

Tribunal holds that participation by a non-resident celebrity in a product launch event outside India, targeted for the Indian market, triggered business connection for him

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In brief

Recently,¹ the Mumbai bench of the Income-tax Appellate Tribunal (Tribunal) held that the income earned by an international celebrity for appearance/ participation in a product launch event outside India, for which all the benefits accrued to the payer in India, constituted an intangible business connection of the non-resident in India, and was taxable in India. Thus, the Indian payer (taxpayer) was obligated to withhold taxes on such payment under section 195 of the Income-tax Act, 1961 (the Act).

In detail

Facts

- The taxpayer was an Indian captive finance company of a global automobile group. It was engaged in the business of providing finance to customers purchasing vehicles from its group companies in India.
- Along with another Indian group entity (I Co), the taxpayer conducted an event in Dubai for the launch of a new model of a car for the Indian market. The event was for select Indian customers and special invites were given to

prospective buyers and journalists.

- An international celebrity was engaged for appearance in the event, in consideration of which the taxpayer paid an agreed amount without deduction of taxes to the celebrity.
- As per the agreement, the taxpayer and I Co had full rights to use all the footage, material, films, stills, interviews, etc., of the launch event, capturing the celebrity's presence, on free non-exclusive basis. The above could be used across all platforms for "below the line" publicity on internet, in press releases, news reports, social media, group magazine, etc., for a period of six months, and for an unlimited time period only for internal usage within the group.
- Expenses of the launch event, including payment to the celebrity, were claimed as deduction under section 37 of the Act by the taxpayer, implying that the same were incurred wholly and exclusively for the business of the taxpayer.
- The tax officer (TO) held that the payment made to the celebrity was taxable in India as royalty under section 9(1)(vi) of the Act.

¹ ITA No. 2195/ Mum/ 2017

The TO also alleged that the provisions of Article 12 (dealing with taxability of royalty) of the Double Taxation Avoidance Agreement (tax treaty) between India and USA also did not come to the rescue of the taxpayer. Thus, the TO raised a demand with regard to the tax that should have been withheld by the taxpayer under section 201 of the Act. This was affirmed by the Commissioner of Income-tax (Appeals).

Issue before the Tribunal

Whether the taxpayer was required to withhold taxes on the payment made to the celebrity for the product launch event in Dubai, for promoting the taxpayer's Indian business?

Taxpayer's contentions²

- The celebrity or his agent did not carry out any activities in India in relation to the fees received from the taxpayer.
- The event happened outside India; therefore, the appearance fee could not be treated as accruing or arising in India or deemed to be accruing or arising in India.
- Section 115BBA of the Act provides for the taxation of a non-resident entertainer with regard to any income received or receivable from his "performance in India." Thereby, any performance outside India is beyond the ambit of taxation in India.
- Participation in a product launch event outside India is not covered by any specific provisions of the India-USA tax treaty, including the article dealing with the income of entertainers. Thus, the

participation fee is covered under Article 23(1) of the India-USA tax treaty, which vests taxation right to the residence state, i.e., the USA.

Tribunal's ruling

- Section 5(2)(b) of the Act provides for taxation of income of a non-resident in India, that accrues or arises in India or is deemed to accrue or arise in India. In other words, the event resulting in the accrual of income must occur in India.
- Section 9(1)(i) of the Act extends the scope of income accruing or arising in India by including, in the deeming fiction, all income that directly or indirectly accrues or arises to a non-resident, "through" or from any business connection in India. As per Explanation 4 to section 9(1)(i) of the Act, the term "through" means and includes "by means of", "in consequence of", or "by reason of".
- Thus, income accruing or arising to a non-resident outside India by means of, in consequence of, or by reason of, any business connection in India, is taxable in India under section 5(2) of the Act.
- Referring to the Supreme Court's judgement,³ a business connection must be real and intimate, through which income directly or indirectly accrues to the non-resident. Thus, business connection includes not only a tangible connection such as people or businesses, but also includes real or intimate relationships that directly or indirectly results in an income accruing or arising to the non-resident.
- In the facts of the case, the target audience and the potential customers were in India. In addition, the celebrity appearance was for "below the line publicity" in India, and it seemed that even the Indian socialites and guests, directly or indirectly, were instruments to influence potential customer behaviour, rather than being potential customers in their own right.
- In addition, the taxpayer claimed the expenses as a deduction under section 37(1) of the Act, which essentially implied that the expenses were incurred "wholly and exclusively for the purposes of business" of the taxpayer in India. Once the expenses for holding this event were held to be in connection with business in India and all the benefits accrued to the taxpayer in India, the natural corollary thereto was that the participation in this event had a business connection in India.
- The scheme of taxation under section 115BBA of the Act deals with the mode and rate of taxation in the hands of specified taxpayers and could not be treated as a restriction on chargeability to tax under section 5 of the Act.
- Article 23(3) of India-USA tax treaty vests the right of taxation to the source country, i.e., India, in the instant case.
- Thus, participation in product launch event outside India, targeted for Indian market, triggered intangible business connection for the non-resident celebrity. The amount paid to non-resident celebrity was taxable in India, and the Indian taxpayer was obligated

² The taxpayer also contended that the Tribunal could not go beyond the case made by the TO against the Tribunal's observations on the taxability of the

payment under section 5(2)(b) read with section 9(1)(i) of the Act. For the sake of brevity, the said contentions and

Tribunal's ruling thereon has not been captured in this Tax Insight.

³ CIT v. RD Aggarwal & Co [1965] 56 ITR 20 (SC)

to withhold taxes on such payment under section 195 of the Act.

The takeaways

This ruling seems to broaden

the concept of business connection to also include an ‘intangible’ business connection, without any activities in India.

Let's talk

For a deeper discussion of how this issue might affect your business, please contact your local PwC advisor

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