

TAX FLASH NEWS

Payment for capturing and delivering of live coverage of cricket matches is neither FTS nor royalty under the India-UK tax treaty

Background

Recently, the Mumbai Bench of the Income-tax Appellate Tribunal (the Tribunal) in the case of IMG Media Limited¹ (the taxpayer) held that a payment received by the taxpayer for capturing and delivering of live audio and visual coverage of cricket matches is not taxable as Fees for Technical Service (FTS) under Article 13(4)(c) of the India-U.K. tax treaty (tax treaty). The taxpayer delivered the 'final product in the form of 'program content' by using its technical expertise and in that process the taxpayer does not 'make available' any technology/knowhow to the Board of Cricket Control of India (BCCI).

The Tribunal held that in order to constitute as royalty, the payment should have been made 'for the use of, or the right to use any copyright, etc'. However, in the instant case the payment was made to the taxpayer for producing the program content consisting of live coverage of cricket matches. The job of the taxpayer ends upon the production of the program content and the broadcasting is carried out by some other entity for which a license was given by the BCCI. Therefore, the question of transfer of all or any right does not arise in this case. Accordingly, the payment received by the taxpayer cannot be considered as 'royalty' under the tax treaty.

Facts of the case

- The taxpayer is incorporated in the U.K. and a tax resident of the same. The taxpayer had furnished a copy of the Tax Residency Certificate (TRC) before the Assessing Officer (AO) in support of the same. The taxpayer is a world leader in the field of multimedia coverage of sports events, including cricket.

- The taxpayer and the BCCI had entered into an agreement for capturing and delivering of the live audio and visual coverage of cricket matches conducted under the brand name Indian Premier League (IPL).
- The taxpayer contended that it had a service Permanent Establishment (PE) in India and income attributable to the Indian operations was computed under the Transactional Net Margin Method (TNMM). However, AO held that the amount received by the taxpayer was in the nature of FTS as well as royalty and accordingly assessed the entire amount of gross receipts.
- The Dispute Resolution Panel (DRP) held that the concept of a 'service PE' does not have an application, once it is held that the gross receipts are taxable as FTS or as royalty. The DRP held that the amount received by the taxpayer was in the nature of FTS under the Income-tax Act, 1961 (the Act) and the tax treaty.

Tribunal's ruling

Taxability as Fees for Technical Services

- The Tribunal observed that the taxpayer possesses the required expertise in live audio-visual coverage of matches and hence, the BCCI has engaged the taxpayer to produce and deliver live audio-visual coverage of the IPL cricket Matches conducted by it.
- The job of the taxpayer shall come to an end once the feed is produced and delivered to the licensed broadcasters in the form of digitalised signals. As per the agreement, the BCCI shall supply the equipment like cameras, microphones, etc. of the required quality to the taxpayer.

¹ IMG Media Limited v. DDIT (ITA No.1513/Mum/2014) (Mum) – Taxsutra.com

- Article 13(4)(c) of the tax treaty uses the expression 'make available'. Though the said expression has not been explained in the context of the India-U.K. tax treaty, the taxpayer claimed that the principle or concept of 'make available' explained in the India-USA protocol should also be applied in respect of the India-U.K. treaty also.
- The taxpayer produces the feed (program content) of live coverage of audio-video visuals of the cricket matches by using its technical expertise. After that, it delivers the feed in the form of digitalised signals to the licensees (broadcasters). There was no dispute that the licensees receive the feed on behalf of the BCCI.
- What was delivered by the taxpayer was a final product in the form of program content produced by it by using its technical expertise. The taxpayer did not deliver or make available any technology/knowhow to the BCCI.
- Production of 'program content' by using technical expertise is altogether different from provision of technology itself. In the earlier case, the recipient would receive only the product and he could use it according to his convenience, whereas in the latter case, the recipient would get the technology/knowhow and hence he would be able to use the technology/knowhow on his own in order to produce any other program content of a similar nature.
- In the latter case, the technology/knowhow would be 'made available' to the recipient, in which case the payment given would fall under the category of FTS. However, in the former case, there is no question of making available any technology/knowhow and hence such payment is to be considered as payment for production of 'program content or live feed' and not for supply of technology.
- The object of the production of live feed was to offer quality coverage of the live cricket matches to the viewers. The taxpayer's job was restricted to the production of live coverage and the job of broadcasting the same was undertaken by the BCCI. The BCCI, in turn, had given license to certain companies to undertake the job of broadcasting of the live coverage on behalf of BCCI.
- Since the taxpayer was supplying the live coverage in the form of digitalised signals, it had to ensure that the broadcasters also do have the compatible technology and equipment so that the live coverage can be broadcasted without compromising on the quality. The same was sought to be achieved by synchronising the quality of technical equipment between the taxpayer and the broadcasters (licensees). Such kind of synchronisation of technology would ensure a seamless function and complete coordination between the taxpayer and the broadcasters.
- Thus, there is a difference between the technology involved in the production of live coverage feed and the technology necessary to broadcast the same in the required quality. Hence, in order to ensure and maintain the quality of live coverage feed, it becomes necessary on the part of the taxpayer to specify or oversee the technology available with the broadcasters.
- The specification of the technical requirements does not mean that the taxpayer had supplied the technology involved in the production of live coverage feed to the broadcasters. If that be the case, the broadcasters should be in a position to use the technology in order to produce the live feed on their own.
- In the present case, the tax department had not established that the broadcasters (who are acting on behalf of the BCCI) or the BCCI itself had acquired the technical expertise from the taxpayer which would enable them to produce the live coverage feeds on their own after the conclusion of IPL cricket matches. Consequently, the essential condition of the 'make available' clause fails and hence the amount received by the taxpayer cannot be considered as FTS under Article 13(4)(c) of the tax treaty.
- The DRP had observed that the live coverage of cricket matches involved instant and continuous production and broadcasting of live matches. Further, the broadcasters were able to split the program content in order to insert advertisements. All these aspects, would not bring the payment under the category of FTS. It only shows the technical expertise of the taxpayer to produce flexible program content to provide enhanced viewing quality of live matches.
- The decision in the case of *Nimbus Sport International Pte Ltd*² was distinguishable on facts of the present case, since the said decision was covered by the India-Singapore tax treaty and the principle or concept of 'make available' had not been examined by the Tribunal.
- Since the amount received by the taxpayer was not FTS under Article 13(4)(c) of the tax treaty, it was not necessary to examine its taxation under Section 9(1)(vii) of the Act.

