deduction of tax under that subsection, and where any such certificate is granted, every person responsible for paying such interest or other sum to the person to whom such certificate is granted shall, so long as the certificate is in force, make payment of such interest or other sum without deducting tax thereon under sub- section (1). ”

75. The issue of payment to non-residents and the obligation to deduct tax u/s 195 of the Act on such payments vis-à-vis taxability of remittances has been deliberated upon by the Supreme Court in *GE India Technology Centre (P) Ltd Vs. CIT & Anr, [2010] 327 ITR 456 (SC)*. The Court held that the payer is bound to deduct tax at source only if the sum paid is assessable to tax in India and that Section 195 also covers composite payments which have an element of income embedded or incorporated in them. The Court clarified that though there is an obligation to deduct tax in respect of such composite payment but the obligation is limited to the appropriate portion of income which is chargeable under the head and in case of such payments which include amounts on which no tax is payable, recourse is to be made u/s 195(2) of the Act and in the absence of such action, tax is to be deducted on the entire composite payment. The

Supreme Court held as under:-

“In our view, section 195 (2) provides a remedy by which a person may seek a determination of the "appropriate proportion of such sum so chargeable" where a proportion of the sum so chargeable is liable to tax. The entire basis of the Department's contention is based on administrative convenience in support of its interpretation. According to the Department, huge seepage of revenue can take place if persons making payments to non-residents are free to deduct TAS or not to deduct TAS. It is the case of the Department that section 195 (2), as interpreted by the High Court, would plug the loophole as the said interpretation requires the payer to make a declaration before the Income tax Officer (TDS) of payments made to non-residents. In other words, according to the Department, section 195 (2) is a provision by which the payer is required to inform the Department of the remittances he makes to non-residents by which the Department is able to keep track of the remittances being made to non-residents outside India. We find no merit in these contentions. As stated hereinabove, section 195 (2) uses the expression "sum chargeable under the provisions of the Act." We need to give weightage to those words. Further, section 195 uses the word "payer" and not the word "assessee". The payer is not an assessee. The payer becomes an assessee-in-default only when he fails to fulfill the statutory obligation under section 195(1). If the payment does not contain the element of income the payer cannot be made liable. He cannot be declared to be an assessee-in-default. The abovementioned contention of the Department is based on an apprehension which is ill-founded. The payer is also an assessee under the ordinary provisions of the Income-tax Act. When the payer remits an amount to a non-resident out of India he claims deduction or allowances under the Income- tax Act for the said sum as an "expenditure". Under section 40 (a)(i), inserted, vide Finance Act, 1988, with effect from April 1, 1989, payment in respect of royalty, fees for technical services or other sums chargeable under the Income-tax Act would not get the benefit of deduction if the assessee fails to deduct TAS in respect of payments outside India which are chargeable under the Income-tax Act. This provision ensures effective compliance with section 195 of the Income-tax Act relating to tax deduction at source in respect of payments outside India in respect of royalties, fees or other sums chargeable under the Income-tax Act. In a given case where the payer is an assessee he will definitely claim deduction under the Income-tax Act for such remittance and on inquiry if the Assessing Officer finds that the sums remitted outside India come within the definition of royalty or fees for technical service or other sums chargeable under the Income- tax Act then it would be open to the Assessing Officer to disallow such claim for deduction. Similarly, vide the Finance Act 2008, with effect from April 1, 2008, sub-section (6) has

been inserted in *section 195* which requires the payer to furnish information relating to payment of any sum in such form and manner as may be prescribed by the Board. This provision is brought into force only from April 1, 2008. It will not apply for the period with which we are concerned in these cases before us. Therefore, in our view, there are adequate safeguards in the Act which would prevent revenue leakage.
Applicability of the judgment in the case of Transmission Corporation (supra)

