



## If the satellite communication system monitoring equipment is in India, the taxpayer is rendering services in India

### Background

Recently, the Chennai Bench of the Income-tax Appellate Tribunal (the Tribunal) in the case of Intelsat Global Sales and Marketing Ltd.<sup>1</sup> (the taxpayer) dealt with a case where the taxpayer is engaged in providing satellite capacity through space segment and related services to the Indian customers. Communication system monitoring equipment (the equipment) belonging to the taxpayer's Associated Enterprise (AE) was installed in India, which was used for testing the signal to be uploaded by Indian companies. The Tribunal held that so long as the taxpayer is maintaining the equipment in India, it would be construed that services have been rendered in India.

### Facts of the case

- The taxpayer is incorporated in the U.K. and is engaged in providing satellite capacity through space segment and related services to Indian customers.
- The taxpayer claims that it has no PE in India, and it is not providing any service in India. Further, the signal/data downlinked by VSNL and other companies in India namely, telecasting companies/telecom operators are received from the transponder maintained by the taxpayer's satellite in the orbit. The signal/data uplinked to the transponder was processed and transmitted/downlinked to the earth station.

- The taxpayer's AE, viz. Intelsat Global Service Corporation, USA owned the equipment, whereas the earth stations are owned, operated and maintained by VSNL or the respective companies/operators in India.
- The taxpayer submitted that the basic function of the equipment is to monitor the signals. Whereas the function of the earth station is to receive the downlinked signal from the transponder provided by the taxpayer.
- The taxpayer contended by referring to Article 5 of the India-UK tax treaty (the tax treaty) that it has no Permanent Establishment (PE) in India. Merely because the Assessing Officer (AO) held that there was the business connection in India that cannot lead to taxability of the non-resident, which is covered by the beneficial provisions of the tax treaty.
- Referring to the decision of the Supreme Court in Toshoku Ltd.<sup>2</sup> and Ishikawajima Harima Heavy Industries Ltd.<sup>3</sup>, the taxpayer contended that at the best, the tax department could tax a portion of the income that may be attributable to the operations carried out in India. Referring to Article 5(6) of the tax treaty, the taxpayer contended that a company, which is a resident in the U.K. and controls a company which is the resident of India or which carries on business in India should not by itself constitute either a PE or otherwise. Therefore, merely because an AE existed in India that cannot be a reason to conclude that the taxpayer has a PE in India.

<sup>1</sup> Intelsat Global Sales and Marketing Ltd. v. ITO [I.T.A. Nos. 1070 to 1074 & 1621/Mds/2010, 1562/Mds/2011, 2246/Mds/2012, 470/Mds/2014, 432/Mds/2015 & 516/Mds/2016 - Assessment years: 2002-03 to 2012-13]

<sup>2</sup> CIT v. Toshoku Ltd. [1980] 125 ITR 525 (SC)

<sup>3</sup> Ishikawajima-Harima Heavy Industries Ltd. v. DIT [2007] 158 Taxman 259 (SC)

- The taxpayer relied on various case laws<sup>4</sup> to contend that the payments did not constitute the royalty.
- According to the tax department, the equipment installed and maintained in India for testing the quality of the signal received in India has to be necessarily treated as an earth station, and the taxpayer has a PE in India. The taxpayer has the business connection in India hence, profit and gain arising out of the services rendered has to be necessarily treated as business income in India. Accordingly, even as per the tax treaty the same has to be taxed only in India.

### The Tribunal's decision

- If the taxpayer is maintaining a satellite in the orbit, and Indian companies are uploading the signal/data, which was received by satellite and transmitted to India, then the taxpayer may not be rendering any service in India.
- In this case, the taxpayer is maintaining equipment at Chandigarh and Chennai for testing the quality of the signal. The very objective of the agreement between the taxpayer and VSNL is to uplink and downlink the signal, and the taxpayer has to maintain the proper quality of the signal, which was transmitted to India or the earth station.
- Before the Tribunal, the taxpayer claimed that the equipment installed in India at Chandigarh and Chennai belongs to its AE. The fact remains that this equipment is for testing the signal, which was uploaded by VSNL and other Indian companies while it was downlinked in India. So long as the taxpayer is maintaining the equipment in India, it has to be construed that the taxpayer is rendering services in India.
- Now the taxpayer claims that the equipment installed at Chandigarh and Chennai was dismantled from the year 2004. However, this fact of the dismantling of machinery/equipment is not brought on record by the authorities below. The Assessing Officer proceeded as if the taxpayer is maintaining the equipment at Chandigarh and Chennai for all the assessment years continuously.

- It needs to be examined when the taxpayer is not maintaining any equipment at Chandigarh/Chennai or any other place, how the quality of the signal is being tested by the taxpayer. If the quality of the signal/data is very poor, then the recipient company may not accept the service as it was claimed by the taxpayer before this Tribunal. Therefore, there is an obligation on the part of the taxpayer to maintain the good quality of signal/data.
- The so-called earth station maintained by VSNL and other companies in India may be downlinking the signal/data from the satellite. The question arises for consideration is whether such earth station could receive signal/data without any intervention by the taxpayer-company in India. This fact was not examined by both the authorities below. Further, how the signals were received in India without the intervention of the taxpayer needs to be examined.
- The technical experts from VSNL or any other companies, which entered into an agreement with the taxpayer needs to be examined about the mode of receipt of signal/data. The AO shall bring on record the actual services rendered by the taxpayer and after that decide the issue in accordance with law.

### Our comments

In the present case, the Tribunal observed that if the taxpayer is maintaining a satellite in the orbit, and Indian companies are uploading the signal/data, which was received by satellite and transmitted to India then the taxpayer might not be rendering any service in India. However, if certain equipment belonging to its AE were installed in India, which was used for testing the signal uploaded by Indian companies, it would be construed that services have been rendered in India.

The decision is not clear as to whether the entire service for which the equipment charges are received would be deemed to be rendered in India, or only a certain portion of services to the extent attributable to the use of the equipment maintained for testing the quality of the service in India.

The Tribunal did not deal with the reliance placed by the taxpayer on the beneficial provisions of the tax treaty. The Tribunal did not consider the nature of income - whether it is business income, royalty or fees for technical services as per the tax treaty. The Tribunal has also not analysed whether a PE of the taxpayer exists in India, and any profit needs to be attributed to such PE, as per the tax treaty.

<sup>4</sup> Asia Satellite Telecommunications Co. Ltd v. DIT [2011] 332 ITR 340 (Del) and DIT v. New Skies Satellite BV [2016] 68 taxmann.com 8 (Del)

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