Taxability as royalty

- The job of the taxpayer ends upon production of the 'program content'. According to the taxpayer, the program content shall become the property of the BCCI. In the present case, the tax department had not brought any material on record to show that the taxpayer had kept the ownership rights over the program content.

² *Nimbus Sport International Pte Ltd* [2012] 18 taxmann.com 105 (Del)

- The taxpayer had received the money for producing live coverage of cricket matches. The equipment required for the said purpose may be brought by the taxpayer itself or it may be provided by the BCCI.
- Under commercial terms, if the taxpayer was required to bring the equipment, then the consideration payable for the production of live coverage of cricket matches should go up. Thus, it was a simple case of a commercial agreement entered between the parties with regard to the modalities to be followed and the same was not a determining factor to decide about the nature of payment received by the taxpayer.
- A careful perusal of the definition of 'royalties' under the tax treaty indicates that the payment, in order to constitute as royalty, should have been made 'for the use of, or the right to use any copyright, etc'. However, in the instant case, the payment was made by BCCI to the taxpayer for producing the program content consisting of live coverage of cricket matches. There was nothing on record which indicates that the taxpayer had retained the ownership of the program content.
- The Tribunal relied on the decision of the Delhi High Court in the case of Delhi Race Club³ where it has been held that live television coverage of any event is a communication of visual images to the public and would fall within the definition of the word 'broadcast' in Section 2(dd) of the Copyright Act. However, Section 13 does not contemplate broadcast as a work in which 'copyright' subsists, as the said Section contemplates 'copyright' to subsist in literary, dramatic, musical and artistic work cinematograph films and sound recording. Accordingly, broadcast or live coverage does not have a 'copyright'.
- The Tribunal observed that though the said decision of the Delhi High Court was rendered in the context of the provisions of Section 194J of the Act; yet the Section imports the definition of the term 'royalty' from Explanation 2 to Section 9(1)(vi) of the Act. Under the definition given in the said provision, 'royalty' means a consideration for the transfer of all or any rights (including the granting of a licence) in respect of a patent, invention, model, design, secret formula or process or trade mark or similar property.
- In the instant case, the BCCI becomes the owner of the program content produced by the taxpayer. The job of the taxpayer ends upon the production of the program content and the broadcasting was carried out by some other entity to which a license was given by the BCCI. Hence, the question of a transfer of all or any right does not arise in the facts and circumstances of the instant case.
- Accordingly, the payment received by the taxpayer cannot be considered as 'royalty' under the tax treaty. Though, it was not necessary to examine the applicability of provisions of Section 9(1)(vi) of the Act, yet the facts discussed above would show that the payment received by the taxpayer cannot fall within the purview of Section 9(1)(vi) of the Act also.

Our comments

In the existing case, the Mumbai Tribunal has held that the payment for capturing and delivering of live audio and visual coverage of cricket matches cannot be considered as FTS under the tax treaty since the taxpayer delivered the final product in the form of program content produced by it by using its technical expertise and in that process the taxpayer did not 'make available' any technology/know-how.

The Tribunal also held that the payment cannot be treated as 'royalty' since BCCI becomes the owner of the program content produced by the taxpayer. The job of the taxpayer ends upon the production of the program content and the broadcasting is carried out by some other entity to whom a license was issued by the BCCI. Hence, the question of a transfer of all or any right does not arise.

The Mumbai Tribunal in the case of Neo Sports Broadcast Private Ltd.⁴ had held that cricket matches cannot be equated with either literary, dramatic, musical, artistic work or a sound recording. The live telecasting could not be said as 'work' and could not be considered as a transfer of copyright. Accordingly, the payment for a telecast of live matches was not in the nature of 'royalty'.

⁴ ADIT v. Neo Sports Broadcast Private Ltd. v. [2011] 133 ITD 468 (Mum)

³ CIT v. Delhi Race Club [2015] 273 CTR 503 (Del)

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