10. In *Transmission Corporation's case* [1999] 239 ITR 587 (SC) a non-resident had entered into a composite contract with the resident party making the payments. The said composite contract not only comprised supply of plant, machinery and equipment in India, but also comprised the installation and commissioning of the same in India. It was admitted that the erection and commissioning of plant and machinery in India gave rise to income taxable in India. It was, therefore, clear even to the payer that payments required to be made by him to the non-resident included an element of income, which was exigible to tax in India. The only issue raised in that case was whether TDS was applicable only to pure income payments and not to composite payments which had an element of income embedded or incorporated in them. The controversy before us in this batch of cases is, therefore, quite different. In *Transmission Corporation case* [1999] 239 ITR 587 (SC) it was held that TAS was liable to be deducted by the payer on the gross amount if such payment included in it an amount which was exigible to tax in India. It was held that if the payer wanted to deduct TAS not on the gross amount but on the lesser amount, on the footing that only a portion of the payment made represented "income chargeable to tax in India", then it was necessary for him to make an application under *section 195 (2)* of the Act to the Income-tax Officer (TDS) and obtain his permission for deducting TAS at lesser amount. Thus, it was held by this court that if the payer had a doubt as to the amount to be deducted as TAS he could approach the Income-tax Officer (TDS) to compute the amount which was liable to be deducted at source. In our view, *section 195 (2)* is based on the "principle of proportionality". The said subsection gets attracted only in cases where the payment made is a composite payment in which a certain proportion of payment has an element of "income" chargeable to tax in India. It is in this context that the Supreme Court stated, "If no such application is filed, income-tax on such sum is to be deducted and it is the statutory obligation of the person responsible for paying such `sum' to deduct tax thereon before making payment. He has to discharge the obligation to TDS". If one reads the observation of the Supreme Court, the words "such sum" clearly indicate that the observation refers to a case of composite payment where the payer has a doubt regarding the inclusion of an amount in such payment

which is exigible to tax in India. In our view, the above observations of this court in Transmission Corporation case [1999] 239 ITR 587 (SC) which are put in italics have been completely, with respect, misunderstood by the Karnataka High Court to mean that it is not open for the payer to contend that if the amount paid by him to the non-resident is not at all "chargeable to tax in India", then no TAS is required to be deducted from such payment. This interpretation of the High Court completely loses sight of the plain words of section 195 (2) which in clear terms lay down that tax at source is deductible only from "sums chargeable" under the provisions of the Income- tax Act, i.e., chargeable under Sections 4, 5 and 9 of the Income-tax Act."

76. As is evident, the object of the provision is to clarify what proportion of the payment made by the payer is liable to tax deduction. In the present case, Jaypee, no doubt, supported FOWC's argument that payments made to the latter were not by way of royalties; at the same time, because of the doubt entertained, it sought clarification through the application to the AAR. Having regard to the conclusions reached by us that FOWC carried on business in India through a PE, at the circuit, it is held that payments made to FOWC, under the RPC were business income and accordingly chargeable to tax, according to the rates applicable in India at that time.

77. For the foregoing reasons, it is held that on the question of existence of FOWC's PE, in India, the answer is in the affirmative; a PE, within the meaning of Article 5 (1) of the DTAA existed, through which it conducted business and derived income, that is taxable in India. The findings of AAR are hereby set aside on this aspect. As regards dependent PE, the answer is in the affirmative; no dependent PE existed, through which FOWC carried on its business. As to royalty, in view of the findings rendered, the AAR's decision is reversed and set aside. On the issue of Section 195, Jaypee is bound to make appropriate deductions from the amounts payable to FOWC under provisions of the Income Tax Act.

78. The writ petitions of Jaypee and FOWC are partly allowed on the question of royalty and Section 195; the writ petition of the revenue is allowed partly on the issue of

FOWC's PE under Article 5 (1). No costs. The order shall be given *dasti* under signatures of court master, to the parties.

**S. RAVINDRA BHAT
(JUDGE)**

**NAJMI WAZIRI
(JUDGE)**

NOVEMBER 30, 2016

